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„International Criminal Court and the Mexican „War on
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Evguenia Iskra

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Betreuer: Prof. Dr. Manfred Nowak, LL.M.

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INTRODUCTION

The International Criminal Court¹ (“ICC or the Court”), at the time of deliberation for its creation was poised to be the solution to the problem of transnational drug trafficking and related crimes. After much discussion, however member states decided to limit the ICC’s jurisdiction to only four crimes. The Rome Statute, establishing the ICC, is limited to genocide (art 5), crimes against humanity (art 6), war crimes (art 7) and aggression (art 9)².

Although limited to the four crimes, the ICC may play an important role in the fight against drug trafficking groups and related offences. Even if restricted to preliminarily examining or investigating drug trafficking, human smuggling, drug related murders, extortion and similar offenses, the ICC could prevent perpetrators from taking advantage of legal discrepancies in domestic courts; make law enforcement more efficient; provide legal support to those states that need it; encourage domestic legislative change and promote adherence to human rights over time.

In 2006 Mexican President, Felipe Calderón declared an outright war on drug cartels³. Within weeks of his appointment over 45,000 soldiers, approximately a quarter of the standing army, were deployed to combat the drug traffickers in the country⁴. From 2006-2012 millions of civilians have suffered from the fight. It is estimated that over 100,000 have died since the beginning of the Mexican “war on drugs”⁵. In the process of trying to eradicate the drug cartels, Mexican security forces have perpetrated thousands of human rights offences⁶ while inter drug cartel conflict has left countless persons tortured, murdered and displaced.

As the current Mexican and international legislative frameworks inadequately deal with the punishment of those responsible for these offences this thesis seeks to analyze whether the

¹ Rome Statute of the International Criminal Court (17 July 1998) UN Doc A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002 (“Rome Statute”)

² *ibid*

³ Thomas Kellner and Francisco Pepitone, ‘Inside Mexico’s Drug War’ (2010) 27 *World Policy Journal* 29, 31 <www.jstor.org/stable/27870316> accessed 16 July 2015

⁴ *ibid* 31

⁵ Jo Tuckman, ‘Mexican officials: 43 killed in major offensive against drug cartel’ *The Guardian* (Mexico 23 May 2015) <www.theguardian.com/world/2015/may/22/mexico-firefight-drug-cartel-region> accessed 12 July 2015; Brianne Lee, ‘Mexico’s Drug War’ (*Council for Foreign Relations*, 5 March 2014) <www.cfr.org/mexico/mexicos-drug-war/p13689> accessed 9 August 2015

⁶ Mexico: Widespread Rights Abuses in ‘War on Drugs’ (*Human Rights Watch*, 11 November 2011) <www.hrw.org/news/2011/11/09/mexico-widespread-rights-abuses-war-drugs> accessed 20 June 2015

ICC could seize itself of the matter to investigate the perpetrators under the crimes against humanity of the Rome Statute.

This thesis will also explore if the ICC has jurisdiction to investigate the crimes committed by the Zetas Mexican drug cartel and the government security forces between 2006-2012. By undertaking the analysis of jurisdictional and admissibility elements the strengths and weaknesses of the case will be illustrated.

The ICC launched a preliminary examination into the Colombian situation stemming from the drug war there. The thesis will explore whether the lessons learned in Colombia are applicable to the Mexican situation.

In connection with the Mexican situation, the remaining portion of the thesis will be dedicated to a discussion of the benefits and drawbacks of the ICC's preliminary examination and subsequent investigation in the fight against impunity and human rights abuses.

The thesis is divided into four chapters. Chapter I will provide the context for the case study while Chapter II analyses the ICC's jurisdictional requirements to investigate a complaint. All of the necessary elements for the ICC to seize the matter will be reviewed. Subject matter requirements will be discussed in great detail. Chapter III focuses on admissibility and Chapter IV discusses the lessons from the ICC's preliminary examination in Colombia illustrating the possible advantages and disadvantages of the same process in Mexico.

CHAPTER I

CONTEXT

ICC and the “War on Drugs”

The drug related offences are part and parcel of the international drug trade. The United Nations Security Council has repeatedly stated that drug trafficking poses a threat to international peace and security⁷. By undermining the authority of states, spreading

⁷ United Nations Security Council Resolutions: Resolution 1817/2008; Resolution 1890/2009; Resolution 1892/2009; Resolution 1373/2001; PRST/2009/32

corruption and weakening the economic development, drug cartels effectively destabilize regions and create conditions for radicalization that may lead to extremism and terrorism⁸.

Although the international community adopted five comprehensive conventions⁹ to address the increased threat of drug trafficking and related crimes, their success is limited¹⁰. With the technological advances, open borders and markets, criminal groups are able to operate with impunity, continuously growing stronger, more diversified and sophisticated¹¹. Despite the international efforts to curb the destabilizing force of drug traffickers, the perpetrators are often left unpunished undermining the entire fight against them¹².

The international conventions established a global system of cooperation and mutual legal assistance in combating transnational organized crime where member states can choose to prosecute or extradite the perpetrators¹³. This system of international criminal law conventions although extensive, still leaves many gaps for criminals to exploit. The main loophole is the system's leaving the enforcement, prosecution and punishment of crimes to individual nations¹⁴. Many states, already weakened by the internal organized crime, cannot properly administer justice against them. The international system fails to provide an effective mechanism to guarantee that alleged criminals are arrested, properly charged, investigated, prosecuted, and fairly punished¹⁵.

In order to successfully combat transnational organized crime including drug trafficking, a robust judicial body is required. The ICC at the time of deliberation for its creation was

⁸ Permanent Mission of France to the United Nations in New York, 'Transnational Threats to International Peace and Security' (*France ONU*, 11 March 2015) <www.franceonu.org/Transnational-threats-to-8739> accessed 20 May 2015

⁹ United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) (2001) 40 ILM 335; United Nations Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) (2004) 43 ILM 37; Single Convention on Narcotic Drugs (adopted 31 October 2003, entered into force 14 December 2005) 520 UNTS 204; United Nations Convention on Psychotropic Substances (adopted 21 February 1971, entered into force 16 August 1976) 1019 UNTS 175; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (adopted 20 Dec 1988, entered into force 11 November 1990) (1989)28 ILM 493

¹⁰ Andreas Schloenhardt, 'Transnational Organised Crime and the International Criminal Court Towards Global Criminal Justice' (*Australian Institute of Criminology*, 29 November 2004) <www.aic.gov.au/media_library/conferences/2004/schloenhardt.pdf > accessed 20 May 2015

¹¹ *ibid*

¹² *ibid*

¹³ *ibid*

¹⁴ *ibid*

¹⁵ *ibid*

poised to be the solution to this problem¹⁶. In 1989 at the United Nations General Assembly, Arthur Robinson, the Prime Minister of Trinidad and Tobago together with seventeen Caribbean and Latin American states encouraged the creation of an international criminal court with jurisdiction over international drug trafficking and related offences by reviving 1953 Draft Statute for an International Criminal Court¹⁷. At the UN General Assembly special session on drugs held in 1990, the International Law Commission (“ILC”) submitted a well-received report that went beyond the limited issue of international drug trafficking prosecutions¹⁸. Spurred by the general acceptance of the report, the ILC moved forward with drafting a comprehensive statute for an international criminal court.

The formation and experience of two ad hoc tribunals, the International Criminal Tribunal for Yugoslavia (“ICTY”), formed in 1993, and the International Criminal Tribunal for Rwanda (“ICTR”), founded in 1994, garnered global recognition and credibility which supported the process for the creation of a permanent international criminal court¹⁹. By July 1994 the ILC prepared a Draft Statute for an International Court (“Draft Statute”) that increased the scope beyond the issue of drug trafficking and related offences²⁰.

The Draft Statute broadened the jurisdiction of the Court to other international crimes while including the drug trafficking offences as desired by Prime Minister Robinson²¹. However, due to lack of consensus over the definition of drug trafficking and related crimes and the issue of complementarity, by 1998 the final Rome Statute omitted the drug trafficking offence from the text.²² After much discussion, member states decided to limit the ICC’s jurisdiction to only four crimes. The Rome Statute only includes genocide (art 5), crimes against humanity (art 6), war crimes (art 7) and aggression (art 9)²³. Although, the Rome

¹⁶ Schloenhardt (n 10)

¹⁷ Laura Barnett, ‘The International Criminal Court: History and Role’ (Canada Parliamentary Information and Research Service, 2013) <ProQuest ebrary> accessed 9 August 2015 at 4; Heather Kiefer, ‘Just say no: the case against expanding the international criminal court’s jurisdiction to include drug trafficking’ (2009) 31 Loy. L.A. Int’l & Comp. L. Rev. 157, 163; ‘Trinidad and Tobago ex-leader Arthur Robinson dies at 87’ *BBC.com* (9 April 2014) <www.bbc.com/news/world-latin-america-26964308> accessed 20 July 2015. See also John Winterdyk, ‘The International Criminal Court (ICC) a brief history’ (2007) *LawNow* 31 <[www.thefreelibrary.com/The+International+Criminal+Court+\(ICC\)+a+brief+history.-a0169636086](http://www.thefreelibrary.com/The+International+Criminal+Court+(ICC)+a+brief+history.-a0169636086)> accessed 9 August 2015

¹⁸ Barnett (n 17) 4. See also Marlies Glassius, *The International Criminal Court: a global civil society achievement* Florence (Routledge 2005) 12

¹⁹ *ibid*

²⁰ Kiefer (n 17) 163; Barnett (n 17) 4

²¹ Kiefer (n 17) 166

²² Kiefer (n 17) 166

²³ Rome Statute (n 1)

Statute was intended to provide the mechanism to try drug related offences, in its final form it left a gap in international law.

Although limited to the four crimes, the ICC may play an important role in the fight against drug trafficking and related crimes. If the ICC could prosecute drug trafficking, human smuggling, drug related murders and similar offenses, it would prevent perpetrators from taking advantage of legal discrepancies in domestic courts; make law enforcement more efficient; provide legal support to those states that need it and send a clear message to the criminal organizations that they will not be left unpunished.

For a case to be heard by the ICC it must be referred by a party state, the United Nations Security Council or by the Prosecutor under the *proprio moto* to the Court. As the two former options are highly unlikely to occur in the Mexican context, the paper looks at the Prosecutor's jurisdiction detailed in Articles 13(c), 15 and 53(1) of the Rome Statute to investigate claims of crimes against humanity submitted to it by interested parties.

By examining the case of Mexico's 'drug war', this paper determines if the Office of the Prosecutor ("OTP") could launch a preliminary examination or investigate the government officials and drug king pins responsible for hundreds of thousands of deaths in Mexico under the crimes against humanity and war crimes offenses. Through this hypothetical exercise the Rome Statute's weaknesses and strengths will become evident and provide recommendations for how the ICC may help in the fight against international organized crime and prevent future crimes against humanity.

"War on Drugs" in Mexico

In 2006, President Felipe Calderón announced a crackdown on Mexican drug cartels.²⁴ In the first weeks of his appointment as president, over six thousand troops were dispatched to fight the largest narco-trafficking group, the Sinaloa cartel in the state of Michoacan.²⁵ The government offensive against the drug cartels disrupted the established territorial divisions and drug routes sparking a war between the mafias.²⁶ The biggest organized crime groups, the Sinaloa cartel, the Los Zetas (the "Cartel or Los Zetas") and the Cartel del Golfo started fighting for trafficking routes. It brought a wave of violence to the northern states of

²⁴ Kellner (n 3) 31

²⁵ *ibid* 32

²⁶ *ibid* 32

Mexico.²⁷ Over 100,000 people died in the violence since 2006.²⁸ Some 45,000 Mexican troops were involved in fighting the drug cartels.²⁹

In response to the government's militarized offensive, the drug cartels responded in kind. The cartels started to purchase and employ higher-grade arms against the competition, corrupt police working with the competing cartels and to battle government troops³⁰. The Small Arms Survey reported that "cartel violence [in Mexico] has only grown in intensity, lethality, and brazenness since the crackdown [of 2006], with attacks by cartels on army troops at an all-time high."³¹

Prevalence of gun fights on the streets, kidnappings, extortion and murder of business owners, judges and journalists forced residents of Mexican northern states to move.

Drug cartels do not have an ideological or political agenda they are solely interested in protecting their lucrative business.³² In order to do so, they will kill anyone that potentially interferes with their operations or supports the rival cartels. For example, eleven mayors were murdered in the small towns of Chihuahua and Tamaulipas.³³ Another terrifying example is the Ciudad Mier.

Ciudad Mier in the state of Tamaulipas became a ghost town after the fighting between the Los Zetas and the Cartel del Golfo escalated to such extent that over 400 inhabitants fled to the neighboring town.³⁴ In early 2010 the Los Zetas increased the antics and issued a threat to all residents of the town, demanding they leave or be killed and almost the entire

²⁷ George Grayson & Samuel Logan, *The Executioner's Men: Los Zetas, Rogue Soldiers, Criminal Entrepreneurs, and the Shadow State They Created* (New Brunswick, Transaction Publishers 2012)

²⁸ Jo Tuckman, 'Mexico declares all-out war after rising drug cartel downs military helicopter' *The Guardian* (Mexico City, 4 May 2015) <www.theguardian.com/world/2015/may/04/mexico-declares-war-rising-drug-cartel-downs-military-helicopter> accessed 21 May 2015

²⁹ Kellner, (n 3) 31; The Federation for Human Rights, 'Report on the Alleged Commission of Crimes Against Humanity in Baja California between 2006-2012' (October 2014) <www.fidh.org/IMG/pdf/mexique642ang2014web.pdf> accessed 19 May 2015 ("FIDH")

³⁰ Kiefer (n 17) 95

³¹ *ibid*

³² Jo Tuckman, *Mexico: Democracy Interrupted* (London, Yale University Press 2012) 35

³³ *ibid*

³⁴ *ibid*

population, 6, 300 inhabitants of the town fled.³⁵ In 2011, a military base was constructed in the city and due to the strong presence of the soldiers, 4,800 people returned³⁶. Some stores and schools have re-opened but 1,500 people remain internally displaced. Many lost their homes and businesses were burned down.³⁷

Similarly, in 2010 the Los Zetas kidnapped and murdered seventy-two, Ecuadorian, Honduran, Salvadorian, and Brazilian, migrants at a remote location in northeastern Mexico when they refused to pay a ransom for their release or work as hit men for the Cartel³⁸.

On September 21st, 2011 the news reported thirty-five murdered people were found on one of the primary roads of Veracruz.³⁹ Their bodies were dropped off on the highway in the middle of the day.⁴⁰ Among the bodies the police found a blanket with a message to the Los Zetas from a rival drug cartel.⁴¹

In the State of Guerrero, on September of 2014, forty-three students were kidnapped and incinerated in a garbage dump⁴². Mexican authorities stated that corrupt police officers rounded up the missing students and then handed them over to members of Guerreros Unidos, an organized crime group⁴³. Allegedly, the gang members then took the students to

³⁵ ibid 36; Javier Estrada, 'Mexican city struggles to stem flight of fearful residents' *CNNMexico.com* (Mexico, 19 January 2011) <<http://edition.cnn.com/2011/WORLD/americas/01/19/mexico.ghost.town/>> accessed 20 May 2015

³⁶ Juan Alberto Cedillo, 'Se repuebla Ciudad Mier, Tamaulipas, por presencia military' *Terra Noticias* (Ciudad Mier, 4 September 2011) <<http://noticias.terra.com.mx/mexico/seguridad/se-repuebla-ciudad-mier-tamaulipas-por-presencia-militar,fe49c4688d7b3310VgnVCM3000009af154d0RCRD.html>> accessed 20 May 2015

³⁷ Internal Displacement Monitoring Center, 'Displacement Due to Criminal and Communal Violence' (25 November 2011) <www.internal-displacement.org/americas/mexico/2011/displacement-due-to-criminal-and-communal-violence/> accessed 25 May 2015

³⁸ Jo Tuckman, 'Survivor tells of escape from Mexican massacre in which 72 were left dead' *The Guardian* (Mexico City, 10 August 2010) <www.theguardian.com/world/2010/aug/25/mexico-massacre-central-american-migrants> accessed 21 May 2015

³⁹ 'Los 35 muertos de Veracruz murieron por asfixia o estrangulamiento' *Noticias Univision* (Mexico, 21 September 2011) <<http://noticias.univision.com/articulo/640109/2011-09-21/narcotrafico/noticias/35-muertos-veracruz-asfixia-estrangulamiento>> accessed 24 May 2015

⁴⁰ ibid

⁴¹ ibid

⁴² Jo Tuckman, 'Missing group of students in Mexico are all dead, claim authorities' *The Guardian* (Mexico City, 28 January 2015) <www.theguardian.com/world/2015/jan/28/missing-group-students-mexico-are-all-dead-claim-authorities> accessed 20 May 2015

⁴³ ibid

the garbage tip and burned them as a consequence of a territorial conflict between Guerreros Unidos and Los Rojos⁴⁴.

On May 1st 2015 a Mexican drug cartel, Nueva Generación downed a military helicopter in response to the Government's renewed efforts to battle drug trafficking in the country⁴⁵. A spark of violence over the weekend left fifteen people dead and nineteen injured in Jalisco⁴⁶. The relatively new drug cartel blocked streets with burning cars, buses and trucks near the state's capital, Guadalajara while setting ablaze eleven banks and five gas stations.⁴⁷

These are just some of the horrific examples of the drug violence in Mexico. However, the drug cartels are not the only ones perpetrating crimes across the country.

The State

Over the years reports have surfaced indicating the ruthlessness of security forces and their abuses of civilians in the process of combating the drug cartels. Once deployed by the President Calderón the military forces started to replace and disarm local police forces in the drug prone regions of Mexico, particularly Chihuahua, Tamaulipas and Baja California⁴⁸. "This replacement process left the practice of law enforcement in occupied areas in the hands of the armed forces and ultimately the presidency rather than the local police"⁴⁹.

By declaring a state of emergency, President Calderón was able to militarize the governance and expand his executive power. He greatly increased the spending on and the role of the military⁵⁰. The combination of the military's boosted power, authority, and lack of supervision bred the perfect condition for abuse. Thousands of civilian human rights complaints mounted against the armed forces⁵¹.

⁴⁴ *ibid*; Jo Tuckman, 'Former mayor charged with kidnapping in case of missing 43 Mexican students' *The Guardian* (Mexico City, 14 January 2015) <www.theguardian.com/world/2015/jan/14/former-mayor-charged-kidnapping-missing-43-mexican-students> accessed 24 May 2015

⁴⁵ 'Mexican military helicopter shot down by gunmen, killing three soldiers' *The Guardian* (Mexico, 1 May 2015) <www.theguardian.com/world/2015/may/01/mexican-military-helicopter-shot-down-by-gunmen-killing-three-soldiers> accessed 20 May 2015

⁴⁶ Jo Tuckman, 'Mexico declares all-out war after rising drug cartel downs military helicopter' *The Guardian* (Mexico, 4 May 2015) <www.theguardian.com/world/2015/may/04/mexico-declares-war-rising-drug-cartel-downs-military-helicopter> accessed 18 May 2015

⁴⁷ *ibid*

⁴⁸ Kiefer (n 17) 100

⁴⁹ *ibid*

⁵⁰ *ibid*101

⁵¹ *ibid*

The Human Rights Watch found evidence that point to the participation of security forces in more than 170 cases of torture, 39 “disappearances,” and 24 extrajudicial killings from December 2006 to 2011⁵².

The Human Rights Watch investigated Baja California, Chihuahua, Guerrero, Nuevo León, and Tabasco. In each state they found that the army and the police systematically used torture to force confessions from detainees or to extract information about cartels⁵³. Military personnel have arrested “civilians in their homes without any legal warrant, subjected them to acts of torture in military facilities, forced them to sign blank sheets of paper that would be used for their self-incrimination or to incriminate others, and placed drugs and arms in their possession as “evidence””⁵⁴.

Those responsible for the acts go unpunished. Military personnel who committed human rights violations face military tribunals, which have been found to be biased, and lack transparency⁵⁵. Human Rights Watch said that the result has been near total impunity⁵⁶. In the five states they surveyed, “military prosecutors opened 1,615 investigations from 2007 to April 2011 into crimes allegedly committed by soldiers against civilians. Not a single soldier has been convicted in these cases”⁵⁷.

Mexican Supreme Court and the Inter-American Court of Human Rights (IACHR) stated that such violations must be investigated under civil jurisdiction⁵⁸. Furthermore, in 2009 due to the growing evidence of military involvement in extrajudicial killings, forced disappearances, and torture, IACHR issued several binding decisions⁵⁹ requiring Mexico to

⁵² Human Rights Watch, ‘Mexico: Widespread Rights Abuses in ‘War on Drugs’” (Mexico City, 9 November 2011) <www.hrw.org/news/2011/11/09/mexico-widespread-rights-abuses-war-drugs> accessed 17 May 2015

⁵³ *ibid*

⁵⁴ International Federation for Human Rights, ‘Human Rights Groups Call on the ICC to Proceed with the Preliminary Examination into the Situation in Mexico’ (12 September 2014) <www.fidh.org/International-Federation-for-Human-Rights/americas/mexico/human-rights-groups-call-on-the-icc-to-proceed-with-the-preliminary> accessed 17 May 2015

⁵⁵ Human Rights Watch (n 52)

⁵⁶ *ibid*

⁵⁷ *ibid*

⁵⁸ *ibid*

⁵⁹ *Case of Radilla Pacheco (Mexico)* (2009) Inter-Am. Ct. IBID.R. (Ser. C) No. 209; *Case of Fernández Ortega (Mexico)* (2010) Inter-Am. Ct. IBID.R. (Ser. C) No. 215; *Case of Rosendo Cantú (Mexico)* (2010) Inter-Am. Ct. IBID.R. (Ser. C) No. 216; *Case of Cabrera García and Montiel Flores (Mexico)* (2010) Inter. Am. Ct. IBID.R. (Ser. C.) No. 220 (discussed at page 47)

reform its justice system to ensure that all human rights abuse cases be tried in civilian courts⁶⁰.

The Mexican Supreme Court complied with IACHR rulings by revoking the military's right to try soldiers accused of violating civilians' human rights in 2011,⁶¹ however, congress' reform only took place in April of 2014⁶². Additionally, this change only applies to human rights violations committed after the coming into force of the reform legislation. Meaning the perpetrators of human rights violations during the Calderón presidency are left unpunished.

Complaints to the ICC

In November 2011, several Mexican prominent lawyers, journalists, academics, and 23,000 petitioners launched a criminal complaint with the ICC against President Calderón on charges of crimes against humanity⁶³. UNAM legal scholar John Ackerman and the United Nations organized crime expert Edgardo Buscaglia spurred the complaint which alleged that Calderón and numerous of his cabinet members had committed crimes against humanity during the drug war in Mexico⁶⁴. The complainants alleged that from 2006 onwards the Mexican government had perpetrated torture, kidnapping, disappearances, and extrajudicial killings of civilians as part of the drug war⁶⁵.

The complainants also named the secretaries of the army, navy, and public safety as well as Mexico's top drug lord, heading the Sinaloa cartel, Joaquin "El Chapo" Guzman as those responsible for perpetrating the human rights atrocities.⁶⁶ By the end of 2011 the then ICC chief prosecutor Luis Moreno Ocampo dismissed the complaint, never opening even a preliminary examination into the situation⁶⁷.

Although the complaint was rejected in 2011, the Federation for Human Rights, the Mexican Commission of Defense and Human Rights Promotion ("CDHRP") and the Citizens'

⁶⁰ Kiefer (n 17) 101

⁶¹ Kiefer (n 17) 101

⁶² Tracy Wilkinson, 'Mexico's Congress approves revision of military code of justice' (Mexico City, 30 April 2014) <www.latimes.com/world/mexico-americas/la-fg-wn-mexico-congress-military-justice-20140430-story.html> accessed 8 July 2015

⁶³ William Paul Simmons and Carol Mueller, *Binational Human Rights: The U.S.-Mexico Experience* (Philadelphia, University of Pennsylvania Press 2014) 92

⁶⁴ *ibid* 93

⁶⁵ *ibid*

⁶⁶ *ibid*

⁶⁷ *ibid*

Commission of Human Rights of the Northeast (“CCHRN”) took up the cause and submitted another report to the ICC Prosecutor claiming that the alleged crimes committed between 2006-2012 by the Mexican security forces, following the policy of President Calderón, amount to crimes against humanity⁶⁸. The report seeks the involvement of the ICC in the investigation of the alleged human rights violations committed by the Mexican military during the period of 2006-2012. Reports by Amnesty International⁶⁹ and Human Rights Watch confirm and underscore the report submitted to the ICC providing the necessary evidence for the Prosecutor to commence a preliminary examination and to submit a request for authorization to investigate.

In summary, since the 2006 several heads of different cartels were arrested or killed by the Mexican security forces, yet the violence, corruption and impunity continue to reign⁷⁰. Although decapitated, the drug cartels fragment, diversify and continue their illegal activities as before. Security experts argue that the lack of judicial action, continued criminalization of institutions and the current strategy are responsible for the failure to curb the drug violence⁷¹. Edgardo Buscaglia, a leading expert in organised crime stated that: “if they keep detaining capos and capitos, but don’t stop the flow of drug money to politics, nothing will change.”⁷²

The military and drug cartel leadership are the two perpetrators of crimes in Mexico and both go unpunished due to the weak and corrupt judiciary in parts of the country. This thesis looks at whether the ICC could hypothetically investigate and potentially prosecute the military leaders and/or the drug kingpins responsible for the atrocities committed in Mexico between 2006-2012.

The ICC investigating and prosecuting those responsible for the crimes would potentially open the door for future adjudication of claims stemming from organized crime around the world and give a judicial arm to the fight against drug trafficking. The hypothetical exercise

⁶⁸ International Federation for Human Rights (n 54)

⁶⁹ ‘Amnesty International Annual Report: Mexico 2013’, (*Amnesty International*, 13 May 2013 <www.amnestyusa.org/research/reports/annual-report-mexico-2013?page=2> accessed 15 July 2015; Human Rights Watch Report, ‘Neither Rights Nor Security, Killings, Torture, and Disappearances in Mexico’s War on Drugs’ (*Human Rights Watch*, 9 November 2011; <www.hrw.org/report/2011/11/09/neither-rights-nor-security/killings-torture-and-disappearances-mexicos-war-drugs> accessed 10 July 2015

⁷⁰ Jo Tuckman, ‘Mexico drug kingpins behind bars but violence and corruption go unchecked’ *The Guardian* (Mexico City, 5 March 2015) <www.theguardian.com/world/2015/mar/05/mexico-drug-kingpins-behind-bars-violence-corruption-unchecked> accessed 18 May 2015

⁷¹ *ibid*

⁷² *ibid*

will illustrate some of the hurdles involved in prosecuting drug cartels and government security forces and explain that even preliminarily examining or investigating the crimes would make an important contribution in the fight against drug trafficking groups and disobeying military.

In order for the ICC to launch a preliminary examination into the situation and then refer the situation to a formal investigation all elements of jurisdiction and admissibility must be met. The next Chapter focuses on the jurisdiction of the ICC to investigate the alleged crimes committed in Mexico by the military and the Los Zetas.

CHAPTER II

JURISDICTION

For a crime to fall within the jurisdiction of the ICC, it has to satisfy the following three conditions: (i) it must fall within the group of crimes referred to in Article 5 and defined in Articles 6, 7, and 8 of the Statute (jurisdiction *ratione materiae*); (ii) it must fulfill the temporal requirements specified under article 11 of the Statute (jurisdiction *ratione temporis*); and (iii) it must meet one of the two alternative requirements embodied in article 12 of the Statute (jurisdiction *ratione loci* or *ratione personae*)⁷³.

Before delving into the three jurisdictional requirements this thesis will discuss the standard of proof required for opening an investigation into the situation. Afterwards it will examine the jurisdictional aspects and then will analyse in detail the elements of the crime. This will be followed by a discussion on admissibility.

Even though this paper focuses on the Prosecutor starting an investigation into the situation in Mexico, it should be noted that the same analytical factors are used irrespective of who refers the matter to the ICC⁷⁴.

⁷³*Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Pre-Trial Chamber II, ICC-01/09-19-Corr, 31 March 2010 ('Kenya Decision') <www.icc-cpi.int/iccdocs/doc/doc854287.pdf> para 39

⁷⁴ International Criminal Court, 'Policy Paper on Preliminary Examinations' (November 2013) 8 <www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf> accessed 8 July 2015

Standard of Proof for an Office of the Prosecutor Investigation

Before launching an investigation, the OTP will conduct a preliminary examination of situations that are not manifestly outside the jurisdiction of the Court as part of the investigation authorization procedure⁷⁵. A preliminary examination is not an investigation; it is an information-gathering process under the Rome Statute that allows the OTP to determine matters of jurisdiction and admissibility⁷⁶.

The investigation authorization procedure starts with the OTP collecting all of the relevant information which it needs to reach a fully informed decision on whether there is a reasonable basis to proceed with an investigation⁷⁷. If the OTP is satisfied that the criteria established by the Statute for this purpose are met, it has a legal duty to open an investigation into the matter⁷⁸.

The Court stated that the underlying purpose of the investigation authorization procedure is ‘to prevent unwarranted, frivolous or politically motivated investigations’⁷⁹. Although there is some elimination of cases at the preliminary stage for the latter policy reason, the standard of proof for the ICC prosecutor to launch his/her own investigation into the matter is quite low, it is “reasonable basis.”⁸⁰ The Court has interpreted this phrase to mean that “a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court ‘has been or is being committed.’”⁸¹ This standard, according to the Court, is lower than that “for the issuing of an arrest warrant or summons to appear (‘reasonable grounds to believe’), confirmation of charges (‘substantial grounds to believe’), and for a finding of guilt (‘beyond reasonable doubt’), the three broad evidentiary thresholds contained in the Statute.”⁸²

⁷⁵ (n 74)

⁷⁶ James Stewart “Transitional Justice in Colombia and the Role of the International Criminal Court” (Bogota, 13 May 2015) 6 <www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf> accessed 10 July 2015

⁷⁷ Policy Paper on Preliminary Examinations (n 74)

⁷⁸ *ibid*

⁷⁹ Manuel J. Ventura, ‘The ‘Reasonable Basis to Proceed’ Threshold in the Kenya and Côte d’Ivoire Proprio Motu Investigation Decisions: The International Criminal Court’s Lowest Evidentiary Standard?’ (2013) 12 *The Law and Practice of International Courts and Tribunals* 49, 51

⁸⁰ William Schabas, *An Introduction to the International Criminal Court* (4th edn Cambridge University Press 2011) 179

⁸¹ *ibid* 180

⁸² Ventura (n 79) 51

The two most recent and renowned decisions of the Court to launch an investigation into a alleged crimes against humanity matters are the Situation in the Republic of Kenya⁸³ and the Situation in Côte d'Ivoire⁸⁴. In both the Kenya and the Côte d'Ivoire decisions, the Court discussed the meaning of this evidentiary standard. In the Kenya Decision, the Pre-trial Chamber II stated that pursuant to Article 15(3) the Prosecutor must first conduct an analysis of the seriousness of available information and if he/she determines that a 'reasonable basis to proceed' with an investigation exists, an application to that effect shall be submitted to the Pre-Trial Chamber⁸⁵.

To reach the conclusion that an investigation is warranted, the Prosecutor must consider the factors contained in Article 53(1)(a)–(c) under the requirements of Rule 48 of the ICC Rules of Procedure⁸⁶. The next step is for the Chamber to examine the OTP's request and supporting material and also conclude that a reasonable basis to proceed with an investigation exists and that the matter falls within the jurisdiction of the ICC in accordance with Article 15(4)⁸⁷.

In the Kenya decision the Court clarified that the standard of proof for an investigation as:

the information available to the Prosecutor is neither expected to be "comprehensive" nor "conclusive", if compared to evidence gathered during the investigation.

This conclusion also results from the fact that, at this early stage, the Prosecutor has limited powers, which cannot be compared to those provided in article 54 of the Statute at the investigative stage⁸⁸.

In both the Kenya and the Côte d'Ivoire Decisions based on the examination of the available information, bearing in mind the nature of the proceedings and the low threshold, the Court

⁸³ Kenya Decision (n 73)

⁸⁴ *Situation in the Republic of Côte d'Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, Pre-Trial Chamber III, ICC-02/11-14, 3 October 2011. This decision was subsequently corrected and superseded the following month: *Situation in the Republic of Côte d'Ivoire*, Corrigendum to "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire", Pre-Trial Chamber III, ICC-02/11-14-Corr, 15 November 2011 ('Côte d'Ivoire Decision')

⁸⁵ Ventura (n 79) 53

⁸⁶ *ibid*

⁸⁷ *ibid*

⁸⁸ Kenya Decision (n 73) para 27

found that the information available to the OTP provided a reasonable basis for the Prosecutor to proceed with the investigation⁸⁹.

Similarly, in the Mexican context, the evidence demonstrating that crimes against humanity have been committed include: reports from publicly-available sources, international organisations, non-governmental organisations and the media⁹⁰. Although some suspects have been identified, like in the Kenya and Côte d'Ivoire matters, the main purpose of the investigation in Mexico would be to identify those individuals who bear the greatest responsibility for ordering or facilitating the crimes against humanity⁹¹. As will be further explored below, the amount of evidence, the low threshold as well as the gravity and lack of national proceedings to deal with the crimes in Mexico meet the standard of proof to commence preliminary examination and the subsequent investigation.

Temporal Jurisdiction/*Ratione Temporis*

The thesis' focus is limited to alleged crimes committed during the then President Calderón's term in office, 2006-2012. This time frame was chosen because in Mexico the Rome Statute came into force in 2006, recognizing and accepting the ICC's jurisdiction. Pursuant to Article 11, the Court has jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute, as such the offences committed between 2006-2012 fall under the temporal jurisdiction of the Court.

Furthermore, in that same year President Calderón began his policy of elimination of drug cartels. Some of the most violent confrontations between Mexican security forces and drug cartels, and drug cartels fighting each other, happened during his term in power⁹². The number of human rights complaints levelled against the security forces combatting drug cartels also rose exponentially during the same period⁹³.

⁸⁹ Kenya Decision (n 73) para; Côte d'Ivoire Decision (n 84) para 41

⁹⁰ Human Rights Watch (n 53); International Federation for Human Rights (n 55); Amnesty International (n 69)

⁹¹ Kenya Decision (n 73) para 3

⁹² Simmons (n 63)

⁹³ *ibid*

Those responsible for the atrocities committed during the period have not been held accountable⁹⁴, illustrating the failures of the Mexican justice system and underscoring the need for involvement of the ICC.

In addition to temporal jurisdiction, before the ICC would prosecute a claim, the claimants must demonstrate that the crimes allegedly committed by the perpetrators fall under the ICC's subject matter jurisdiction. The two potential grounds for prosecution are crimes against humanity and war crimes. For the purpose of this analysis only the former will be examined.

Subject Matter Jurisdiction/*Ratione Materiae*

Crimes Against Humanity-Elements of the Crime

In order for the ICC to seize itself of the matter it must be shown that all the elements of the crime are met. The relevant portions of Article 7 of the Rome Statute read:

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a *widespread or systematic attack directed against any civilian population*, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture.

2. For the purpose of paragraph 1:

- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack⁹⁵

Pursuant to Article 7(1) of the Statute, a crime against humanity contains any of the specified acts that are "listed ("underlying acts") when committed as part of a widespread or

⁹⁴ *ibid*

⁹⁵ Rome Statute (n 1) (emphasis added)

systematic attack directed against any civilian population, with knowledge of the attack (“contextual elements”)”⁹⁶.

Therefore, crimes against humanity involve the following contextual elements: (i) an attack directed against any civilian population; (ii) a State or organisational policy; (iii) an attack of a widespread or systematic nature; (iv) existence of a link between the individual act and the attack; and (v) knowledge of the attack⁹⁷. Below is the analysis of contextual elements, first the acts allegedly committed by the government security forces followed by the act allegedly committed by the Los Zetas.

Each element of the definition has a particular legal meaning; as such, firstly ‘widespread or systematic’, ‘directed against’, ‘civilian population’, ‘knowledge of the attack’ and ‘furtherance of a State or organizational policy’ need to be defined and analyzed individually to determine if the acts committed by the Cartel and government security forces meet the subject matter jurisdiction of the ICC.

‘Widespread or Systematic’

In Article 7(1), the drafters of the Rome Statute did not want to have all incidents of random or isolated acts being prosecuted by the ICC as crimes against humanity; as such they added the ‘widespread or systematic’ element to the definition⁹⁸.

‘Widespread’

It must be demonstrated that the military and/or drug cartel leadership committed ‘widespread or systematic attack’ directed against the civilian population. It is not necessary to demonstrate that the attack was both widespread and systematic as the provision uses the word “or” instead of “and”, so one of these criteria will suffice.

The phrase ‘widespread or systematic’ is part of the definition of crimes against humanity in both the Statute of the International Criminal Tribunal on Rwanda (“ICTR”) and the Statute of the Special Court for Sierra Leone, as such the ICC referred to previous tribunal case law

⁹⁶ Côte d’Ivoire Decision’ (n 84) para 27

⁹⁷ *ibid* para 29

⁹⁸ Jennifer M. Smith, ‘An International Hit Job: Prosecuting Organized Crime Acts as Crimes Against Humanity’ (2009) *Georgetown Law Journal* 97 <<http://georgetownlawjournal.org/files/pdf/97-4/Smith.PDF> > 1135 accessed 15 May 2015

to establish the meaning of the wording⁹⁹.

Turning to the word ‘widespread’, existing case law has defined it to refer to the scale of the attack and the number of victims¹⁰⁰. For example, in the 1998 case of the *Prosecutor v. Akayesu*, the ICTR Trial Chamber stated that: ‘widespread may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.’¹⁰¹

The Court needs to look at the magnitude of the results of the series of acts or to one particular act with extremely broad effects¹⁰². For instance, the deaths of Jews, homosexuals, and other individuals in Auschwitz were seen as a widespread attack comprising of many incidents of murder with vast effect¹⁰³. The single attack on the World Trade Center would also fit under the definition of ‘widespread’.¹⁰⁴ The ICC never made a pronouncement on the exact number of victims an attack should have to qualify as widespread. However case law¹⁰⁵ suggests and it is tendered that for the Court to take jurisdiction they would have to be in the high hundreds or thousands¹⁰⁶.

In the Cote d’Ivoire and the Kenya Decisions, the Court defined “widespread” as encompassing:

the large scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims". This element refers both to the large-scale nature of the attack and the number of victims. The assessment is not exclusively quantitative or geographical, but must be carried out on the basis of the individual facts.

⁹⁹ Christine Byron, *Melland Schill Studies in International Law: War Crimes and Crimes Against Humanity in the Rome Statute of the International Criminal Court* (Manchester, Manchester University Press 2009) 192

¹⁰⁰ Peter Burns, *Aspect Of Crimes Against Humanity And The International Criminal Court* (Vancouver International Centre for Criminal Law Reform and Criminal Justice Policy 2007) 8

¹⁰¹ Smith (n 98)

¹⁰² *ibid*

¹⁰³ Bernhard Kuschnik, ‘Humaneness, Humankind and Crimes Against Humanity’ *Goettingen Journal of International Law* (2010) 501, 521 <www.gojil.eu/issues/22/22_article_kuschnik.pdf> accessed 12 May 2015

¹⁰⁴ Byron (n 99) 193

¹⁰⁵ Akayesu Case No. ICTR-96-4, Judgment (Sept. 2, 1998), Rutaganda, (Trial Chamber), December 6, 1999, para. 69; Musema, (Trial Chamber), January 27, 2000, para. 204; Ntakirutimana and Ntakirutimana (Trial Chamber), February 21, 2003, para. 804; Kayishema and Ruzindana, (Trial Chamber), May 21, 1999, para. 123: “A widespread attack is one that is directed against a multiplicity of victims.” See also Bagilishema (Trial Chamber), June 7, 2001, para. 77.

¹⁰⁶ Byron (n 99) 193

Accordingly, a widespread attack may be the "cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude."¹⁰⁷

The International Federation for Human Rights (“FIDH”) in their 2014 report (the “Report”) submitted to the ICC alleges that the crimes committed by the individual military and police officers amounted to widespread and systematic attacks on the civilian population¹⁰⁸. Based on investigations made by the UN Special Rapporteur on Torture, Mexican Commission of Defense and Human Rights Promotion and complaints made to the National Commission of Human Rights, the Report states that in Baja California alone, between 2006-2012 there were 7,391 complaints of torture and cruel and degrading treatment and 7,764 for arbitrary imprisonment by Mexican security forces¹⁰⁹. On its face, the sheer number of victims of torture and arbitrary detention would meet the ‘widespread’ definition. The Report notes that many incidents of torture and arbitrary confinement go unreported and as such, the numbers presented in the Report are conservative and in reality the number of victims is much higher¹¹⁰.

The Report further alleges that the crimes are not limited to Baja California alone, but are spread across the country. The limited scope of the Report was to garner attention from the ICC and encourage the Prosecutor to launch its own investigation into the alleged violations under the *proprio moto* jurisdiction detailed in articles in Articles 13(c), 15 and 53(1) of the Rome Statute¹¹¹.

The victims of torture and arbitrary imprisonment are middle to lower class individuals, tortured and imprisoned in connection with the ‘war on drugs.’¹¹² The torture included waterboarding, beatings, suffocation and psychological attacks¹¹³.

While the Mexican security forces’ actions may amount to a ‘widespread’ attack, could the same be said for Los Zetas cartel crimes?

¹⁰⁷ Côte d'Ivoire decision (n 84) para 53; Kenya decision (n 73) 96

¹⁰⁸ FIDH (n 29)

¹⁰⁹ *ibid*

¹¹⁰ *ibid*

¹¹¹ *ibid*

¹¹² *ibid*

¹¹³ *ibid* at 10

The Cartel is behind some of the gravest atrocities committed by drug cartels in Mexico¹¹⁴. For instance, the Cartel murdered 72 Central and South American migrants in the northern town of San Fernando, in Tamaulipas in 2010. The following year federal officials found another 193 bodies buried in the same town, most of them migrants kidnapped off buses and killed by the Los Zetas¹¹⁵.

Over the years, Los Zetas cartel has killed several hundreds of people in different states of Mexico¹¹⁶. The victims are usually families, friends, supporters or drug traffickers of competing drug cartels, migrants and those that end up in the crossfire¹¹⁷. Again, based on the criteria for ‘widespread’, the violence perpetrated by the Cartel may fall under the definition of the word. The attacks described above are only a fraction of those committed by the Cartel. The violence is frequent and large scale as it meant to eradicate the competition and intimidate the general population¹¹⁸.

On the other hand, as mentioned before, the Cartel is one of many such organizations across Mexico. Los Zetas is among the top seven major cartels, but the country is plagued with smaller outgrowths of drug cartels¹¹⁹. As such, it may be argued that the violence perpetrated by the Cartel alone is not sufficient to be qualified as ‘widespread’. The attacks committed by all cartels put together may be seen as ‘widespread’, while individual organizations fall under the regular crimes rubric. As the ICC has limited resources, this may play a factor in the Prosecutor’s decision not to investigate the leaders and the members of the Cartel.

‘Systematic’

In *Blaskic* it was held that the term ‘systematic’ refers to the organized nature of the impugned conduct, evidenced by the accused’s planning and organizing of the attack¹²⁰. The Trial Chamber in *Jelusic* implied that the ‘repeated, unchanging and continuous nature of the

¹¹⁴ *ibid*

¹¹⁵ *ibid*

¹¹⁶ Grayson (n 27) 271

¹¹⁷ *ibid*

¹¹⁸ *ibid*

¹¹⁹ ‘Mexico Drug War Fast Facts’ CNN Library (10 March 2015)

<<http://edition.cnn.com/2013/09/02/world/americas/mexico-drug-war-fast-facts/>> accessed 20 May 2015

¹²⁰ Burns (n 100) 8

violence committed' would be a factor demonstrating the systematic nature of the attack¹²¹.

In *Kunarac*, the ICTY stated that the expression 'systematic' 'signifies the organized nature of the acts of violence and the improbability of their random occurrence' and that '[p]atterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence'¹²². The Appeal Chamber concurred with the Trial judgment and emphasized that 'neither the attack nor the acts of the accused needs to be supported by any form of "policy" or "plan"' and that while such a policy may be useful evidentially in establishing that the attack was truly directed against a civilian population and was widespread or systematic 'it is not a legal element of the crime'¹²³.

In the Kenya decision the Court concurred with previous tribunal case law and stated that systematic refers:

...to the "organised nature of the acts of violence and the improbability of their random occurrence". An attack's systematic nature can "often be expressed through patterns of crimes, in the sense of non-accidental repetition of similar criminal conduct on a regular basis." The Chamber notes that the "systematic" element has been defined by the ICTR as (i) being thoroughly organised, (ii) following a regular pattern, (iii) on the basis of a common policy, and (iv) involving substantial public or private resources, whilst the ICTY has determined that the element requires (i) a political objective or plan, (ii) large-scale or continuous commission of crimes which are linked, (iii) use of significant public or private resources, and (iv) the implication of high-level political and/or military authorities¹²⁴.

Pursuant to the Report, all of the actions of the security forces against civilians have similarities in the manner they were undertaken; who was targeted and to what torture mechanisms they were subjected to.¹²⁵ The same pattern was exhibited in the way that the individuals were arrested and then questioned.

For instance, "the majority of the victims were detained arbitrarily with the pretext of having

¹²¹ Byron (n 99) 192

¹²² *ibid* 193

¹²³ *ibid* 193

¹²⁴ Kenya decision (n 73) para 96

¹²⁵ FIDH (n 29) 12

been taken prisoners while they were committing a crime (flagrancy), and then they were illegally detained and without acknowledging their detention during hours or even during days, before being brought before the Public Prosecutor”¹²⁶. While they were detained in undisclosed police or military facilities, they were tortured for the purpose of obtaining information regarding organized crime and forced to confess to be a part of a criminal organization¹²⁷.

Reports have been made of many incidents of military and police officers breaking into houses, without a warrant, under the pretenses that there were drugs, weapons or kidnapped persons in the residence¹²⁸. Additionally, security forces have been planting narcotics on the victims to justify their arrests and illustrate the semblance of successes on the war on drugs¹²⁹. The *modus operandi* of the security forces illustrates the repetitive, patterned actions across many states in Mexico all falling under the description of ‘systematic’ and meeting this requirement of the ICC’s provision.

The methods used by the Cartel to eliminate their competition and hurt the security forces are far from uniform. Los Zetas use creative methods to torture and kill their victims. They blow torch to burn the victims, use carpenters’ planes to peel away their skin, use special knives designed for mutilation, tourniquets, and appliances to administer electric shocks¹³⁰. In addition they use deadly chemicals, water filled barrels in which to immerse captives, and special planks to rip away skin¹³¹. Allegedly, Miguel Treviño’s, one of the leaders of Los Zetas, favorite method was ‘el guiso’ or the stew, where his enemies were placed into eighteen-liter drums and burned alive¹³².

However, all of the incidents required planning and organization, the events were neither spontaneous nor incidental. The Los Zetas are a highly trained, disciplined, paramilitary group having defected from Mexican Army’s elite Airborne Special Forces Group¹³³. The

¹²⁶ *ibid*

¹²⁷ *ibid*

¹²⁸ *ibid* 13

¹²⁹ *ibid*

¹³⁰ Grayson (n 27) 91

¹³¹ *ibid*

¹³² *ibid*

¹³³ *ibid*

Cartel is extremely sophisticated targeting many individuals at the same time¹³⁴. The actions of the Cartel also meet the ‘systematic’ criteria of Article 7 of the Rome Statute, even if the methods are varied, the purpose of the actions is the same. The level of organization, chain of command, training and premeditation required to execute the actions are all of the factors illustrating the ‘systematic’ nature of the Cartel’s actions.

As the ‘widespread or systematic’ criteria are preliminarily met, it is necessary to review the subsequent elements of the jurisdictional test.

‘Attack Directed Against any Civilian Population’

An attack is “a campaign or operation carried out against the civilian population.”¹³⁵ An attack need not be a military attack and civilian population means any individuals who are not legitimate combatants and/or are not members of armed forces¹³⁶.

Furthermore, pursuant to Article 7 of the Statute the potential civilian victims of a crime can be of any nationality or ethnicity, or they may possess other distinguishing features¹³⁷. It is up to the Prosecutor to demonstrate that the attack was directed against the civilian population as a whole and not merely against randomly selected individuals¹³⁸. There is no requirement to demonstrate to the satisfaction of the ICC that the entire civilian population of an area in question was targeted, however, the civilian population must have been the primary target of the attack and not just incidental victims¹³⁹.

As will be illustrated in detail below, both the government security forces and the Cartel target migrants and reporters. In addition to these groups, in majority of cases, government security forces have been documented to target young men who came from lower or working-class backgrounds¹⁴⁰. Additionally, the Cartel in an effort to protect itself and

¹³⁴ Eduardo Castillo & Mark Stevenson, ‘Capture Of Miguel Angel Treviño Morales, Zetas Leader, Unlikely To Stop Violence’ *Huffington Post* (Mexico City 16 June 2013) <www.huffingtonpost.com/2013/07/16/zetas-leader-capture-stop-violence_n_3605034.html> accessed 18 May 2015; ‘Zetas Profile’ (InSightCrime.org) <www.insightcrime.org/mexico-organized-crime-news/zetas-profile> accessed 20 May 2015. See also Grayson (n 27) 27 & 47

¹³⁵ International Criminal Services, ‘International Criminal Law & Practice Training Materials: Crimes Against Humanity Module 7’ <http://wejp.unicri.it/deliverables/docs/Module_7_Crimes_against_humanity.pdf> accessed 19 May 2015

¹³⁶ Côte d’Ivoire decision (n 84) paras 31-33

¹³⁷ *ibid*

¹³⁸ Kenya decision (n 73) paras 80-82

¹³⁹ *ibid*

¹⁴⁰ HRW Report (n 69) 7

diversify its operations targets competing drug gangs, government officials and security forces, business operators and the general public. Media stories, the Human Rights Watch, Amnesty International, and other Non-governmental groups' investigations demonstrate that the civilian population is directly targeted.

Migrants

According to Amnesty International Drug cartels have been targeting impoverished migrants coming through Mexico¹⁴¹. In the hopes of reaching the U.S to find work, thousands of migrants from Central American countries travel through Mexico¹⁴². On their journey they have been kidnapped, raped, extorted, and murdered by the drug gangs¹⁴³. In 2009, the National Human Rights Commission ("CNDH") found that nearly 10,000 migrants were kidnapped in a span of six months mainly for ransom¹⁴⁴.

Close to the U.S. border, one of the leaders of Los Zetas in the area of San Fernando, Tamaulipas, was Édgar Huerta Montiel. He confessed to the police to having participated in the execution of 72 Central and South American migrants in August 2010¹⁴⁵. According to Montiel, El Lazca the leader of the Cartel at the time ordered that buses headed for Reynosa be stopped and all men investigated¹⁴⁶. Those suspected of being connected to the rival drug gangs were to be killed¹⁴⁷. In April 2013 alone, Mexican authorities found 193 cadavers in 47 clandestine pits linked to the Los Zetas executions¹⁴⁸.

As mentioned above, the Cartel is not the only one targeting the migrants. Government security forces have been accused of playing an active part in migrant kidnappings, rapes, and murders¹⁴⁹. CNDH reported that half of interviewed victims in 2009 said that public officials were involved in their kidnapping¹⁵⁰.

¹⁴¹ 'Widespread Abuse of Migrants in Mexico is 'Human Rights Crisis' (28 April 2010) States News Service Academic OneFile accessed 12 July 2015

¹⁴² *ibid*

¹⁴³ *ibid*

¹⁴⁴ *ibid*

¹⁴⁵ 'Lider Zeta confiesa sobre masacre de migrantes' *La Prensa* (Mexico, 15 Aug 2013)

<www.laprensa.hn/mundo/americalatina/355917-98/1%C3%ADder-zeta-confiesa-sobre-masacre-de-migrantes>

¹⁴⁶ *ibid*

¹⁴⁷ *ibid*

¹⁴⁸ *ibid*

¹⁴⁹ *ibid*

¹⁵⁰ *ibid*

An example of security forces involvement occurred in Chiapas State of southern Mexico. On 23 January 2010, armed police stopped a freight train carrying over 100 migrants¹⁵¹. One of the migrants on board said that the Federal Police officers forced her and the other migrants to get off the train and lie face down on the ground, stole their belongings and threatened to kill them unless they continued their journey on foot along the railway¹⁵². After walking for several hours, armed men assaulted the migrants, raped one of the women, and killed another¹⁵³. Later a local activist helped the migrants file a complaint and two suspects were detained, however no legal action was taken against the Federal Police, in spite of the migrants identifying two officers allegedly involved¹⁵⁴.

Journalists

Over the past decade, drug gangs have been responsible for over sixty-seven murders and disappearances of reporters in Mexico¹⁵⁵. The war on drugs has made Mexico one of the world's most dangerous places for journalists to work¹⁵⁶.

Around 2004 the Los Zetas began their campaign of terror against the Fourth Estate¹⁵⁷. On the morning of March 19, 2004, hit men stabbed the editorial director of the Nuevo Laredo daily *El Mañana*¹⁵⁸. Roberto Javier Mora García was murdered in front of his middle-class home in the besieged northern city¹⁵⁹. Following the death of his colleague, Daniel Rosas, *El Mañana*'s managing editor said: "Drug battles have become bloodier, and gangs have no code of ethics. They don't respect human life; why should they respect reporters?" "It's the new trend of drug gangs: journalists are warned, paid off or killed."¹⁶⁰

Francisco Arratia Saldierna was the next freelance columnist to be brutally tortured and killed by the Los Zetas¹⁶¹. While working as a high school counsellor, he wrote highly critical commentary in the *El Portavoz* where his articles appeared six days a week in several

¹⁵¹ *ibid*

¹⁵² *ibid*

¹⁵³ *ibid*

¹⁵⁴ *ibid*

¹⁵⁵ David A. Shirk, 'Drug War in Mexico: Confronting a Shared Threat' (NY, USA: Council on Foreign Relations, 2011) 8 <www.cfr.org/mexico/drug-war-mexico/p24262> accessed 18 July 2015

¹⁵⁶ *ibid*

¹⁵⁷ Grayson (n 27) 133

¹⁵⁸ *ibid* 134

¹⁵⁹ *ibid*

¹⁶⁰ *ibid*

¹⁶¹ Grayson (n 27) 134

daily and online publications covering Tamaulipas¹⁶². He relentlessly criticized corrupt politicians and police with ties to the drug gangs and the narco-bosses themselves¹⁶³. On August 31, 2004 the Los Zetas kidnapped and tortured Arratia¹⁶⁴. According to the authorities, Arratia's assailants had used an "iron bar and acid to smash and mutilate his hands and fingers even as they burned him with cigarettes and knocked out his teeth"¹⁶⁵.

During Calderón's presidency, the Los Zetas attacked the La Mañana again. In the early evening on February 6, 2006 Los Zetas opened fire and tossed in fragmentation grenades into the newspaper's offices¹⁶⁶. Jaime Orozco Tey, a forty-year-old re-write man and father of three was hit in the abdomen and back with several rounds of ammunition¹⁶⁷. Less than a month after the attack, the newspaper's editor Ramón Cantú said the newspaper would decrease even further its coverage of drug related crimes, which had already been reduced after Mora García's 2004 murder¹⁶⁸.

Los Zetas targeted reporters in other parts of the country as well. A prominent journalist in Villahermosa disappeared after he exposed drug trafficking in Tabasco. Rodolfo Rincón Taracena was last seen on January 20, 2007 when a local drug dealer, Miguel Ángel Payró Morales, forced him into a car in front of the Tabasco Hoy Daily offices¹⁶⁹.

These are just a few examples of the Los Zetas targeting journalist around the country. The drug gang attacked newsmen in Tabasco, Tamaulipas, Veracruz, Campeche, Nuevo León, and elsewhere¹⁷⁰. Not only Mexican reporters are targeted, apparently one American journalist was killed as well¹⁷¹.

Government security forces, specifically the police have been noted to target journalists too. For example, in mid-March 2009 police officers in Puebla stopped a vehicle travelling with reporters from Intolerancia, El Columnista, and Cambio newspapers¹⁷². After learning who the passengers were, the police threw the three men to the ground, handcuffed them, and

¹⁶² *ibid*

¹⁶³ *ibid*

¹⁶⁴ *ibid*

¹⁶⁵ *ibid*

¹⁶⁶ *ibid* 135

¹⁶⁷ *ibid* 135

¹⁶⁸ *ibid* 135

¹⁶⁹ *ibid* 136

¹⁷⁰ *ibid* 136

¹⁷¹ *ibid* 137

¹⁷² *ibid* 138

repeatedly beat and threatened them for allegedly having humiliated the law enforcement system¹⁷³.

Similarly, on August 7, 2010 four reporters while investigating a story on a car accident in Monclova, in the northern state of Coahuila heard that a military convoy was operating in the city and decided to follow it. Upon finding the military convoy, the four journalists were abruptly detained, blindfolded and forced to get into a truck. They were then interrogated and repeatedly punched in the face, the chest and the stomach¹⁷⁴. According to the authorities, the arresting soldiers believed the journalists were members of the Los Zetas who allegedly used spotters to monitor the movements of the military¹⁷⁵. Comparable incidents of police and military brutality against journalists are reported each year in the newspapers, TV networks, and radio stations¹⁷⁶.

Government officials

Drug related murders in Mexico are concentrated in five states with particularly high density of violence occurring in major cities like Ciudad Juarez and Culiacan¹⁷⁷. In Juarez alone, a city of just over one million inhabitants, 2,700 homicides were reported in 2010¹⁷⁸. This is more than the combined annual totals for New York (532), Chicago (435), Philadelphia (304), Los Angeles (297), Washington, DC (131), and Miami-Dade (84)¹⁷⁹.

During Calderón's presidency, drug gangs killed 174 government officials including hundreds of police, military personnel, and intelligence agents¹⁸⁰. The Cartel is one of the groups responsible for the killings. For instance, Edelmiro Cavazos the Mayor of Santiago, a city in northern Mexico, was murdered in 2010¹⁸¹. Six perpetrators arrested confessed to

¹⁷³ *ibid*

¹⁷⁴ 'Mexican journalist recounts abuse during army detention' *Committee to Protect Journalists* (New York 14 August 2007) <<https://cpj.org/2007/08/mexican-journalist-recounts-abuse-during-army-dete.php>>

¹⁷⁵ *ibid*

¹⁷⁶ Grayson (n 27) 138

¹⁷⁷ Shirk (n 155) 8

¹⁷⁸ *ibid*

¹⁷⁹ *ibid*

¹⁸⁰ *ibid*; Jorge Grande, '174 Government Officials killed in six years, 83 were police chiefs' (Mexico City 13 September 2011) <www.borderlandbeat.com/2011/09/174-government-officals-killed-in-six.html> accessed 19 July 2015

¹⁸¹ Eduardo Castillo, 'Mexico: Zetas gang ordered killing of mayor' (24 August 2010) <www.boston.com/news/world/latinamerica/articles/2010/08/24/mexico_zetas_gang_ordered_killing_of_mayo_r/> accessed 20 July 2015

working for the Los Zetas¹⁸². Marco Antonio Leal Garcia, the mayor of Hidalgo in the volatile border state of Tamaulipas, was shot and killed on August 29, 2010¹⁸³. His young daughter was wounded in the attack. Los Zetas or the Gulf Cartel are fighting a turf war in the border state ambushed the pair in their vehicle¹⁸⁴.

Government officials are often the targets of drug gangs if they fail to cooperate with the drug cartel, work for a competing drug gang, or try to impede the drug and related criminal operations¹⁸⁵.

General Population

As with other drug gangs in Mexico, Los Zetas have diversified their operations to include additional crimes such as kidnapping, assassination for hire, controlling prostitution, extortion, money-laundering, software piracy, resource theft, human smuggling, theft of petroleum from state-owned oil company PEMEX¹⁸⁶. The increase in violence due to inter- and intra-cartel conflict over drug trafficking routes has been accompanied by a rise in kidnapping for ransom and other crimes¹⁸⁷. Kidnappings in Mexico have increased by 188% since 2007, armed robbery by 47%, and extortion by 101% according to recent estimates¹⁸⁸. The growing diversification into street crime causes more harm to the average Mexican civilians than internecine violence related to conflicts over drug trafficking¹⁸⁹.

As of August 2011, the Los Zetas control the eastern portion of the country and have operations in over 21 states giving them greater geographic presence than other cartels¹⁹⁰. This illustrates how their diversified crimes target more and more of the general population in Mexico.

¹⁸² *ibid*

¹⁸³ Tracy Wilkinson, Mexican drug traffickers blamed in killing of second mayor (Los Angeles Times 30 August 2010) <<http://articles.latimes.com/2010/aug/30/world/la-fg-mexico-mayor-20100831>> accessed 18 July 2015

¹⁸⁴ *ibid*

¹⁸⁵ June Beittel, 'Mexico's Drug Trafficking Organizations: Source and Scope of the Violence' Congressional Research Service (22 July 2015) 29 & 40' <www.fas.org/sgp/crs/row/R41576.pdf> accessed 5 August 2015

¹⁸⁶ *ibid* 20

¹⁸⁷ *ibid*

¹⁸⁸ *ibid*

¹⁸⁹ *ibid*

¹⁹⁰ *ibid* 22

Extortion, one of the secondary crimes that the Los Zetas partake in, is becoming even more harmful to the Mexican population than drug trafficking¹⁹¹. Drug gangs terrorize communities and displace the government's basic functions by demanding payments from innocent individuals and businesses¹⁹². Drug gangs also target the entrepreneurial class "who should be the drivers of economic growth, sometimes forcing business owners to remain prisoners in their own homes or flee the area entirely"¹⁹³. The cumulative effect is impressive. The Mexican employer's association COPARMEX estimates that 37 percent of business have fallen victim to the crime, with the cost of business directed extortion and other crime amounting to \$5.8 billion per year¹⁹⁴.

Jonatan, a close friend of mine, lives in Xalapa, Veracruz in Mexico. Xalapa is the capital of one of the richest states in Mexico and is located in the Gulf of Mexico, about a thirty-minute drive from a bustling, coastal city of Veracruz. As an owner of a successful bar and restaurant in Xalapa, Jonatan is the target of frequent frightening encounters with the Los Zetas and has been repeatedly extorted by their representatives. They extort all successful bar and nightclub owners and threaten anyone with retaliation if the authorities are contacted.

Another example of prominent extortion related violence occurred in 2011 when the Los Zetas attacked Casino Royale in Monterrey¹⁹⁵. With automatic weapons and lighting fire to it, the Cartel attacked the casino and killed 52 people¹⁹⁶. Reportedly the Zetas had attempted to extort the casino owner for \$200,000 per month; refusal to comply resulted in the attack¹⁹⁷.

¹⁹¹ Benjamin Locks, 'Extortion in Mexico: Why Mexico's Pain Won't End with the War on Drugs' Yale Journal of International Affairs (6 October 2014) <http://yalejournal.org/article_post/extortion-in-mexico-why-mexicos-pain-wont-end-with-the-war-on-drugs/> accessed 5 August 2015

¹⁹² Ibid

¹⁹³ Ibid

¹⁹⁴ Ibid

¹⁹⁵ ibid

¹⁹⁶ ibid

¹⁹⁷ ibid

Young People

Another population feeling the brunt of the drug violence and government military services' assault are young people between the ages of fifteen and twenty-nine¹⁹⁸. For instance El Universal, a Mexican newspaper reported that drug trade related violence had become the leading cause of death for youngsters in recent years, rising ten fold between 2007 and 2010¹⁹⁹. However, not all victims are identified because of the widespread problem of disappearances perpetrated equally by the drug cartels²⁰⁰ and the government military services²⁰¹. The government produced data stated that in 2011 alone on average 47 people died, three were tortured, one was decapitated, two of those were women, and ten were young people who were killed in an organized crime related violence²⁰².

As described above, the government security forces and the Cartel do not randomly select their victims. On the contrary, there are specific, well defined characteristics of those who they pursue.

The evidence discussed above represents a small sample of the available data to fulfill the jurisdictional element of *rationae materiae* and “attacks against civilian population” requirement. The next jurisdictional element that must be discussed is “in furtherance of a State or Organizational Policy.”

“..in furtherance of a State or Organizational Policy’

The Explanatory Notes for Elements of the Crimes provide some guidance noting that:

It is understood that “policy to commit such attack” requires that the State or organization actively promote or encourage such an attack against a civilian population²⁰³.

In the footnote to the Explanatory Notes for Elements of the Crimes, the writers explain that:

[a] policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional

¹⁹⁸ Grayson (n 27) 28

¹⁹⁹ *ibid*

²⁰⁰ *ibid*

²⁰¹ (n 69)

²⁰² Grayson (n 27) 25

²⁰³ Official Records of the Review Conference of the Rome Statute of the International Criminal Court, ‘Elements of Crimes’ (11 June 2010) <www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> accessed 21 May 2015

circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action²⁰⁴.

Recent ICC case law has discussed the organizational or policy requirement broadly. For instance, in the case against Katanga and Ngudjolo Chui, Pre-Trial Chamber I found that this requirement:

[...] ensures that the attack, even if carried out over a large geographical area or directed against a large number of victims, must still be thoroughly organised and follow a regular pattern. It must also be conducted in furtherance of a common policy involving public or private resources. Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be explicitly defined by the organisational group. Indeed, an attack which is planned, directed or organised - as opposed to spontaneous or isolated acts of violence - will satisfy this criterion²⁰⁵.

Similarly, in the Decision regarding Jean-Pierre Bemba Gombo²⁰⁶ the ICC judges stated that:

[t]he requirement of 'a State or organizational policy' implies that the attack follows a regular pattern. Such a policy may be made by groups of person who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be formalised²⁰⁷.

Although there is some debate regarding the level of organization or policy that is required to meet the threshold for Article 7, as in some cases the emphasis is placed on the government issuing the policy, others argue that any group that may inflict a crime under Article 7 on a

²⁰⁴ *Situation in the Democratic Republic of the Congo*, Decision on the confirmation of charges in the Case of the Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui Pre-Trial Chamber I, ICC-01/04-01/07 para 396

²⁰⁵ *Situation in the Central African Republic in the Case of the Prosecutor v Jean-Pierre Bemba Gombo*, Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/08-424

²⁰⁶ *ibid* para 81

²⁰⁷ Charles Chernor Jalloh, 'What Makes a Crime Against Humanity a Crime Against Humanity' (2013) 28/2 American University International Law Review 402
<<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1767&context=auilr>> accessed 23 May 2015

widespread scale will fall under the Article²⁰⁸. Overall, it appears that the standard is relatively low and favoring the latter, broad interpretation of Article 7.

To help the Court in determining whether there was a policy to commit an attack against the Mexican civilian population, the ICC may take into consideration a plethora of factors from the ICC and tribunal decisions. For example, in the case against Tihomir Blaskic, the ICTY Trial Chamber held that the plan to commit an attack:

[...] need not necessarily be declared expressly or even stated clearly and precisely.

It may be surmised from the occurrence of a series of events, inter alia:

- the general historical circumstances and the overall political background against which the criminal acts are set;
- the establishment and implementation of autonomous political structures at any level of authority in a given territory;
- the general content of a political programme, as it appears in the writings and speeches of its authors; media propaganda;
- the establishment and implementation of autonomous military structures;
- the mobilisation of armed forces; temporally and geographically repeated and co-ordinated military offensives; links between the military hierarchy and the political structure and its political programme;
- alterations to the "ethnic" composition of populations; discriminatory measures, whether administrative or other (banking restrictions, laissez-passer,...);
- the scale of the acts of violence perpetrated - in particular, murders and other physical acts of violence, rape, arbitrary imprisonment, deportations and expulsions or the destruction of non-military property, in particular, sacral sites²⁰⁹.

In the Kenya decision, the Court took into consideration the following criteria to determine if a group qualified as an organization: “(i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attacks against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal

²⁰⁸ ICTY, *The Prosecutor v Tihomir Blaskic*, IT-95-14, Trial Chamber, Decision of 3 March 2000 para 204 (footnotes omitted)

²⁰⁹ Kenya decision (n 73) 87

activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria²¹⁰.

In a pre ICC, Dutch case, *Ahlbrecht*, the judges, when discussing the type of attack, focused on whether the crimes against civilians were sufficiently widespread or systematic to constitute crimes against humanity and decided on a low threshold for the policy and level of organization necessary to satisfy the contextual element of crimes against humanity²¹¹.

In the ICC decision prosecuting Jean-Pierre Gomba of the Democratic Republic of Congo, the Court held that crimes against humanity committed pursuant to a State or organizational policy only required that the offenses follow a regular pattern²¹². The ICC continued and stated “the policy may come from a group of persons who command a particular territory, or from an organization with the capacity to commit a generalized or systematic attack against the civilian population”²¹³. Subsequent ICC and ICTY cases post-*Kunarac*, decided that the policy can be prepared by a "group of persons who govern a specific territory or by any organization with the capacity to commit a widespread and systematic attack against a civilian population"²¹⁴ favoring the low threshold approach in the *Ahlbrecht* case.

President Calderón was responsible for the vision and the Ministry of National Defense prepared the ‘Integral Directive to Prevent and Combat Drug trafficking’²¹⁵ (“Directive”) and the National Defense Plan (“Plan”) which incorporated the Directive²¹⁶. Pursuant to the Directive and the Plan, Mexico’s four federal police forces were to be merged, national criminal database was to be created, federal police was to gain more training, penitentiary reform undertaken, and active participation of civil society in crime prevention promoted²¹⁷. Part of the Plan was also to expand the power of federal prosecutors and the police to arrest

²¹⁰ Kenya decision (n 73) 93

²¹¹ Jalloh (n 207) 404

²¹² *ibid* 421

²¹³ FIDH (n 29) 8

²¹⁴ Jalloh (n 207) 421

²¹⁵ FIDH (n 29) at 17 (Directiva para el Combate Integral al Narcotráfico 2007-2012)

²¹⁶ Maureen Meyer, ‘At a Crossroads: Drug Trafficking, Violence and the Mexican State’ Briefing Paper (The Berkeley Foundation November 2007) 8 <http://reformdrugpolicy.com/wp-content/uploads/2011/10/paper_13.pdf > accessed 5 August 2015

²¹⁷ *ibid* 8

people, conduct searches, and intervene in personal communications without the need for a warrant from judges²¹⁸.

The Directive and the Plan were heavily criticized by academics and non-governmental organizations. The critics said that the Plan

is directed more at solving problems that the government views as a threat and not the problems that concern citizens; it confuses insecurity with organized crime and identifies this with drug trafficking; the security policy is presented in isolation from other policies, therefore failing to create an integral security policy; and the *plan deals more with measurable results* than with the profound transformations needed within the police and justice institutions” among other issues.²¹⁹

Additionally, the Directive authorizes “ample freedom of action in the use of resources at the disposal,” “ample initiative”, “more dynamism” and to “carry out decisive action to the army in combating drug traffickers²²⁰. The Report argues that the Calderón’s policy of authorizing the security forces to take any measures necessary to obtain confessions and provide tangible results in the fight against organized crime is both explicit and implicit²²¹.

The Directive provides a blanket authority to the military to do whatever it sees necessary in its efforts, while a lack of any legal oversight ensures that those committing torture and forced disappearance are not punished²²². The lack of outlines as to what actions are permitted and those that are not, is the implicit consent of the ex-President to use illegal measure in their fight,²²³ as is the failure of the authorities to investigate the complaints and prevent further attacks.²²⁴

The link between the Directive and the alleged crimes committed by the security forces are the complaints of those detained. The victims of the army’s illegal manner of operating have

²¹⁸ *ibid*

²¹⁹ *ibid* (emphasis added)

²²⁰ Latin American Security and Defense Network, ‘Atlas Comparativo de la Defensa en América Latina y Caribe: Chapter 21-Mexico’ (2010) 240 <www.resdal.org/atlas/atlas10-20-mexico.pdf> accessed 20 May 2015; FIDH (n 29) 17

²²¹ FIDH (n 29) 16 & 17

²²² *ibid*. See also Ana Paula Ordorica, ‘El Ejército y la Ley’ (1 December 2011) Nexos <www.nexos.com.mx/?p=14585> accessed 23 May 2015

²²³ *ibid*

²²⁴ FIDH (n 29) 17

come forward to a multitude of human rights organizations claiming that they were water boarded, electrocuted, beaten and held in military facilities for extensive periods of time without letting their families or lawyers know about the detention²²⁵. The military used the victims to show their success in the “war against drugs” even when the detainees were released or not prosecuted at all. This is another illustration proving that a connection between the Directive and the alleged crimes against humanity exists²²⁶.

On its face the Plan and the Directive target only drug traffickers and enable the security forces to undertake a more efficient program against organized crime. This is a government’s political policy dealing with a serious problem. In the past, the OTP has been loath to investigate such policies. In response to a 2011 claim to the ICC by Mexican academics and human rights organizations, Luis Ocampo Morena, the then ICC’s Prosecutor stated: “We don’t judge political decisions or political responsibility.”²²⁷ A lack of direct evidence connecting the Directive and the Plan with the actions of the military also weakens the case against the military leaders and the ex-president.

On the other hand, arguably, the way the Plan and Directive were interpreted by the military heads and those issuing the commands to the lower ranks was the organizational policy at issue. Even if the ex-President Calderón cannot be held accountable for the Plan and Directive himself, the military, as the main body, falls under the criteria of a “group of persons that command a territory” and is responsible for demanding of the lower ranks to get “results” any way possible condoning the use of torture and illegal detention.

Either way, the Plan and Directive and their interpretation are targeted at civilians. The drug cartels and regular citizens are civilians and both groups have been beset by the actions of the military services, thus meeting the “against civilians” aspect of the definition.

Again, the low threshold for this aspect of the jurisdictional test and the low threshold for the standard of proof for an investigation weigh in favor of stating that the requirement is met. Whether the Cartel’s actions fulfill the same requirements is analyzed below.

²²⁵ *ibid*

²²⁶ *ibid*

²²⁷ ‘ICC Won’t Take Up Case of Mexico’s Drug War’ (Mexico City undated)
<www.laht.com/article.asp?ArticleId=439519&CategoryId=14091>accessed 20 May 2015

There is some debate whether a Cartel would fall under the ‘State or organizational policy part’ as this it is a non-state actor²²⁸. However, looking at the ordinary meaning of the word ‘organization’ in accordance with the Vienna Convention of the Law of Treaties, the term means a “body of persons . . . formed for a common purpose.”²²⁹ Drug cartels are composed of individuals formed for the common purpose of smuggling drugs and making economic profit by illegal means and as such fall under the definition. Moreover, the word is not restricted to political or state-like actors, and domestic criminal justice systems also use the term to refer to private parties²³⁰.

Likewise, in the Kenya decision ICC judges stated:

that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values:

the associative element, and its inherently aggravating effect, could eventually be satisfied by ‘purely’ private criminal organizations, thus not finding sufficient reasons for distinguishing the gravity of patterns of conduct directed by ‘territorial’ entities or by private groups, given the latter’s acquired capacity to infringe basic human values.²³¹

Additionally, the Judges referred to the ILC commentary to the Draft Statute to conclude that had the drafters of the Statute intended to exclude non-State actors from the term “organization”, they would not have included this term in article 7(2)(a) of the Statute.²³²

It is useful to refer to the Commentary to the Draft Statute to understand the Court’s reasoning. The Commentary states that one shall not:

²²⁸ Smith (n 98) 1123

²²⁹ *ibid*

²³⁰ *ibid* 1123

²³¹ Kenya decision (n 73) para 90

²³² Kenya decision (n 73) paras 91-92

confine possible perpetrators of the crimes to public officials or representatives alone. Admittedly, they would, in view of their official position, have far-reaching factual opportunity to commit the crimes covered by the draft article; yet the article does not rule out the possibility that private individuals with de facto power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code²³³.

Initially recruited by the Gulf Cartel, Los Zetas is a paramilitary enforcer group comprised of elite former military forces that defected from the Mexican military²³⁴. After breaking away from the Gulf Cartel, by 2010 they evolved into an armed group with some 1,200 members, both men and women, capable of deploying significant fighting forces across Mexico²³⁵. “They introduced new militarized tactics to the drug war, brought new forms of extreme violence (such as beheadings), and led other drug trafficking organizations to use similar methods”²³⁶. Apart from controlling large parts of Mexico, Los Zetas have formed ties with American gangs and other foreign criminal groups and have established a presence in Dallas, Houston and other U.S cities²³⁷.

Such quick growth and level of organization requires a strategy, leadership and discipline. The leadership of Los Zetas comes from the military, as such has the training and the will to operate a well-structured group. Although, there is no written policy of the Cartel, a plan of action exists. The Cartel wants to establish supremacy over or eliminate all other competing drug trafficking cartels²³⁸. The Cartel wants to be the leader in drug trafficking and uses all means available to it to achieve this goal. A clear *modus operandi* of killing off competition, defying the authorities, extorting business owners and kidnappings is obvious. Additionally, the Cartel holds sway over large portions of territory in Mexico, spanning across several states, where members can travel freely without any government interference²³⁹.

Based on the factors discussed above, the Cartel’s actions evoke those of an organizational

²³³ *ibid*

²³⁴ Shirk (n 155) 10

²³⁵ Kellner (n 3) 32

²³⁶ Shirk (n 155) 10

²³⁷ Kellner (n 3) 32

²³⁸ Samuel Logan, ‘Preface: Los Zetas and a new barbarism, Small Wars & Insurgencies’ (Routledge 2011)

22/5 718-727

²³⁹ *ibid* 726

policy. As illustrated above, the majority of instances the crimes committed by the Cartel are against civilians and not against the military service. Hence the “against civilian” aspect of the definition is also fulfilled.

‘With Knowledge of the Attack’

The next component of the definition is the wording of ‘with knowledge of the attack’. For the purpose of obtaining authorization to investigate, it is not necessary to analyse “with knowledge of the attack” if there is no specific suspect before the Court²⁴⁰. Pursuant to Article 30 of the Statute, knowledge is an aspect of the mental element of the offence as such without a specific suspect it would not be possible to address the *mens rea* adequately²⁴¹.

Although the request for investigation to the ICC would be for the purpose of identifying those responsible for the crimes committed in Mexico and the analysis above proceeded on that notion, it would be beneficial to provide a bare bones analysis without naming potential defendants. This analysis will illustrate the strengths and weaknesses of the request and a need for further investigation.

The ICC in the explanatory notes states that:

The last two elements for each crime against humanity describe the context in which the conduct must take place. These elements clarify the requisite participation in and knowledge of a widespread or systematic attack against a civilian population. However, the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack²⁴².

In other words, the element of ‘knowledge’ demands that the perpetrator knows that the conduct was or intended to be a part of a widespread or systematic attack directed against a civilian population. “In addition to the intent to commit the underlying crime, an accused

²⁴⁰ Kenya decision (n 73) 79

²⁴¹ *ibid*

²⁴² (n 203)

must know of the broader context in which his actions occur”²⁴³. In the ICTY case of *Prosecutor v Kunarac* the Appeals Chamber’s established a standard whereby “the perpetrator must have actual or constructive knowledge of the overall context of the attack but need not know all the details about the attack.”²⁴⁴ The perpetrator’s knowledge of an attack may be inferred from its scale and systematic nature and his/her motives are immaterial²⁴⁵. The defendant does not need to target the entire population and may direct his or her acts only against the victim²⁴⁶.

Given the state’s Directive and Plan, repetitive tactics employed by government security forces, the numerous complaints brought forward, and the summary investigations into the matters, it is reasonable to believe that the perpetrators involved, allegedly President Calderón, had knowledge that their conduct was part of a larger policy to eliminate drug cartels at any cost.

Similarly, taking into consideration the organized, purposeful nature of the attacks by the Los Zetas described above and the scale on which they occurred, it is reasonable to assume that the perpetrators of the Tamaulipas Massacre knew that their actions were part of a larger systematic policy to kill those not cooperating with the Cartel²⁴⁷.

Having reviewed the elements of the offense, it is apparent that without contradictory evidence the attacks committed by the security forces and the Cartel fall within the jurisdiction of the Court. The analysis above would alone provide reasonable grounds for the ICC prosecutor to investigate the matter further, as the burden of proof for the ICC prosecutor to launch her own investigation are quite low.

Although some elements are supported by greater evidence than others, it is submitted that what is presented meets the low threshold for the ICC to begin at least a preliminary examination

²⁴³Kunarac, Kovac and Vukovic, IT-96-23 & 23/1-A, Judgement (TC), 22 February 2001 <www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e-4.htm> accessed 5 August 2015

²⁴⁴ Smith (n 98) 1138

²⁴⁵ *ibid*

²⁴⁶ *ibid*

²⁴⁷ *ibid*

Nexus Between the Individual Acts and the Attack

The chapeau of article 7(1) of the Statute defines crimes against humanity as any of the acts specified therein insofar as they are committed "as part of a widespread or systematic attack directed against any civilian population". Meaning the acts of the accused must be "part of"—and not simply coincide with—the widespread or systematic attack directed against a civilian population²⁴⁸. Hence, one of the requirements that must be satisfied in order for the commission of crimes against humanity to be found is the nexus between such acts and the attack against a civilian population²⁴⁹.

In the Kenya decision, the Court reiterated that at an early stage of an authorization for investigation, the entire situation must be considered and not the individual acts. The Court stated:

...the issue of whether an act was committed as part of a widespread or systematic attack needs to be analyzed on a case-by-case basis with regard to each particular act. At the current stage of the proceedings, the Chamber merely considers the situation as a whole without focusing beyond what is necessary for the purpose of the present decision on specific criminal acts. In this regard, the Chamber observes that the nature, aims and consequences of many of the individual acts recall either the characteristics of the initial attacks, the retaliatory attacks or the attacks emanating from the police²⁵⁰.

As with the Kenya decision, broad patterns are exhibited from which a nexus between the criminal acts and the attack can be inferred. The criminal acts committed by the Los Zetas against the general population stem from the infighting between the cartels and the military operations conducted against the Los Zetas by the government. The purpose of the attack was to gain supremacy over drug trafficking routes and procure extra funds for the operation of the illicit group. This was conducted in a series of criminal acts over a span of several years. With regard to the attacks by the government security forces, they were acting pursuant to the government Policy, they were widely spread out and left hundreds tortured, disappeared, or killed.

²⁴⁸ International Criminal Law & Practice Training Materials, 'Crimes Against Humanity' <http://wcjp.unicri.it/deliverables/docs/Module_7_Crimes_against_humanity.pdf> 14

²⁴⁹ Kenya decision (n 73) para 97

²⁵⁰ Kenya decision (n 73) para 135

In the Côte d'Ivoire decision, the Court found a preliminary nexus between the criminal acts and the attack based on the evidence provided by the Prosecutor regarding

i) the geographic and temporal overlap of the attack and the crimes; ii) the fact that the attackers were the perpetrators of the crimes; iii) the accounts that have been provided of the raids on the pro-Ouattara neighbourhoods and Mr. Ouattara's political headquarters; (iv) the use of excessive force against protestors and the deployment of heavy artillery in densely populated areas; and (v) the prolonged nature of the attacks, which it is said shows "a pattern of conduct largely attributable to the official apparatus of the State, including FDS, CECOS and Republic Guards, combined with unofficial forces such as Young Patriots and Liberian militia."²⁵¹

Furthermore, the Court stated that in

determining whether an act falling within the scope of Article 7(1) of the Statute forms part of an attack, the Chamber must consider the nature, aims and consequences of the act. Isolated acts that clearly differ in their nature, aims and consequences from other acts that occur during an attack, fall outside the scope of Article 7(1) of the Statute.²⁵²

Similarly in the Mexican situation, it can be proved that the geographic and temporal overlap between the attack and the crimes exists; there are many reports from witnesses and victims alike corroborating the nature and extent. The crimes committed by the government security forces and the Cartel, as discussed above, followed their respective group's aims. The consequences in both cases as illustrated above, are extensive, leaving thousands impacted.

Since the standard of proof for "nexus" as with other elements of the crime against humanity at this stage is "reasonable basis", it is submitted that the evidence available indicates a reasonable basis to believe that at least some of the underlying acts committed by the government security forces and the Cartel formed part of the attack.

²⁵¹ Côte d'Ivoire decision (n 84) para 87

²⁵² Ibid para 89

For the sake of conciseness and considering the extensive discussion above a separate analysis of the underlying acts constituting crimes against humanity is omitted. It is presumed that based on the above examples of murder, torture, forced disappearance and other inhumane acts causing death and serious injury the low threshold of “reasonable to believe” to launch an investigation is satisfied.

Territorial Jurisdiction/ *Ratione loci*

In order for a crime to fall within the jurisdiction of the Court for the purpose of Article 53(1)(a) of the Statute, it must also meet at least one of the conditions that are set out in Article 12 of the Statute²⁵³. Namely, the crime must occur in the territory of either a State Party to the Statute or a State that has lodged a declaration by virtue of Article 12(3) of the Statute, or a national of relevant State must have committed the offence²⁵⁴.

On the basis of the examples above and other evidence available, it can be concluded that the alleged crimes occurred on Mexican territory, and thus the Court has jurisdiction *ratione loci* under Article 12(2)(a) of the Statute. Since the requirement of jurisdiction *ratione loci* is fulfilled, the ICC would not need to examine jurisdiction *ratione personae* under Article 12(2)(b) of the Statute²⁵⁵.

Although meeting the jurisdictional requirements for an investigation by the ICC Prosecutor, the facts must also meet the admissibility test of the ICC before the Court may seize itself of the matter.

CHAPTER III

Admissibility

Articles 17 and 53(1)(b) of the Statute speak of the admissibility of a "case". Pursuant to these provisions the ICC must examine, on the basis of the available information, whether the case is admissible. As this is a preliminary stage, without identified defendants the

²⁵³ Côte d’Ivoire decision (n 84) para 187

²⁵⁴ *ibid*

²⁵⁵ *ibid* para 188

assessment of admissibility under article 53(1) is with respect of a defined case is impossible as such, the entire “situation” must be assessed instead.²⁵⁶

Furthermore, the Statute is drafted in a manner that addresses the questions related to admissibility at different stages of the proceedings up until trial²⁵⁷. “These stages begin with a "situation" and end with a concrete "case", where one or more suspects have been identified for the purpose of prosecution”²⁵⁸. This weighs in favour of a “situation” versus “case” analysis.

Hence, the ICC, pursuant to Articles 17 and 53(1)(b) of the Statute and Rule 48 of the Rules conducts an initial admissibility examination in order to determine whether there is a "reasonable basis to proceed" with an investigation after reviewing the situation²⁵⁹.

Linearly, although not practically, the ICC’s procedural development from a situation to a case is as follows:

1. The OTP obtains *notitia criminis*
2. Starts pre-investigating
3. Identifies a situation
4. Checks the criteria enshrined in Art. 53 (1), 15 (3), rule 48 with regard to the situation as a whole
5. Starts a formal investigation (in the case of a referral), or asks for authorization of a formal investigation (in the case of information under Art. 15) in the sense of Art. 54
6. Investigates all-embracing and ideally identifies individual suspects
7. Ultimately applies for a warrant of arrest or summons to appear if the reasonable grounds standard of Art. 58 (1), (7) is met; and
8. The PTC issues a warrant of arrest or summons to appear²⁶⁰.

²⁵⁶ Kenya decision (n 73) para 45

²⁵⁷ Kenya decision (n 73) para 41

²⁵⁸ *ibid*

²⁵⁹ Cote d’Ivoire decision, (n 84) para 190

²⁶⁰ Kai Ambos, *Colombian Peace Process and the Principle of Complementarity of the International Criminal Court : An Inductive, Situation-based Approach*. (Berlin/Heidelberg, DEU: Springer, 2010) 37

In order for the ICC to seize the situation in addition to meeting all the elements of the crime, it must be demonstrated that the Mexican domestic criminal courts are unable or unwilling to prosecute those responsible. Although the substantive situation appears to meet the requirements of the ICC's jurisdiction, analyzing the admissibility of the claim depicts a less clear picture.

Complementarity Principle

Pursuant to the Preamble and Articles 1 and 17 of the Rome statute, the ICC is only complimentary to the domestic criminal courts ensuring the supremacy of national jurisdiction and the sovereignty principle. Also, the principle reflects the practical reality that domestic courts have better access to evidence and witnesses, while the ICC has limited resources reducing the number of prosecutions it may undertake.

Under Article 17(1)(a) only if the domestic criminal courts are unable or unwilling to prosecute those responsible for the atrocious acts committed by drug cartels or government security forces, may the ICC adjudicate the matter. Article 17(2) provides criteria for “unwillingness” of the State. Articles 17(2) and 17(3) read:

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of *due process* recognized by international law, whether one or more of the following exist, as applicable:
 - (a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;
 - (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
 - (c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.²⁶¹

²⁶¹ Rome Statute (n 1):

Article 17: 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

- (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;
- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

The Appeals Chamber in its judgment of 25 September 2009 further interpreted this provision involving a twofold test:

[I]n considering whether a case is inadmissible under article 17 (1) (a) and (b) of the Statute, the initial questions to ask are (1) whether there are ongoing investigations or prosecutions, or (2) whether there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned. It is only when the answers to these questions are in the affirmative that one has to look to the second halves of sub-paragraphs (a) and (b) and to examine the question of unwillingness and inability. To do otherwise would be to put the cart before the horse. It follows that in case of inaction, the question of unwillingness or inability does not arise; inaction on the part of a State having jurisdiction (that is, the fact that a e is not investigating or prosecuting, or has not done so) renders a case admissible before the Court, subject to article 17 (1) (d) of the Statute²⁶².

The two-fold test is applied below to the facts of the Mexico situation.

Unwilling

Current Mexican President Nieto has acknowledged that the government security forces in the fight against drug cartels during his predecessor's term had perpetrated serious abuses against human rights²⁶³. Albeit trying to implement measures²⁶⁴ to prevent future crimes by the security forces, those responsible for the past incidents of forced disappearances and torture remain unpunished. Human Rights Watch reported that as of April 2015 "no one had been convicted for an enforced disappearance committed after 2006."²⁶⁵

In spite of nearly 5,000 claims of violations of human rights committed by the security forces between 2007 and 2012, the Military Attorney General's Office reported that only four sentences have been issued and only two of them are final²⁶⁶. The root cause for the lack of

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

²⁶² Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ICC-01/04- 01/07-1497, para. 78

²⁶³ Human Rights Watch, 'World Report 2015' < www.hrw.org/world-report/2015/country-chapters/mexico?page=1 > accessed 18 May 2015

²⁶⁴ *ibid*; President Nieto spurred the creation of the National Human Rights Program and a unit in the Federal Prosecutor's Office to investigate disappearances, however this is yet to produce tangible results.

²⁶⁵ *ibid*

²⁶⁶ FIDH (n 29) 18; Washington Office on Latin America, 'Mexican Congress Approves Historic Reforms to the Military Code of Justice' Advocacy for Human Rights in the Americas(Wola.org 30 April 2014)

sentences and prosecution is that the military courts' responsibility²⁶⁷ for investigating crimes committed by military personnel against civilians lasted until 2014²⁶⁸. These courts have been repeatedly criticized by human rights organizations and Mexican and international courts for lacking the "necessary safeguards to ensure judicial independence and impartiality, reliable investigations, and accountability"²⁶⁹.

For instance, the Inter-American Court of Human Rights unequivocally stated in the case of *Cabrera Garcia & Montiel Flores v Mexico* that:

[w]hen the military jurisdiction assumes competence over a matter that should be heard by the ordinary jurisdiction, it violates the right to a competent Court and, *a fortiori*, to due process," which is, at the same time, intimately related to the right to a fair trial. The judge in charge of hearing a case shall be competent, as well as independent and impartial. Regarding situations that violate human rights of civilians, the military jurisdiction cannot operate under any circumstance.²⁷⁰

Analogously, in the Inter-American Court of Human Rights case, *Rosendo Cantú v Mexico* the IACHR among other pronouncements stated that Mexico must undertake a full investigation under civilian jurisdiction into the case of Rosendo Cantú, who was raped and tortured by Mexican soldiers in 2002²⁷¹. Pursuant to the court's judgment, Mexico's semblance of an investigation under the military's jurisdiction violated the *Inter-American Convention for the Prevention, Punishment and Eradication of Violence against Women*²⁷².

The Human Rights Watch Report illustrates the unwillingness of the military courts to prosecute their own, undertaking of proceedings half-heartedly and closing of investigations

<www.wola.org/news/mexican_congress_approves_historic_reforms_to_the_military_code_of_justice > accessed 21 May 2015; Human Rights Watch, 'Testimony of Nik Steinberg' (17 June 2013)

<www.foreign.senate.gov/imo/media/doc/Steinberg_Testimony1.pdf > accessed 21 May 2015

²⁶⁷ HRW (n 69)

²⁶⁸ Washington Office on Latin America, 'Mexican Congress approved reforms to Mexico's Military Code of Justice ensuring that human rights violations committed by soldiers against civilians will be prosecuted in civilian courts' (20 April 2014)

<www.wola.org/news/mexican_congress_approves_historic_reforms_to_the_military_code_of_justice> accessed 20 May 2015

²⁶⁹ Human Rights Watch, 'Uniform Impunity: Mexico's Misuse of Military Justice to Prosecute Abuses in Counternarcotics and Public Security Operations' (April 2009) 16

<www.hrw.org/sites/default/files/reports/mexico0409web_0.pdf> accessed 19 May 2015

²⁷⁰ *Case of Cabrera Garcia & Montiel Flores v Mexico (Judgement)* Inter-American Court of Human Rights Series C No. 220, (26 November 2010)

²⁷¹ *Case of Rosendo Cantú* (n 159)

²⁷² *ibid*

in a system that is inherently biased. For instance, in May 2007 soldiers detained eight people after a shootout between the military and an alleged drug trafficker, the report stated²⁷³. Soldiers placed the detainees in military installations where they proceeded to kick and beat them, placing their heads in black bags and forcing them to lie on the floor blindfolded²⁷⁴. None of the detainees were related to the shoot out²⁷⁵. Following the incident, a federal prosecutor asked that the military conduct an investigation into the soldiers' actions²⁷⁶. Within a month the investigation was closed for alleged lack of evidence of wrongdoing²⁷⁷. The investigation concluded in a month illustrates procedural irregularity as it is not normal for investigations to be completed so hastily.

Similarly, in August 2007, five soldiers detained Jesús Picazo Gómez. For over 24 hours Mr. Gomez was held incommunicado in a military installation while being beaten, kicked, water boarded and electrocuted²⁷⁸. Military prosecutors launched an investigation into the event following a request from the federal prosecutor²⁷⁹. The military closed its investigation stating that it did not have evidence that soldiers tortured Mr. Gomez despite the existence of medical exams illustrating that the crime occurred²⁸⁰.

These are just two examples of the unwillingness of the military prosecutors to investigate and hold those responsible accountable for the crimes committed against civilians. The examples meet Article 17(2)(a) and Article 17(2)(c) criteria to assume jurisdiction. The fact that military courts are prosecuting human rights crimes is evidence alone that there is no regard to the “principles of due process” as stated by the Inter-American court. Apart from that, the military courts are biased as illustrated by the lack of prosecutions and inadequate investigations.

Even though Mexico has recently reformed its military justice system, this change applies to the crimes committed after it came into force and not to those committed during 2006-

²⁷³ HRW (n 69)

²⁷⁴ *ibid* 40

²⁷⁵ *ibid*

²⁷⁶ *ibid* 41

²⁷⁷ *ibid* 41

²⁷⁸ *ibid* 47

²⁷⁹ *ibid*

²⁸⁰ *ibid*

2012²⁸¹. As such, although the reform shows political willingness to remedy the situation, it does not address impunity for crimes committed by the government security forces in the past. This weighs in favour of the ICC taking jurisdiction over the matter. Furthermore, it would send a clear message to the perpetrators, military and civil courts that impunity for crimes against humanity would not be tolerated, thus strengthening the rule of law internationally.

With respect to the Cartel, there is ample evidence that the Mexican state is putting efforts into capturing and sometimes prosecuting those responsible for the crimes. During President Calderón's time in office, of the 37 most-wanted cartel leaders identified by the Mexican government in 2009, 25 were either captured or killed²⁸². During that period, instead of prosecuting themselves, Mexico extradited 25 cartel leaders and approximately 600 cartel associates to stand trial in the United States²⁸³. President Nieto is choosing to keep the drug lords on Mexican soil after capture. For instance, on March 5, 2015, Mexican authorities apprehended Omar Treviño Morales, the head of the Cartel, after his brother Miguel Angel Treviño was arrested in 2013²⁸⁴. Miguel Angel Treviño is now in a maximum-security prison in Mexico awaiting trial for drug trafficking, murder, illegal possession of weapons and illicit funds.²⁸⁵ Similarly, Omar Treviño Morales's was charged with money laundering, possession of military weapons and illicit funds, murder, torture and kidnapping²⁸⁶. The questions arise why is the state not prosecuting them for crimes against humanity? Is it unable to do so?

²⁸¹ Mexico Adopts Legislation Limiting Military Courts' Jurisdiction over Soldiers' Human Rights Abuses, (19 May 2014) <www.ijrcenter.org/2014/05/19/mexico-adopts-legislation-limiting-military-courts-jurisdiction-over-soldiers-human-rights-abuses/>

²⁸² David Osborne, 'Notorious Mexican Drug Lord Miguel Angel Trevino' *Independent* (16 July 2013) <www.independent.co.uk/news/world/americas/notorious-mexican-drug-lord-miguel-angel-trevino-who-stewed-his-victims-alive-captured-in-raid-8710225.html> accessed 18 May 2015

²⁸³ *ibid*

²⁸⁴ Dudley Althaus, 'Reputed Zetas Leader Captured by Mexican Security Forces' *The Wall Street Journal* (Mexico City 4 March 2015) <www.wsj.com/articles/reputed-zetas-leader-captured-in-suburb-by-mexican-security-forces-1425491084> accessed 17 May 2015; Mariano Castillo, Catherine E. Shoichet and Fidel Gutierrez, 'Reputed boss of Zetas drug cartel captured in Mexico' *CNN* (5 March 2015) <<http://edition.cnn.com/2015/03/04/americas/mexico-zetas-leader-captured/>> accessed 19 May 2015

²⁸⁵ 'Un juez dicta formal prisión a Miguel Ángel Treviño Morales, el 'Z-40'' *CNNMexico.com* (25 July 2013) <<http://mexico.cnn.com/nacional/2013/07/25/un-juez-dicta-formal-prision-a-miguel-angel-trevino-morales-el-z-40>> accessed 20 May 2015; Israel Yañez, 'Inicia proceso penal contra el Z-40' *24 Horas* (21 July 2013) <www.24-horas.mx/inicia-proceso-penal-contra-el-z-40/> accessed 19 May 2015

²⁸⁶ Juan Omar Fierro, 'Inician primer juicio penal contra el líder de 'Los Zetas' Omar Treviño Morales, 'Z-42'' (13 March 2015) *Noticias MVS* <www.noticiasmvs.com/#!/noticias/inician-primer-juicio-penal-contra-el-lider-de-los-zetas-omar-trevino-morales-z-42-158.html> accessed 19 May 2015

Unable

To determine if Mexico is unable to prosecute the Article 17(3) two-pronged test must be satisfied. Article 17(3) reads:

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings²⁸⁷

The second prong is dependent on the occurrence of the first prong.²⁸⁸ It must be first established that there is either a) total or substantial collapse of the nation's judicial system, or b) because of the unavailability of the national judicial system the Mexican government is unable to: 1) obtain the accused, 2) the necessary evidence or 3) otherwise unable to carry out the proceedings.

Arguably, Mexico is one of the most corrupt countries in the world ranking 103 out of 175 nations and much of the corruption can be attributed to the cartels and "drug war".²⁸⁹ It could be insinuated that the judiciary is no longer to be trusted as well.

It has been reported that an estimated 75 percent of crimes go unreported, allegedly because citizens have no confidence in Mexico's justice system²⁹⁰. Stemming from the institutional weaknesses, many cases that are reported are not investigated or crime witnesses do not identify a suspect²⁹¹. Widespread criminal impunity reigns, with only one or two out of every hundred crimes resulting in a verdict²⁹². On the other hand, if a suspect has been identified a guilty sentence is probable, in part because of the use of torture and forced confessions are prevalent²⁹³. Poor investigative techniques often provide the basis for

²⁸⁷ (n 1)

²⁸⁸ Spencer Thomas, 'A Complementarity Conundrum: International Criminal Enforcement in the Mexican Drug War' 45 *Vanderbilt Journal of Transnational Law* 619 < www.vanderbilt.edu/jotl/manage/wp-content/uploads/Thomas_CR_4_16.pdf> accessed 15 May 2015

²⁸⁹ Transparency International, 'Corruption Perceptions Index: 2014' < www.transparency.org/cpi2014/results> accessed 18 May 2015

²⁹⁰ Shirk (n 155) 11

²⁹¹ *ibid*

²⁹² *ibid*

²⁹³ *ibid*

prosecution and conviction²⁹⁴. Once incarcerated, prisoners tend to encounter terrible conditions that promote continued criminal behavior, frequent riots, and escapes²⁹⁵.

In 2008 Mexican legislators have attempted to address these issues by passing a package of constitutional reforms²⁹⁶. The new legislation would have categorically changed the criminal justice system “by introducing police and judicial reforms to strengthen public security, criminal investigations, due process protections for the accused, and efforts to combat organized crime.”²⁹⁷ If implemented, these reforms would have helped improve law enforcement, fight judicial sector corruption, and prevent systemic human rights abuses²⁹⁸. To date very few of the proposed measures have been implemented.

In spite of this, it is highly unlikely that the ICC would find that a total or substantial collapse of Mexico’s judicial system prevails. Although the Los Zetas wield a lot of influence over swaths of territory in Mexico, not all states are subject to their power. Independent, uncorrupted judiciary in parts of the country that are not affected by the drug trade survives. It is conceivable that upon capture of the Cartel’s member, the detainee would be prosecuted in a court far from the perpetrator’s turf²⁹⁹.

Furthermore, to prove a “substantial collapse” other indicia needs to be present apart from corruption, *inter alia* a lack of: necessary personnel, judges, investigators and prosecutors³⁰⁰. Alternatively or in addition to, there must be lack of judicial infrastructure or obstruction by uncontrolled elements, which render the system unavailable³⁰¹. Albeit subject to corruption allegations, Mexico’s judiciary is well established, providing for multiple levels of justice³⁰². For instance, federal courts include the “Supreme Court, with 21 magistrates; 32 circuit tribunals, and 98 district courts, with one judge in each”.³⁰³ This supports the contention that

²⁹⁴ *ibid*

²⁹⁵ *ibid*

²⁹⁶ *ibid*

²⁹⁷ *ibid*

²⁹⁸ *ibid*

²⁹⁹ Thomas (n 288) 623

³⁰⁰ International Criminal Court, ‘Informal expert paper: the principle of complementarity in practice’ (2003) <www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf> accessed 19 May 2015

³⁰¹ *ibid*

³⁰² Francisco A. Avalos, excerpt from- *The Mexican Legal System: A Comprehensive Research Guide*, 3rd ed. (2013) retrieved from <<http://lawlibrary.arizona.edu/research/mexican-legal-system>> accessed 19 May 2015

³⁰³ Encyclopedia of the Nations, ‘Mexico-Judicial System’ < www.nationsencyclopedia.com/Americas/Mexico-JUDICIAL-SYSTEM.html> accessed 20 May 2015

the ICC would unlikely find Mexico's judicial system to be "substantially collapsed".

However, failure to incorporate the Rome Statute into domestic legislation indicates the lack of substantive penal legislation, which may render the system "unavailable"³⁰⁴. It is under the "unavailability of the national system" and "otherwise unable to carry out its proceedings" of Article 17(3), by virtue of not including international crimes against humanity in Mexico's criminal code, that Mexico appears to be unable to prosecute and favours the ICC accepting the matter³⁰⁵. Mexico's judiciary can only prosecute those responsible under the ordinary crimes such as murder and kidnapping under the criminal code arguably leaving the perpetrators unpunished.

Nevertheless, the sentences that the perpetrators would receive are commensurate with international sentencing standards³⁰⁶. For instance when Miguel Angel Treviño, one of the most ruthless Los Zetas leaders, stands trial for murder and other charges, and if convicted he would face life in prison³⁰⁷. Even though he would not be convicted of crimes against humanity the fact that he would be punished satisfies the availability of the system at least in terms of the end result.

Additionally, Article 20(c) of the Rome Statute prevents double jeopardy. It specifies that if the person of concern has already been tried for *conduct* which is the subject of the complaint, then a trial by the Court is not permitted unless the proceedings in the domestic court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes *within the jurisdiction of the Court*; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice³⁰⁸.

³⁰⁴ (n 296)

³⁰⁵ Thomas (n 288) 620; Simon Meisenberg, 'Complying with Complementarity? The Cambodian Implementation of the Rome Statute of the International Criminal Court' (2015) 5/1 Asian Journal of International Law 126

³⁰⁶ Thomas (n 288) 623

³⁰⁷ *ibid* 628

³⁰⁸ Rome Statute (n 1)

Hypothetically, if one of the top Zetas were prosecuted under the domestic legislation for the same conduct that would fall under the ICC's jurisdiction, the Court would not be able to seize itself of the matter. Others, however argue that if the same offense does not exist under domestic legislation, and if the conduct is characterized differently in the Court than in the domestic court, then the ICC is not barred from prosecuting again³⁰⁹.

This illustrates the imprecision of guidelines in the complementarity regime of the ICC, leaving much to the discretion of the Prosecutor and the Court. If every state around the world incorporated crimes of genocide, crimes against humanity, and war crimes committed during armed conflicts in their domestic legislation, then the issue of "inability" would be much simpler to resolve and the primacy of domestic jurisdiction less likely to be questioned.

There is no consensus over the ICC assuming jurisdiction in a situation where domestic legislation fails to include the Rome Statute offenses. In practice, it is yet to occur but much discussion revolves around the subjective nature of the complementarity principle and the dangers of allowing the ICC to take jurisdiction in such circumstances³¹⁰. Some argue that if the ICC were to consider a state unable to prosecute based on a lack of domestic incorporation of a Rome Statute offence, the Court would undermine the legitimacy of its complementarity regime and its respect for national prosecutions³¹¹. Other critics though state that such decision would close the loophole of impunity, promote the implementation of the ICC offenses in domestic legislations and strengthen the international legal practice³¹².

There is no definitive answer as to whether the ICC could adjudicate the Cartel or government security forces based on "unwillingness" or "inability" stemming from the lack of domestic legislation mirroring the ICC offenses. The ICC investigating the Cartel and the security forces could potentially resolve this issue. As part of the investigation, the ICC could pronounce explicitly as to where it stands on the incorporation of the Rome Statute offences in domestic legislation thus spurring states to amend their own legislation and the ICC clarifying its own jurisdiction. A preliminary examination alone may encourage

³⁰⁹ Michael Newton, 'The Complementarity Conundrum: are we watching evolution or evisceration?'(2010) 8/1 Santa Clara Journal of International Law 153-154

³¹⁰ Newton (n 304) 153; Meisenberg (n 300)

³¹¹ Meisenberg (n 305) 199

³¹² Meisenberg (n 305) 127

Mexico to incorporate the ICC offenses as part of its criminal code to avoid ICC's meddling in what it considers its internal affairs.

As illustrated, there are arguments for and against prosecution by the ICC and factual elements that weigh in favour and in contra. Taking the position that the test above is met, it is worth reviewing whether the situation meets the conditions of gravity and serves the interests of justice. Even if one of the admissibility requirements is not satisfied, then the ICC will not be able to assume jurisdiction.

Gravity

Pursuant to Article 5 of the Rome Statute the "substantive jurisdiction of the ICC is limited to only the most serious crimes of concern to the international community as a whole."³¹³ Reflecting Article 5, Article 17(1)(d) states that a case is inadmissible where there "is not sufficient gravity to justify further action by the Court"³¹⁴. Article 17 must be read together with Article 53(1)(c) which permits the Prosecutor to take into account the gravity of the crime and whether the interest of justice would be served when determining whether to proceed with an investigation³¹⁵.

The gravity threshold is not defined in the Rome Statute leaving it to the interpretation of the ICC judges. The Court stated that since the subject matter jurisdiction already includes "gravity", the admissibility gravity threshold must have something in addition to the seriousness inherent in the definitions of the offences³¹⁶. Furthermore, the ICC expressly stated that the "threshold must be met not only in every situation, but also in every case arising from the investigation of a situation"³¹⁷.

The Court, in the few cases where it considered the gravity threshold developed a flexible multi-factor approach. The Court recognizing that it should not preclude a case from being heard under the admissibility grounds when the substantial jurisdiction elements are met,

³¹³ Rome Statute (n 1) Article 5

³¹⁴ *ibid* Article 17

³¹⁵ Newton (n 309) 157

³¹⁶ Margaret deGuzman, 'The International Criminal Court's gravity jurisprudence at ten' (2013) 12 Wash. U. Global Stud. L. Rev. 478

³¹⁷ Susana SaCouto, Katherine A. Cleary. 'Gravity Threshold of the ICC' (2008) 23/5 American Journal of International Law 811

developed this flexible, facts based approach that enables it to justify admitting practically any case within the ICC's jurisdiction³¹⁸.

The Court stated that in determining the gravity threshold for admissibility qualitative and quantitative factors must be considered. The quantitative refers to the number of victims, while the qualitative means the "issues of the nature, manner and impact".³¹⁹ The Court looks at the extent of damage caused, particularly, the harm caused to victims and their families, the nature of the unlawful behaviour and the means used to execute the crime³²⁰. Virtually all cases will include some of the factors to support a finding of sufficient gravity³²¹.

For instance in Abu Garda, Darfur case there were twelve killed and eight wounded peacekeepers in the attack, a relatively low number of victims that it could be considered insufficiently grave to meet the threshold solely on the quantitative factor³²². However the ICC Pre-Trial Chamber I determined the case admissible by putting more emphasis on the qualitative factors over the quantitative. The Court found that despite the low number of direct victims, the case met the gravity threshold because the offences seriously impacted the broader community by causing a reduction in peacekeeping forces in the area, thus finding the crimes sufficiently grave to merit admittance.

Since the threshold for gravity under the admissibility heading is only minimal beyond what is inherent in the Rome Statute's provisions regarding jurisdiction, the facts discussed above illustrating the quantity and quality of the murders, tortures and kidnappings committed by the Mexican government security forces and the Cartel surely meet the requirement. Not only are there high numbers of victims but also the duration and the manner in which the crimes were perpetrated merit the ICC's attention. The high number of internally displaced persons due to the drug violence should not be forgotten either, as they also indicate the gravity of the situation.

³¹⁸ *ibid* 476

³¹⁹ deGuzman (n 316) 480

³²⁰ *ibid* 482

³²¹ *ibid*

³²² *ibid*

In the Interests of Justice

Only after all the conditions for jurisdiction and admissibility are met, may the Prosecutor assess whether or not to proceed with the investigation. Pursuant to Article 53(1)(c) the Prosecutor must determine whether substantial reasons exist that an investigation would not serve the interests of justice³²³. The Rome Statute does not define the meaning of “interests of justice.” To make a proper assessment, the Prosecutor must take into consideration the gravity of the crime and the interests of victims and the rights of the perpetrators in the decision to not proceed. Turning down an investigation is highly exceptional as there is a strong presumption that investigations and prosecutions will be in the interests of justice³²⁴. In the event that a Prosecutor decides not to proceed with an investigation solely on the grounds of Article 53(1)(c), she must notify the Pre Trial Chamber of her reasons.

There are no extenuating circumstances in the Mexican situation to warrant a decision by the Prosecutor not to proceed with the investigation. The gravity of the crime as discussed above is dire. Thousands have been killed, tortured, kidnapped at the hands of the Cartel and government security forces. Due to the situation, many more thousands have had to flee their homes to escape the violence. Those responsible in the security service have gone unpunished and those in the Cartel, like Miguel Treviño Morales, has been awaiting trial in prison for the last two years against the principles of due process. It would be a grave disservice to the interests of justice if an investigation were not launched into the matter.

The dissenting Judge in the Kenya decision strongly voiced his opposition of approving an investigation into the Kenya situation. Judge Hans-Peter Kaul stressed that the demarcation line between ordinary crimes and crimes against humanity must not be blurred³²⁵. He emphasized that the crimes committed in Kenya, although very serious, did not meet the threshold to be of international concern and of a crimes against humanity.

³²³ International Criminal Court, ‘Policy Paper on Preliminary Examinations’ (2013) <www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20202013.pdf> accessed 20 May 2015

³²⁴ International Criminal Court, ‘Policy Paper on the Interests of Justice’ (2007) <http://icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf> accessed 20 May 2015

³²⁵ Kenya decision (n 73) Dissent para 10

He presented arguments often cited by those desirous to hold state sovereignty at the pinnacle of international relations. He argued that the interest of justice would not be served if the ICC was the forum for the Kenya situation stating that:

...such an approach might infringe on State sovereignty and the action of national courts for crimes which should not be within the ambit of the Statute. It would broaden the scope of possible ICC intervention almost indefinitely. This might turn the ICC, which is fully dependent on State cooperation, in a hopelessly overstretched, inefficient international court, with related risks for its standing and credibility. Taken into consideration the limited financial and material means of the institution, it might be unable to tackle all the situations which could fall under its jurisdiction with the consequence that the selection of the situations under actual investigation might be quite arbitrary to the dismay of the numerous victims in the situations disregarded by the Court who would be deprived of any access to justice without any convincing justification³²⁶.

These criticisms are applicable to the Mexican situation as well. However, it is proposed that a preliminary examination will be sufficient to stimulate legislative changes in Mexico, whereby further intervention by the ICC would not be necessary. If Mexico passes legislation incorporating the Rome Statute offences into its criminal code the ICC and the international criminal regime will actually be strengthened and the ICC's legitimacy reinforced. A preliminary examination would also focus international attention on Mexico. In the process of "naming and shaming", Mexico would be more likely to commence a process into dealing with corruption and revising its policy on removing cartel leaders which has been often criticized and proven ineffective in the fight against drug trafficking.

Arguments discussed by Judge Hans-Peter Kaul are perhaps premature. Preliminary examinations do not pose a threat to national sovereignty the same way as a full out investigation does. They are less coercive and provide a gentler impetus to a state to change its ways before the ICC, thus less likely for that state to cut off funding to the institution. A state is more likely to comply with ICC's recommendations at a preliminary stage 1) to avoid an investigation; 2) to show the international community that a situation of international concern does not exist. These are some of the lessons that can be learned from the Colombia situation discussed below.

³²⁶ *ibid*

CHAPTER IV

Lessons from the Preliminary Examination in Colombia

The situation in Mexico has been often compared to the drug war in Colombia³²⁷. The ICC started a preliminary examination into Colombia in 2005 after hundreds of reports surfaced regarding crimes against humanity and war crimes in the country³²⁸. The preliminary examination is still ongoing and focuses on accountability of local judiciary and government falling under the complementarity/admissibility criteria.³²⁹ In the report, *The Impact of the ICC in Colombia: Positive Complementarity on Trial*, published in 2011, the author explores the different ways in which the preliminary examination by the ICC has influenced the local response to crimes against humanity and war crimes in Colombia³³⁰.

The situation in Colombia is very complex because of the multitude of actors, years of conflict and a mass of causes³³¹. The main parties to the conflict are: the government, the army, the right wing paramilitary groups, the leftist *Fuerzas Armadas Revolucionarias de Colombia* (FARC) guerillas, and other rebel factions³³². Following Colombia's ratification of the Rome Statute and the commencement of a preliminary examination into the situation, arguably the threat of a future ICC investigation led to the parties coming to a peace and justice framework, codified in the Justice and Peace Law ("JPL") and more recently in the Legal Framework for Peace³³³.

Because of the JPL framework nearly one third of the congressmen have been charged and their assets seized³³⁴. There is greater room for domestic prosecution as the majority of the paramilitary leaders have been extradited to the United States³³⁵. Under the JPL system three

³²⁷ See: Robert C Bonner, 'The New Cocaine Cowboys, How to Defeat Mexico's Drug', Council on Foreign Relations (July/August 2010) <www.foreignaffairs.com/articles/mexico/2010-07-01/new-cocaine-cowboys> accessed 5 August 2015

³²⁸ Colombia, <www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/colombia/Pages/colombia.aspx> accessed 19 July 2015

³²⁹ *ibid*

³³⁰ Alejandro Chehtman, 'The Impact of the ICC in Colombia: Positive Complementarity on Trial' <www.domac.is/media/domac-skjol/Domac-17-AC.pdf> (Domac, Reykjavik 2011) accessed 15 July 2015

³³¹ Colombia's Justice and Peace Process, International Center for Transitional Justice (5 August 2012) <www.ictj.org/news/feature-series-colombia's-justice-and-peace-process>

³³² *ibid*

³³³ Diego Acosta Arcarazo, Russell Buchan, Rene Uruena, 'Beyond Justice, Beyond Peace? Colombia, the Interests of Justice, and the Limits of International Criminal Law' (2015)26 *Criminal Law Forum* 291-318

³³⁴ Chehtman (n 3300) 40

³³⁵ *ibid*

perpetrators have been convicted for crimes under international law and there is reported progress with other investigations as well³³⁶. Although these events cannot be attributed directly to the involvement of the ICC, a correlation may be made between the developments and the threat of a full ICC investigation weighing over the Colombia government.

Alejandro Chehtman in his report found that thanks, at least in part, to the ICC preliminary examination

...many domestic actors have made use of the “threat” of an intervention of the ICC to further accountability processes, and normative developments both in Congress and before the Colombian judiciary. The “shadow” of the ICC was also used to pressure (at least initially) the parties to the conflict. Furthermore, the ICC has also been influential in slowly driving prosecutors into focusing on the systematic and widespread character of mass criminality in Colombia, and changing their institutional division of labour from the traditional distribution by cases, to the more rational allocation of fronts within the conflict. It has also favoured progress in local criminal investigations generally, as shown by the unprecedented number of mass graves identified and unearthed. Finally, it is argued that the influence of the ICC contributed to enhancing the accountability elements contained within the JPL framework. It contributed, inter alia, to domestic legal authorities adopting tougher imprisonment conditions for paramilitaries, wider participation of victims within the processes, and more demanding provisions on reparations for victims³³⁷.

Chetman’s research provides examples of how ICC’s preliminary examination helped spur legislative, investigative and accountability regimes in Colombia. For example, domestic courts started implementing international standards to examine problems of complicity and participation in mass atrocities³³⁸. Additionally, they used the concept of crimes against humanity, even in cases where there was no domestic legislation incorporating them.³³⁹ Colombia courts started implementing standards of evidence for cases of sexual violence, from international legal provisions³⁴⁰. Similarly legal discussion regarding partial attribution

³³⁶ *ibid*

³³⁷ *ibid*

³³⁸ *ibid* 44

³³⁹ *ibid*

³⁴⁰ *ibid*

of facts has been undertaken on the basis of international law arguments³⁴¹. For instance, in Colombia, the law prevents a finding of vicarious liability of an individual in position of authority for the acts of the subordinates³⁴². The push to accept foreign modes of liability into its law may be plausibly connected to the ICC³⁴³. Additionally the development and application of legal tools to investigate and apprehend culprits of crimes against humanity has radically advanced³⁴⁴.

Many of the developments above arose to satisfy the requirements of the principle of complementarity but others may be attributed to other forces³⁴⁵. For instance, the particular development towards a more systematic analysis of the mass criminality in Colombia has also been connected with domestic political synergies and the decisions of the Inter-American Court on Human Rights, which issued a binding decision stating that the Colombian State had to take this line of action in its criminal investigations³⁴⁶. It illustrates that positive complementarity of the ICC is hard to discern and some of the developments in Colombia may be attributed to different events and not only to the ICC's shadow of investigation.

Experts argue that a halt in OTP's preliminary examination into Colombia would be detrimental to the progress, albeit slow, in the accountability and change of legal processes³⁴⁷. At the same time, if the ICC were to open a full investigation on Colombia, this too would impede progress. By initiating an investigation, the ICC would remove the incentive for the Colombian authorities to promote investigations and domestic prosecutions³⁴⁸. Arguably, the ICC's investigation signals an inability of the local judiciary to deal with the situation and could potentially lead to a free ride on the work of the ICC, namely the investigation and prosecution³⁴⁹. These are just some of the pros and cons of ICC's intervention.

³⁴¹ *ibid*

³⁴² *ibid* 17

³⁴³ *ibid* 47

³⁴⁴ *ibid* 39

³⁴⁵ *ibid* 51

³⁴⁶ *ibid*

³⁴⁷ *ibid* 56

³⁴⁸ William Burke-White, 'Implementing a Policy of Positive Complementarity in the Rome System of Justice' (2008) 19 *Criminal Law Forum* 82

³⁴⁹ *ibid*

Over the years, the “stick” of the ICC’s full investigation has led to positive changes in the legal system in Colombia, such preliminary examination may lead Mexico onto the same path of change.

CONCLUSION

The analysis done in this thesis illustrates that an investigation or at least a preliminary examination is warranted and should be pursued by the OTP in Mexico. Firstly, the low standard of proof for an investigation and/or preliminary examination favors the ICC’s review into the matter. Secondly, although some elements of the jurisdictional test are met with varying degree, the uncertainty is not for a lack of facts that conform to the ICC test, but rather the ambiguity in the Court’s law.

The Rome Statute fails to define key elements of the test for meeting jurisdiction and admissibility. As illustrated above, the concepts of “unable”, “unwilling” “organizational” and “gravity threshold” continue to be ambiguous.

Also, complementarity continues to be a controversial topic. There is a general lack of consensus in the case law on the legal terms, which leaves a lot of discretion to the Prosecutor to decide whether a case should be investigated or not. An initial test case or even a preliminary examination into the Mexican situation could provide important legal analysis for other countries dealing with similar situations of organized crime leading to crimes against humanity. As exemplified with Colombia, the issue of complementarity offers both advantages and disadvantages that should be explored further in other countries too. This will enable the ICC to determine where it stands on the positive complementarity principle and provide more comparative analysis without spending as many funds and resources as for a full-blown investigation.

Additionally, if the Prosecutor had to provide detailed reasons for refusal of cases, a preliminary examination would provide greater guidance for those wishing to re-submit the claim with new evidence. It would garner greater transparency and legitimacy to the institution and provide clear indications to the government that domestic action is required irrespective of the ICC’s non-interference.

Also, “naming and shaming” technique works. For instance, Mexico has recently implemented legislative reform whereby military personnel allegedly having committed human rights violations against civilians will be prosecuted in civil courts. This change was spurred by repeated criticisms of the system by IACHR, domestic courts and human rights organizations. Having the ICC make a statement regarding the inadequacy of the domestic legal regime may have an impact and lead to change, thus ending impunity.

Furthermore, even initial involvement by the ICC in a situation has led to an increase in domestic prosecutions of state agents for human rights crimes in general³⁵⁰. It is reported that countries under investigation by the ICC have approximately three times as many domestic human rights prosecutions as other states, “even when statistically controlling for a number of other factors”.³⁵¹ This may lead to positive change because more human rights trials may lead to improved human rights protections over time³⁵². This applies to the Mexican situation as well. Although the ICC would not be directly combatting impunity it will provide the impetus for states to do it themselves.

It is also posited that the preliminary investigations by the ICC create a “willingness game” between ruling and reformer alliances³⁵³. Those in power attempt to demonstrate their willingness to comply with human rights norms, while the opposition try and expose their hypocrisy leading to a move towards greater domestic accountability and change³⁵⁴.

Furthermore, preliminary examinations may motivate states, including Mexico, to implement ICC’s crimes in domestic legislation. As many states hold sovereignty above all else, it may be easier for them to adopt domestic legislation that mirrors the Rome Statute rather than succumb to the ICC’s jurisdiction based on a finding of “unable” to prosecute for lack of substantive legislation. Mexico criminalizing offenses listed in Article 5 of the Rome Statute would help strengthen the international criminal justice system.

³⁵⁰Geoffrey Dance, ‘Selections from “Unintended Positive Complementarity: Why ICC Investigations Increase Domestic Human Rights Prosecutions”’ *Post Conflict Justice* (10 December 2014) <<http://postconflictjustice.com/selections-from-unintended-positive-complementarity-why-icc-investigations-increase-domestic-human-rights-prosecutions/>> accessed 23 May 2015

³⁵¹ *ibid*

³⁵² *ibid*

³⁵³ *ibid*

³⁵⁴ *ibid*

Changes to the accountability mechanisms in Mexico through the impetus of a preliminary examination by the ICC will most likely include not only reform of the judiciary and legal instruments but also military and police.

In conclusion, the ICC should investigate the Mexican case not only to bring justice to those responsible for the atrocities committed from 2006-2012 but also to clarify its own jurisdiction and incite change in states that have not incorporated the Rome Statute into their domestic law. The ICC's involvement solely in investigating the case would signal that another player on the international scene is concerned with the repercussion of organized crime and would shine a spotlight on a problem that concerns the entire world. The Cartel wreaks havoc in Mexico but the effects of the drug war are felt in neighbouring countries. Addressing the issues in Mexico will benefit the adjacent countries and the international community generally.

ABSTRACT

The International Criminal Court (“ICC or the Court”), at the time of deliberation for its creation was poised to be the solution to the problem of transnational drug trafficking and related crimes. After much discussion, however member states decided to limit the ICC’s jurisdiction to only four crimes. The Rome Statute is limited to genocide (art 5), crimes against humanity (art 6), war crimes (art 7) and aggression (art 9).

Although limited to the four crimes the ICC may play an important role in the fight against drug trafficking groups and related offences. If the ICC investigates drug trafficking, human smuggling, drug related murders, extortion and similar offenses it could prevent perpetrators from taking advantage of legal discrepancies in domestic courts; make law enforcement more efficient; provide legal support to those states that need it; spur domestic legislative change and promote adherence to human rights over time.

As a case study, alleged crimes committed by the Los Zetas Mexican drug cartel and the government security forces are analyzed under the crimes against humanity criteria of the Rome Statute. The analysis illustrates that the ICC has jurisdiction to investigate the crimes committed by the Los Zetas Mexican drug cartel and the government security forces between 2006-2012. It is further shown that the ICC by commencing even a preliminary examination into the Mexican situation may provide the necessary impetus for domestic legislative and political change which will prevent further crimes against humanity stemming from the war on drugs.

Der Internationale Strafgerichtshof und der mexikanische "Krieg gegen Drogen"- eine Frage der Gerichtsbarkeit

ABSTRACT

Zur Zeit seiner Gründung wurde der Internationale Strafgerichtshof ("IStGH") als Lösung für jene Verhandlungen angesehen, die sich mit Problemen transnationalen Drogenschmuggels und verwandter Verbrechen auseinander zu setzen hatten. Nach zahlreichen Beratungsgesprächen wurde von den Mitgliedstaaten jedoch entschieden, den Rahmen der Rechtsprechung des IStGH auf lediglich vier Verbrechen einzuschränken. Das Rom Statut des Internationalen Strafgerichtshofs beschränkt sich auf die strafrechtliche Verfolgung von Völkermord (Art 5), Verbrechen gegen die Menschlichkeit (Art 6), Kriegsverbrechen (Art 7) sowie das Verbrechen der Aggression (Art 9).

Obwohl die Gerichtsbarkeit des Gerichtshofs sich in Übereinstimmung mit diesem Statut nur auf vier Verbrechenstypen erstreckt, könnte der IStGH eine wichtige Rolle im Kampf gegen Drogenhändlergruppen und ähnlichen Straftaten einnehmen. In jenen Fällen, die den Drogenschmuggel, Menschenmenschmuggel, durch Drogen bedingte Tötungen, Erpressung und verwandte Verbrechen betreffen, könnte der IStGH Straftäter daran hindern, aus rechtlichen Diskrepanzen heimischer Gerichte Vorteile zu ziehen, in dem er den Strafvollzug effizienter gestaltet; jenen Staaten eine Rechtsberatung zuteil werden lässt, die eine solche benötigen; indem er die nationale Umsetzung in heimischen Gesetzgebungen anspricht um dabei eine allmähliche Einhaltung der Menschenrechte vorantreiben zu können.

Als Fallbeispiel werden die mutmaßlichen Verbrechen des mexikanischen Los Zetas Drogenkartells und der staatlichen Sicherheitskräfte anhand der Kriterien der Verbrechen gegen die Menschlichkeit des Rom Statuts untersucht. In der Analyse wird dargestellt, in wie fern der IStGH dafür zuständig ist, die vom mexikanischen Los Zetas Drogenkartell und den staatlichen Sicherheitskräften in den Jahren 2006-2012 verübten Straftaten zu untersuchen. Des weiteren wird gezeigt, wie sogar eine Eingangsprüfung der mexikanischen Situation durch den IStGH den nötigen Anstoß für die inländische gesetzgebende Gewalt und einen politischen Kurswechsel bieten kann, um weitere Verbrechen gegen die Menschlichkeit im Krieg gegen Drogen zu vermeiden.

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