

Bleeding Mexico

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Mexico is suffering. Since 2006, Mexicans have endured widespread corruption, torture, and over 50,000 innocent civilian deaths due to the drug wars, while the perpetrators of these aggressions have received impunity. Mexicans have turned their frustration into outrage at the most recent kidnapping and murder of forty-three students from a rural teaching college in Ayotzinapa, Mexico. Even more troubling is Mexico's handling of the legal case against the suspects. While seventy persons have been arrested, one of the most notable suspects in the case—the mayor's wife—merely received a forty-day disciplinary detention. It was not until half a year later, and with pressure from international and domestic groups alike, did Mexico formally charge her for organized crime. This recent story is only one small window into the deeply-engrained corruption and drug-related violence plaguing Mexico, making it one of the greatest humanitarian crises of our time.

This Article argues that the crimes occurring in Mexico qualify as crimes against humanity under countervailing international criminal law. This Article also proposes the creation of a hybrid international tribunal titled the Special Court for Mexico, which would codify collateral crimes of the drug trade as crimes against humanity under its agreement. Employing international and domestic law, as well as international and domestic adjudicators, this Court would prosecute the persons that are most responsible for the crimes against humanity committed in Mexico since 2006.

Part I describes the development of the drug trade in Mexico, detailing the atrocities committed against Mexican citizens because of widespread drug-related violence. Part II explains international criminal law's treatment of crimes against humanity and its codification under the International Criminal Court. Part III argues that the crimes occurring in Mexico qualify as crimes against humanity, fitting within the purview of international criminal law. Part IV then proposes the creation of a new hybrid tribunal called the Special Court for Mexico to adjudicate the perpetrators of the international crimes. Finally, Part V argues that Special Court is the best solution—both legally and practically—to Mexico's drug war and its long-standing tolerance of brutal acts against its civilians.

INTRODUCTION

No member State of the international community is immune from the deleterious socio-economic effects of international drug trafficking.

- H.E. Ambassador Rodney Charles
Permanent Representative Republic of Trinidad
and Tobago to the United Nations¹

Enough was enough. For nineteen-year-olds Leonel Castro and Júlio César, students at the rural Normal University teaching college in Ayotzinapa, Mexico, their one shot at a future beyond the dwindling farming of corn and soybean fields was something worth fighting for.²

¹ Rodney Charles, H.E. Ambassador, Permanent Representative, designate of the Republic of Trinidad and Tobago to the United Nations, General Debate of the Ninth Session of the Assembly of States Parties To the Rome Statute of the International Criminal Court, United Nations Headquarters (Dec. 7, 2010), http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/Statements/ICC-ASP9-GenDeba-TrinidadTobago-ENG.pdf#search=drugs.

² Randal C. Archibold, *43 Missing Students, a Mass Grave and a Suspect: Mexico's Police*, N.Y. TIMES (Oct. 6, 2014), <http://www.nytimes.com/2014/10/07/world/americas>

Leonel, the oldest of seven siblings, had promised his father he would use his salary to help his impoverished family, while Júlio hoped to start his own school and provide better education for future generations with his degree.³

But even this hope was slowly being stolen from them by the Mexican government.⁴ The already-dilapidated and underfunded rural school had just received another round of financial cuts.⁵ Leonel and Júlio joined their classmates on the fateful day of September 26, 2014, to commandeer some buses to take them to a rally in the main city.⁶ Suddenly, panic. Guerrero police shots rang through the buses.⁷ Students scattered to the ground or off the bus. Leonel saw blood around him, confused but flooded in the chaos. Someone grabbed his shirt and threw him into a van.⁸ There next to him was Júlio, but Leonel could hardly recognize his face. The van door shut to darkness.

Leonel and Júlio were two of forty-three victims that day in Guerrero.⁹ Who were the perpetrators? The Iguala pólice, the Iguala Mayor Jose Luis Abarca, and the mayor's wife, Maria de los Angeles Pineda.¹⁰ Authorities reported that the first lady had heard about the planned demonstration, and she did not want it to interfere with a political event she was taking part in elsewhere in the city.¹¹ Mayor Jose Lois Abarca purportedly commanded then-Iguala police Chief Felipe Flores Velasquez to ensure there was no interruption.¹² Six murdered students and forty-three kidnapped students later, that

/43-missing-students-a-mass-grave-and-a-suspect-mexicos-police-.html?mtrref=topics.nytimes.com&gwh=3A1F250BFC423EB744B92296A55A1368&gwt=pay&assetType=nyt_now.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Rafael Romo & Greg Botelho, *Mexican Mayor, Wife Arrested in Case of Missing Students*, CNN (Nov. 6, 2014, 1:48 AM), www.cnn.com/2014/11/04/world/americas/mexico-missing-students/.

⁸ Archibald, *supra* note 2 (“I saw police trucks go up and down the hill to up there, where the bodies are found,” said one man in the neighborhood near the site who declined to give his name out of fear. “Then came the news they found the grave and it may be the students. But you would be a fool around here to accuse the police and expect to live.”).

⁹ Rubén Martínez, *Mexico Reels, and the U.S. Looks Away*, L.A. TIMES, (Nov. 15, 2014, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-martinez-mexico-students-massacre-20141116-story.html>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*; see also Romo & Botelho, *supra* note 7.

request was satisfied.¹³ The kidnapped students were handed off to a local gang, the Guerreros Unidos, and have not been heard from since.¹⁴

The grief felt by these victims' families is intensified by the fact that the children remain lost. A mass grave was found near the site of the shootings and kidnappings, but DNA evidence revealed that those bodies were not the bodies of the students and instead were victims from yet another brutal crime.¹⁵ It is one of nearly a dozen mass graves found in the state of Guerrero during the search for the students,¹⁶ though no grave has yet been traced to these forty-three.

Even more troubling is Mexico's handling of the legal case against the suspects. While seventy persons have been arrested, one of the most notable and publicly accused suspects in the case—the mayor's wife—was merely given a forty-day disciplinary detention despite numerous testimonies against her.¹⁷ Not until half a year later and pressure from international and domestic groups alike did Mexico formally charge her for organized crime.¹⁸ Moreover, the Attorney General Jesus Murillo Karam was criticized heavily for his mishandling of the case.¹⁹ He apparently spread the case across judges and courts all over the country, which complicated the legal process, slowed investigations, and resulted in lax charges for high-ranking suspects that do not reflect

¹³ *Id.*

¹⁴ *Id.*; see also Francisco Goldman, *Mexico's Missing Forty-Three: One Year, Many Lies, and a Theory That Might Make Sense*, THE NEW YORKER (Sept. 30, 2015), <http://www.newyorker.com/news/news-desk/mexicos-missing-forty-three-one-year-many-lies-and-a-theory-that-might-make-sense>. Since the students' disappearance, much controversy has surrounded the fate of the students and the investigation by the Mexican government. Though the Mexican government had announced the students to be dead by incineration, those reports are likely false. *Id.* Reports from the highly acclaimed investigation group, the Interdisciplinary Group of Independent Experts (GIEI), appointed by the Inter-American Court of Human Rights to investigate the disappearance of the forty-three students, detail six months of intensive investigation which completely counter—and even scientifically disprove—the original findings by the Mexican government and its prosecutors. *Id.*

¹⁵ Randal C. Archibold, *Lost Students Not Among Bodies Found in Mexico, Officials Say*, N.Y. TIMES (Oct. 14, 2014), <http://www.nytimes.com/2014/10/15/world/americas/mexico-bodies-do-not-match-lost-students.html>.

¹⁶ Carrie Cahn, *In Mexico, Protests Over Missing 43 Students Continue*, NPR (Nov. 14, 2014, 4:23 PM ET), <http://www.npr.org/2014/11/14/364138347/in-mexico-protests-over-missing-43-students-continue>.

¹⁷ *Id.*

¹⁸ Helen Regan, *Mexico Charges Former Mayor's Wife with Organized Crime*, TIME, (Jan. 6, 2015), <http://time.com/3655296/mexico-igualda-mayor-wife-maria-pineda-crime/>.

¹⁹ Cahn, *supra* note 16.

the gravity of the violence.²⁰ Additionally, his comment “I’m tired” made at the end of a press conference to stop reporter questioning has spread infamously across the country, fueling deeper anger from Mexicans and spurring response riots with signs reading “I’m tired of fear.”²¹

This story, the most recent in a pattern of similar stories, provides a small window into the deeply engrained corruption and violence plaguing Mexico because of its drug wars, one of the greatest humanitarian crises of our time. The beginning of such marked violence by Mexican officials, police, and military began with former Mexican President Felipe Calderón’s 2006 decision to utilize Mexican military forces against drug trafficking.²² Since that time, these same authorities have conspired with drug gangs to commit murder, kidnapping, torture, extortion, rape, and other heinous crimes against Mexican citizens.²³ Reports detail the Mexican police’s torture of criminal suspects through hanging them by their toes, fingers, or necks; other reports indicate the dismembering of Mexican civilians at a checkpoint by army personnel.²⁴ Although Mexico has criminal codes prohibiting such behavior, the enforcement of the laws against police and military forces themselves has gone grossly unchecked for nearly a decade.²⁵ Further, Mexico has not adopted a domestic codification of crimes against humanity.²⁶

The unprecedented nature of the crisis spurred lawyers and human rights activists to file a complaint with the International Criminal Court (ICC) in 2011 against former President Felipe Calderón.²⁷ The

²⁰ *Id.*

²¹ Associated Press, ‘I’ve had enough,’ says Mexican Attorney General in Missing Students Gaffe, THE GUARDIAN (Nov. 8, 2014, 10:33 PM), <http://www.theguardian.com/world/2014/nov/09/protests-flare-in-mexico-after-attorney-generals-enough-im-tired-remarks>.

²² *Id.*; see also AMNESTY INTERNATIONAL, OUT OF CONTROL, TORTURE AND OTHER ILL-TREATMENT IN MEXICO 11 (2014).

²³ U.S. DEP’T OF STATE, *Country Reports on Human Rights Practices for 2013*, (2013), <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2013&dld=220457#wrapper>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Spencer Thomas, *A Complementarity Conundrum: International Criminal Enforcement in the Mexican Drug War*, 45 VAND. J. TRANSNAT’L L. 599, 603 (2012).

²⁷ Sara Webb & Manuel Rueda, *Mexican Group Asks ICC to Probe President, Officials*, REUTERS (Nov. 25, 2011, 10:05 PM), <http://www.reuters.com/article/2011/11/26/us-mexico-icc-idUSTRE7AO0TA20111126#Mptxe3QdzZtWu1Z4.97>.

complaint was backed by a petition with over 23,000 signatures.²⁸ The ICC, however, dismissed the complaint, explaining that they cannot open an investigation or prosecution without the presence of war crimes or crimes against humanity.²⁹ The violence afflicting Mexico at the hands of government officials has yet to subside since that complaint, even after a new president, President Enrique Peña Nieto, took office in 2012.³⁰

Contrary to the view of the ICC, this Article argues that the crimes occurring in Mexico qualify as crimes against humanity under countervailing international criminal law. This Article also proposes the creation of a hybrid international tribunal titled the Special Court for Mexico, which would codify collateral crimes of the drug trade as crimes against humanity under its charter.³¹ Employing international and domestic law, as well as international and domestic adjudicators, this Court would prosecute the persons that are most responsible for the crimes against humanity committed in Mexico since 2006. Part I describes the development of the Mexican drug trade, the atrocities committed against Mexican citizens because of widespread drug-related violence, and the condition of Mexico's policies and tensions today. Part II explains international criminal law's treatment of crimes against humanity and its treatment by different international and hybrid tribunals through history. Part III argues that the crimes occurring in Mexico are in fact crimes against humanity, fitting within the purview of international criminal law, specifically the Rome Statute. Part IV then proposes the creation of a new hybrid tribunal called the Special Court for Mexico to adjudicate the perpetrators of the international crimes. Finally, Part V illustrates that Special Court is the best solution to Mexico's drug war and its long-standing tolerance of brutal acts against its civilians.

²⁸ *Id.*

²⁹ Kimberly Curtis, *Will the International Criminal Court take on the Mexican Drug War*, UN DISPATCH (Sept. 18, 2014), <http://www.undispatch.com/will-international-criminal-court-take-mexican-drug-war/>.

³⁰ Manuel Suárez-Mier, *Mexico's Situation After Peña Nieto's First Year at the Helm*, AULA BLOG CTR. FOR LATIN AMERICAN & LATINO STUDIES, AMERICAN UNIV., <http://aulablog.net/2014/02/03/mexicos-situation-after-pena-nietos-first-year-at-the-helm/> (last visited Dec. 7, 2014).

³¹ Rome Statute of the International Criminal Court art. 7, July 1, 2002, http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf [hereinafter Rome Statute].

I
THE PROBLEM OF THE MEXICAN DRUG WAR

But you would be a fool around here to accuse the police and expect to live.

- Mexican citizen, remaining anonymous³²

A. History of the Drug Trade

Drug-related violence has plagued Mexico since the 1970s.³³ It was not until the 1990s, though, that the rampant, widespread sale of drugs and accompanying violence began to overwhelm the country, and it has only been in the last decade that Mexico has received much attention for the problem.³⁴ The fall of Columbia's most powerful drug lords in the 1990s sparked the rise of Mexico's robust drug trade.³⁵ Columbia's successful "war on drugs" opened the market for Mexican drug leaders to begin their own operations in place of Columbia's previous monopoly.³⁶ With drugs still coming from Colombia, Colombian growers began a "payment by product" deal where they paid traffickers in cocaine instead of money.³⁷ The beginning of Mexican drug trafficking's tragic effects began here; for the first time, Mexican drug traffickers were able to move into direct sale of drugs to the United States.³⁸

With drug sales now in the hands of Mexican gangs, competition among the gangs for drugs and drug routes sparked a parallel rise in violence as the gangs fought to gain territory.³⁹ The stark increase in heinous crimes by these gangs to civilians and Mexican police through the 1990s and 2000s, such as gruesome beheadings and the discovery of mass graves, quickly became the focus of Mexico's new president Felipe Calderón who took office in late 2006.⁴⁰

Calderón's approach to combating drug lords seemed to match the aggression of the drug gangs themselves. Terming the initiative

³² Archibold *supra* note 2.

³³ See Tomas Kellner & Francesco Pipitone, *Inside Mexico's Drug War*, 29 WORLD POLICY INSTITUTE (2010).

³⁴ *See id.*

³⁵ *Id.* at 30.

³⁶ *See id.*

³⁷ *Id.*

³⁸ *Id.* As of 2010, it was estimated that ninety percent of drugs were routed through Mexico, giving Mexican drug lords and traffickers an enormous opportunity. *Id.*

³⁹ *See id.*

⁴⁰ *Id.* at 30–31.

“Operation Michoacán,” Calderón sent in 6,500 federal military troops into the state of Michoacán to combat drug gangs within his first month of office.⁴¹ Now, even under Pena Nieto’s new administration, it is estimated that there are over 50,000 federal troops deployed across Mexico in the “war on drugs,” with no end in sight to the violence.⁴²

B. Results of the “Drug War”

Since Calderón’s “Operation Michoacán” in 2006, the number of violent crimes and kidnappings has grown exponentially. Between 2006 and 2012, more than 40,000 civilians have died as a result of Felipe Calderón’s initiative using the Mexican military to combat the drug trade.⁴³ This disturbingly high number is actually small compared to the 120,000 total number of organized crime related deaths under Calderón’s administration.⁴⁴ The actions of Mexican officials and drug lords have resulted in marked crimes against the citizens of Mexico, discussed below.

1. Torture

Torture has been of particular concern to the Mexican civilians. Mexico’s National Human Rights Commission (CNDH) reported receiving 1,084 complaints of cruel or degrading treatment by Mexican police and military, and twenty-five cases of torture between January and August, 2013, alone.⁴⁵ The CNDH only responded to twelve of those complaints.⁴⁶ In addition to Mexican officials’ torture of victims, the CNDH received over 7,000 complaints of torture in a span of the last three years from persons connected with the drug wars.⁴⁷ The methods of torture used by police and military forces against suspects

⁴¹ *Id.*; Will Grant, *Mexico Election: Drugs War in Spotlight in Michoacan* (May 24, 2012), <http://www.bbc.com/news/world-latin-america-18171636>.

⁴² Tim Padgett, *Mexico’s Drug-Corruption Arrests: Why Soldiers Make Bad Narco Agents*, TIME (May 31, 2012), <http://world.time.com/2012/05/31/mexicos-drug-corruption-arrests-why-soldiers-make-bad-narco-agents/>; ROBERT S. LEIKEN, MEXICO’S DRUG WAR 4 (2012).

⁴³ *Mexico Activists Seek ICC Investigation of Drugs War*, BBC, NEWS LATIN AMERICA & CARIBBEAN (Nov. 25, 2011), <http://www.bbc.com/news/world-latin-america-15899687>.

⁴⁴ CORY MOLZAHN, OCTAVIO RODRÍGUEZ & DAVID A. SHIRK, *Drug Violence in Mexico*, U. SAN DIEGO (2013), <http://justiceinmexico.files.wordpress.com/2013/02/130206-dvm-2013-final.pdf>.

⁴⁵ U.S. DEP’T OF STATE, *supra* note 23.

⁴⁶ *Id.*

⁴⁷ AMNESTY INTERNATIONAL, *supra* note 22.

are gruesome; methods described include electric shocks, rape, threat of death, and hanging of individuals by their feet, fingers, and neck.⁴⁸

2. *Forced Disappearances*

Forced disappearances (meaning, the abduction or deprivation of liberty by agents of the State or those working with or for the State),⁴⁹ have been an equally tragic problem for Mexico. Between 2006 and 2012, the Mexican Secretariat of Government reported that 26,121 persons disappeared, though this figure is likely low due to the inherent difficulty in collecting data.⁵⁰ Individual cases are innumerable but provide context for the problem. In 2011 for example, six persons were kidnapped by the Secretariat of the Navy.⁵¹ Naval officers took the people from their homes and workplaces using Naval vehicles and kept them in an unknown location. They were pronounced forcibly disappeared by the end of the year.⁵² Mexican prosecutors have filed no charges in the case.⁵³

3. *Murder*

As mentioned, the death toll of civilians since Calderón's surge of federal military forces into drug cartel territory is over 50,000.⁵⁴ One of the most notorious murder cases, which paralleled the 2006 start of "Operation Michoacán" and occurred in Michoacán itself,⁵⁵ involved the drug cartel La Familia Michoacán hurling five decapitated heads onto a dance floor in a popular downtown night club.⁵⁶ Another time, in 2011, engineering student Jethro Sanchez was kidnapped and beaten by local police of Cuernavaca.⁵⁷ Later, the police turned Sanchez over

⁴⁸ *Id.*

⁴⁹ International Convention for the Protection of All Persons from Enforced Disappearance, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx> (last visited Oct. 19, 2015).

⁵⁰ U.S. DEP'T OF STATE, *supra* note 23.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See INT'L CRIMINAL COURT, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2013 (2013); MOLZAHN ET AL., *supra* note 44.

⁵⁵ Catherine E. Shoichet, *A Grisly Crime Surges into Spotlight as Mexico Shifts Drug War Strategy*, CNN (Mar. 28, 2013, 11:50 PM), <http://www.cnn.com/2013/03/27/world/americas/mexico-violence>.

⁵⁶ *Id.*

⁵⁷ U.S. DEP'T OF STATE, *supra* note 23.

to the Mexican army claiming he was part of a drug gang.⁵⁸ The Army tortured him until he died.⁵⁹

4. *Impunity*

One reported reason Mexican police and military members have not been charged with these crimes is that police and military could only be tried by Mexican military courts.⁶⁰ Such a structure lacks neutrality and accountability since the military was in charge of bringing cases against its own members.⁶¹ For example, out of the 3,021 formal human rights complaints that Mexican Human Rights Commission received against the military in 2008 and 2009, only five were investigated by the military prosecutor.⁶² It was not until April of 2014 that the Mexico Supreme Court finally ruled that any crime against a civilian perpetrated by a military officer must be heard in a civilian court.⁶³ Though a promising change, impunity is still the norm in the civil courts. Perpetrators commonly escape trial, penalties, and routine fees by bribing administrative officials and security forces.⁶⁴ Shockingly, in 2013, Mexico's National Human Rights Commission found that Mexico's judicial impunity rate for prosecuting violent crimes was 98%—meaning only 2% of violent crime cases were investigated or prosecuted.⁶⁵

C. *Mexico Today*

Even with Felipe Calderón out of office and a fresh administration under Mexican President Peña Nieto in place, violence persists.⁶⁶ As recently as September 2014, the Mexican army's unprovoked killing of twenty-two people in a remote Mexican village triggered citizens' anger towards the Mexican government's lackluster efforts to

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ KRISTIN BRICKER, MILITARY JUSTICE AND IMPUNITY IN MEXICO'S DRUG WAR, 7 n.14 (2011), http://www.cigionline.org/sites/default/files/ssr_issue_no3_1.pdf.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Mexico Adopts Legislation Limiting Military Courts' Jurisdiction over Soldiers' Human Rights Abuses*, INT'L JUSTICE RES. CTR. (May 19, 2014), <http://www.ijrcenter.org/2014/05/19/mexico-adopts-legislation-limiting-military-courts-jurisdiction-over-soldiers-human-rights-abuses>.

⁶⁴ U.S. DEP'T OF STATE, *supra* note 23.

⁶⁵ *Id.*

⁶⁶ Suárez-Mier, *supra* note 30.

overcome corruption and violence committed by Mexican officials.⁶⁷ In fact, an army officer and seven soldiers are in custody of the Mexican Defense Department after a reversal of the officials' original story.⁶⁸ The Army officers initially claimed that the deaths were a result of a shootout between police and locals in a warehouse.⁶⁹ Reporters visiting the area, however, exposed that the victims were actually shot standing flat against a wall; the death certificate of fifteen-year-old Erika Gómez González, for example, cites a fatal gunshot to the thorax as cause of death.⁷⁰ In response to this violence, the Mexican Human Rights Commission conducted and published a report investigating the case's progress which noted:

The results of the Commission's independent investigations are shocking: at least twelve people were arbitrarily killed by the military, including three adolescents; at least five of the eight soldiers present were involved in the massacre; some of the bodies showed signs of beatings before being shot; the crime scene was altered to support the army's version of the events; and, most shockingly, state prosecutors coerced the three survivors of the massacre to corroborate the army's story through beatings and threats of rape, and they didn't thoroughly document the crime scene in its investigation.⁷¹

The killing and kidnapping of the youth in rural Iguala, Mexico, has been the tipping point for Mexican citizens. Furious about the State's handling of the case, Mexicans protested and rioted for weeks following the incidents, holding signs saying, "It was the State."⁷² They burned buildings, blocked highways, and closed airports.⁷³ As

⁶⁷ Damien Cave, *Mexico Holds 8 in Army in Inquiry of 22 Deaths*, N.Y. TIMES (Sept. 26, 2014), <http://www.nytimes.com/2014/09/27/world/americas/mexico-holds-8-in-army-inquiry-of-22-deaths.html?module=Search&mabReward=relbias%3Ar>.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* The inquiry into these shootings in San Pedro Limón on June 30, 2014, came only after members of the Associated Press went to the small town to investigate. The Human Rights Watch and Mexico's National Human Rights Commission are also now investigating after the Mexican officials' story was obviously "falling apart" upon inquiry by local reporters. *Id.*

⁷¹ Marina Do Nascimento, *Peril and Impunity in Mexico: Justice in Tlatlaya*, BROWN POL. REV. (Oct. 27, 2014), <http://www.brownpoliticalreview.org/2014/10/peril-and-impunity-in-mexico-justice-in-tlatlaya/>.

⁷² Rubén Martínez, *supra* note 9.

⁷³ Joshua Partlow, *Outrage in Mexico over Missing Students Broadens into Fury at Corruption, Inequality*, WASH. POST (Nov. 17, 2014), http://www.washingtonpost.com/world/protests-over-missing-students-planted-in-guerrero-spread-across-mexico/2014/11/17/0ab932b8-69fc-11e4-bafd-6598192a448d_story.html.

summarized by Felipe de la Cruz, spokesperson for the parents of the missing Iguala students, “the flame of insurgency has been lit.”⁷⁴

D. Citizens’ Response

Mexican citizens’ outcry in opposition to the violence and corruption is not new. In 2011, a group of Mexican lawyers and human rights activists led by Netzai Sandoval filed a formal complaint to the ICC.⁷⁵ Backed by over 23,000 signatures, the complaint asked for a formal investigation into the numerous kidnappings, murders, rape, and extortions that have occurred in Mexico since Felipe Calderón’s institution of Mexican military to combat the drug war in 2006.⁷⁶ Specifically, the complaint asked the ICC to determine if crimes against humanity had in fact been committed in Mexico as defined by the ICC’s Rome Statute, and if so, who was responsible.⁷⁷ Noting that the violence in Mexico has been “bigger than the violence in Afghanistan . . . and Columbia,” the complaint pleads the ICC to address Mexico’s humanitarian crisis.⁷⁸

Unfortunately, as of 2015, the ICC has yet to respond to the human rights activists’ complaint.⁷⁹ Prior to the submission of the complaint in November 2011, then-prosecutor Luis Moreno-Ocampo indicated that the ICC does not anticipate taking up an investigation of Mexico’s intensive violence, stating that the ICC does not judge “political decisions” or “political responsibility.”⁸⁰

As the people of Mexico are still suffering violent attacks, often at the hands of corrupt police and military, several international human

⁷⁴ *Id.*

⁷⁵ Webb & Rueda, *supra* note 27.

⁷⁶ *Id.*

⁷⁷ *Id.* The complaint specifically charged former Mexican President Felipe Calderon, Sinaloa cartel boss Joaquin “Shorty” Guzman, Public Security Minister Genaro Garcia Luna, and several military commanders. *Id.*

⁷⁸ BBC, *supra* note 43.

⁷⁹ See INT’L CRIM. CT., *Office of the Prosecutor*, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/Pages/office%20of%20the%20prosecutor.aspx (last visited Oct. 20, 2014) (list of investigations that the ICC is pursuing). *ICC Won’t Take Up Case of Mexico’s Drug War*, LATIN AM. HERALD TRIB., <http://www.laht.com/article/asp?ArticleID=439519&CategoryId=14091> (last visited Oct. 20, 2015).

⁸⁰ John Ackerman, *The G20’s Choice of Calderón is a Grave Error*, THE GUARDIAN (Nov. 10, 2011), <http://www.theguardian.com/commentisfree/cifamerica/2011/nov/10/g20-mexico-felipe-calderon-grave-error>.

rights groups filed a second complaint to the ICC in September 2014.⁸¹ The complaint implored the ICC to investigate the atrocities occurring in Mexico, specifically in Baja California, and ultimately find them to be crimes against humanity.⁸² Again, the ICC declined to act. With no support from the ICC, the citizens of Mexico are buckling under extreme conditions and suffering, and a president that has no intentions of changing the landscape of violence.⁸³

II

A CALL FOR CRIMES AGAINST HUMANITY

To address long-lasting and dire circumstances occurring in Mexico, the crimes plaguing Mexico should fall under international criminal law as crimes against humanity. “Recognizing that there is an established link between illicit trafficking in narcotic drugs and other organized criminal activities which endanger the constitutional order of States and violate basic human rights,”⁸⁴ the crimes of Mexico are the exact combination of criminal activity and State involvement that international criminal law was created to address.⁸⁵

To understand why the drug war crimes constitute “crimes against humanity,” it is critical to understand the formation of crimes against humanity and why they have been criminalized on the world stage. As seen below, each international criminal tribunal that has considered the issue has used previous world crises, past legal analysis, and the context of the crimes at issue to form its own definition of “crimes against humanity.” Given the history, development, and precedent of these tribunals, it is appropriate for collateral crimes resulting from drug trafficking and drug trade to be classified as crimes against humanity under international criminal law analysis.

⁸¹ *Human Rights Groups Call on the ICC to Proceed with the Preliminary Examination into the Situation in Mexico*, INT’L FED’N FOR HUMAN RIGHTS (Sept. 12, 2014), <http://www.fidh.org/en/americas/mexico/16028-human-rights-groups-call-on-the-icc-to-proceed-with-the-preliminary>.

⁸² *Id.*

⁸³ See Shoichet, *supra* note 55; see also Suárez-Mier, *supra* note 30 (statement of blogger Suárez-Mier) (“On the positive side, his structural reforms encompassing labor, education, taxation, finance, telecommunications, anti-monopoly and energy—the crown jewel—are unexpected and sweeping successes . . . on the dark side, however, Peña Nieto’s performance has been less than stellar regarding the pacification of the country from the violent onslaught over the last decade at the hands of bands of narco-traffickers.”).

⁸⁴ G.A. Res. 44/39, ¶ 5 (Dec. 4, 1989).

⁸⁵ See generally Rome Statute, *supra* note 31, at 1.

A. Early Beginnings

In 1907, the Second Hague Convention members introduced the concept of crimes against humanity in the legal context.⁸⁶ In their “Convention Respecting the Laws and Customs of War on Land,” the authors declared that “the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the *laws of humanity*, and the *dictates of the public conscience*”⁸⁷ (emphasis added). This was the first time the concept of transcendental rights to all humans—no matter the race, ethnicity, religion, gender, or political status—was introduced on an international scale and under legal consequence.⁸⁸

After World War I, the discussion of “crimes against humanity” met its true opponent: the United States.⁸⁹ The post-war international commission proposed stating its mission as adjudicating the offences of World War I and those “who have been guilty of offences against the laws and customs of war or the *laws of humanity*”⁹⁰ (emphasis added). The United States, however, was wholly opposed to such language, insisting that “laws of humanity” were relative to each individual person and had no place to be tried in an international criminal court.⁹¹ U.S. opinion overshadowed the other members’, and use of the phrase “laws of humanity” was ultimately excluded from the Versailles Treaty.⁹²

Though World War I shook the world’s foundation, it was only after World War II that the Allied Powers found it undeniably crucial to prevent the Nazi’s crimes from ever occurring to another nation or ethnic group.⁹³ Unique to this World War was that Nazi criminals had not only committed egregious crimes against other nations such as

⁸⁶ BETH VAN SCHAACK & RONALD C. SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT* 390 (2d ed. 2010).

⁸⁷ Convention Respecting the Laws and Customs of War on Land, pmbl. Oct. 18, 1907, 36 Stat. 2277.

⁸⁸ VAN SCHAACK & SLYE, *supra* note 86, at 390–92.

⁸⁹ *Id.* at 291.

⁹⁰ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference (Mar. 29, 1919), *reprinted in* 14 AM. J. INT’L L. 95, 177 (1920).

⁹¹ *Id.*

⁹² VAN SCHAACK & SLYE, *supra* note 86, at 391.

⁹³ EDWARD KISSI, *The Holocaust as a Guidepost for Genocide Detection and Prevention in Africa*, THE HOLOCAUST AND THE U.N. OUTREACH PROGRAM DISCUSSION PAPER SERIES 45, 45–50, <http://www.un.org/en/holocaustremembrance/docs/paper5.shtml>.

Poland (which were more easily defined under war crimes), they had also committed heinous acts against their own German nationals.⁹⁴ The Charter authors wanted to ensure that those crimes, such as mass execution of German Communists and forced concentration camps for German Jews, would be punishable on an *international* criminal stage and not just in a German domestic court.⁹⁵

Thus, for the first time in history, the Nuremberg Charter used the term “crimes against humanity” in codified international criminal law.⁹⁶ The Charter defined “crimes against humanity” by referencing a hodgepodge of criminal acts:

[M]urder, extermination, enslavement, deportation, and other inhumane acts committed against an civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the tribunal, whether or not in violation of the domestic law of the country where perpetrated.⁹⁷

By including a list of inexcusable crimes (separate from the “crimes of war), the Nuremberg Charter broke new ground.

This was a victory for international human rights, but the Nuremberg Charter was not quite ready to distinguish “crimes against humanity” as its own legal crime. Under the Charter, an act was only a “crime[] against humanity” if committed “in execution of or in connection with any crime within the jurisdiction of the Tribunal.”⁹⁸ Labeled the “war nexus,” this meant that the act had to be committed in tandem with a crime of war, aggression, or other crime labeled by the Charter that occurred *during* the war.⁹⁹ This distinction took the bite out of the “crimes against humanity” offense and, as a result of that distinction, all the crimes committed by the Nazis before the War began in 1939 could not be prosecuted.¹⁰⁰

The crimes committed by the Nazis embody the most deplorable treatment of the human race, and, and such, they gave a framework to what the world considers impermissible no matter the circumstance of the perpetrator or the victim. The crimes listed by the Charter as

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ VAN SCHAACK & SLYE, *supra* note 86, at 391.

⁹⁷ *Id.*

⁹⁸ U.N. Secretary-General, *The Charter and Judgment of the Nürnberg Tribunal*, U.N. Doc. A/CN.4/5 (1949).

⁹⁹ *See* VAN SCHAACK & SLYE, *supra* note 86, at 397.

¹⁰⁰ VAN SCHAACK & SLYE, *supra* note 86, at 392.

“crimes against humanity” all have a common theme of being senseless, unfounded, and destructive of the most basic human dignity of a person. In fact, the Charter’s use of the term “inhumane acts” is significant; it communicates that the crimes listed are not tolerated in the conscience of the human race.¹⁰¹ The Charter’s requirement that the acts be committed against a civilian population is also noteworthy; it makes a stark and crucial delineation between crimes against humanity and war crimes, with crimes against humanity protecting a whole host of persons that are unarmed, vulnerable, and not a party in an armed conflict.

B. Crimes Against Humanity in a Modern World

While the early development of international criminal law post-World War II laid the foundation for crimes against humanity, crises from the latter part of the twentieth century have defined a country’s ability to shape international criminal law to their particular circumstances. Crimes against humanity are no exception. Different responses to international criminal crises over time have revealed that a country’s definition of crimes against humanity is a product of circumstance, not an application to a stagnant standard.

One of the first applications of the international criminal laws occurred several decades after World War II, in the mid-1990s, in the war-torn region of the Baltics where the international community and the United Nations once again had opportunity to address the definition of “crimes against humanity.”¹⁰² In response to the ethnic cleansing of Muslims and Croats by the Serbs in Yugoslavia, the United Nations Security Council, created the International Criminal Tribunal of Yugoslavia (ICTY), to adjudicate those responsible for the vicious crimes committed against non-Serbs.¹⁰³ Its “crimes against humanity” statute required an armed conflict to be present, which is a reflection of the ICTY’s reaction to the circumstances of its particular region—the Bosnian War.¹⁰⁴ The statute also required the crimes to be against a civilian population, as did the Nuremberg Charter, but added the crimes of imprisonment, torture, and rape to the list of crimes against humanity from the Nuremberg Charter to fit the crimes that

¹⁰¹ See BLACK’S LAW DICTIONARY (9th ed. 2013) “crimes against humanity” definition.

¹⁰² VAN SCHAACK & SLYE, *supra* note 86, at 401.

¹⁰³ *Id.* at 401–02.

¹⁰⁴ *Id.* at 402.

occurred during the Bosnian War.¹⁰⁵ The statute also kept the catchall phrase of all “other inhumane acts.”¹⁰⁶

Building off the statutes of the tribunals before it, the International Criminal Tribunal of Rwanda (ICTR) was also formed in the mid 1990s to deal with the offences of the Rwandan genocide.¹⁰⁷ It took a slightly different approach to its definition of the crimes against humanity, responding to its own circumstance of intense civil unrest between ethnic parties instead of a formally declared war as in other situations before it. Rwanda stated plainly in its definition that any crime against humanity had to be committed “as part of a widespread or systemic attack” against a civilian population.¹⁰⁸ The ICTR was the first to incorporate such language into the crimes against humanity statute. It also listed the grounds on which the attack could be based, namely “national, political, ethnic, racial, or religious grounds.”¹⁰⁹

While the United Nations international tribunals were prosecuting criminals for their respective international crimes, the United Nations was also working to configure one cohesive code of international criminal law. Finalized in 1998 and implemented in 2002, the Rome Statute established the International Criminal Court and codified the crimes listed under its jurisdiction.¹¹⁰ The Rome Statute was groundbreaking. It not only provided for the first-ever international criminal court, but it also provided an international crimes list that was cognizant of all former charters of international criminal law in the past century.

The Rome Statute lists crimes against humanity as murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution, forced disappearance, apartheid, and any “other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”¹¹¹ It also uses the language of the ICTR requiring the acts to be part of a widespread *or* systematic attack on a civilian population, and it declines

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *The ICTR in Brief*, UNITED NATIONS, INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, <http://www.unictr.org/en/tribunal> (last visited Dec. 1, 2015).

¹⁰⁸ VAN SCHAACK & SLYE, *supra* note 86, at 402.

¹⁰⁹ *Id.*

¹¹⁰ See Rome Statute, *supra* note 31; *Evolution of International Criminal Justice*, ABA-ICC PROJECT, <http://www.aba-icc.org/about-the-icc/evolution-of-international-criminal-justice/> (last visited Oct. 30, 2015).

¹¹¹ Rome Statute, *supra* note 31, at art. 7(1)(a)–(k).

to use the ICTY's and Nuremburg Charter's requirement for an armed conflict to be present along with the crimes against humanity in order to prosecute persons for the offense.¹¹²

Moreover, taking the ICTY's approach, the Rome Statute requires the perpetrators to have knowledge of the greater context of their crime, and that the crime be in furtherance of "a State or organizational policy to commit such attack."¹¹³ While the "knowledge" and "policy" requirements are not well described in the statute, the Rome Statute set the foundation for a cohesive rule of international criminal law for the ICC to adjudicate future international criminal conflicts.

Though progressive, the Rome Statute intentionally declined to provide jurisdiction over illicit transnational drug trade and the potential collateral damages from such trafficking. To account for the atrocities occurring in Mexico, the collateral crimes occurring from the Mexican drug war must be considered crimes against humanity. As many international crises have done before it, the crimes against humanity distinction for Mexico's crimes accommodates the particular conflict in Mexico, while still clearly fitting the existing crimes against humanity legal requirements.

¹¹² *Id.* at art. 7, Nuremburg Charter, ICTR art. 3. In fact, an ICTY appeals decision stated the reasoning well, declaring, "It is by now a settled rule of customary international law that crimes against humanity do not require connection to international armed conflict. Indeed . . . customary international law may not require a connection between crimes against humanity and any conflict at all." International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Dusko Tadic a/k/a "Dule"*: *Decision on the defence motion for interlocutory appeal on jurisdiction*, Decision of 2 October 1995, Case No. IT-94-1-AR72, p. 72, para. 141.

¹¹³ Rome Statute, *supra* note 31, at art. 7.

III COLLATERAL CRIMES FROM DRUG WARS ARE CRIMES AGAINST HUMANITY

The violent crimes committed by drug cartels, as well as those carried out by the Mexican state and military officials, are overwhelming in number and atrocious in nature.¹¹⁴ Recalling the plea from Trinidad and Tobago to form an international criminal court as a solution to the massive violence due to the drug trafficking, it is only appropriate that such crimes would be considered crimes against humanity.

A. The Crimes of Mexico Meet the Elements of Crimes Against Humanity Under the Rome Statute

Under the Rome Statute, the collateral crimes from the drug trade in Mexico are crimes against humanity because they meet the five qualifications required by the Rome Statute, namely: (1) a qualifying crime; (2) committed as part of a widespread or systematic attack; (3) directed against any civilian population; (4) under a state or organizational policy; (5) with knowledge of the attack.¹¹⁵

1. Qualifying Crime

First, the nature of the crimes committed in Mexico explained in Part I of this comment align directly with the Rome Statute's list of crimes that constitute crimes against humanity. Particularly, the crimes of murder,¹¹⁶ torture,¹¹⁷ rape and sexual violence,¹¹⁸ and forced disappearance of persons have plagued Mexico most deeply in the last three decades.¹¹⁹

2. Attacks Systematic and Widespread

Second, the crimes committed by drug gangs are both systematic *and* widespread, though the Rome Statute only requires the crimes to be one of these categories to fall under its jurisdiction.¹²⁰ The ICC has explained that "widespread" refers to "the large-scale nature of the

¹¹⁴ See *supra* Part I.

¹¹⁵ Rome Statute, *supra* note 31, at art. 7.

¹¹⁶ *Id.* at art. 7(1)(a).

¹¹⁷ *Id.* at art. 7(1)(f).

¹¹⁸ *Id.* at art. 7(1)(h).

¹¹⁹ *Id.* at art. 7(1)(i).

¹²⁰ See *id.* at art. 1.

attack and the number of targeted persons,”¹²¹ and systematic refers to the “organised (sic) nature of the acts of violence and the improbability of their random occurrence.”¹²²

The crimes committed in Mexico are undoubtedly widespread, reflecting a large scale destruction of lives and a large number of victims. Regarding the number of victims, more than 50,000 civilian murders committed by Mexican drug cartels and conspiring Mexican officials is comparable to Sierra Leone’s estimated 50,000 civilian deaths that sparked the creation of its hybrid tribunal trying crimes against humanity.¹²³ Also, since Felipe Calderón’s new policies in 2006, over 29,700 persons were victims to forced disappearances.¹²⁴ Additionally, in only a span of three years, Mexico’s Human Rights Commission received 7,000 complaints of torture, with numerous more undoubtedly unreported.¹²⁵

Moreover, the large-scale nature of these crimes is impressive. These crimes are not limited to one small region or even one single state of Mexico.¹²⁶ The worst of the crimes can be seen in the five states of Baja California, Guerrero, Chihuahua, Michoacán, Tamaulipas, Nuevo León, though essentially every area of Mexico’s land is controlled by one of seven major drug cartels.¹²⁷ More importantly, the drug lords have only risen to such power with help from local police and Mexican military that has been present in the states since 2006.¹²⁸ With help from these authorities, drug gangs are able to infiltrate entire communities, extort businesses and families, and openly recruit new

¹²¹ The Office of the Prosecutor, ICC-02/11, Situation in the Republic of Côte D’Ivoire, ¶ 53 (Oct. 3, 2011).

¹²² *Id.* ¶ 54.

¹²³ BBC, *supra* note 43; Daniel McLaughlin, *International Criminal Tribunals: A Visual Overview*, LEITNER CENTER FOR INTERNATIONAL LAW AND JUSTICE, p. 36, <http://www.leitnercenter.org/files/News/International%20Criminal%20Tribunals.pdf>.

¹²⁴ Kyra Gurney, *Report Highlights Rampant Impunity in Mexico Forced Disappearances*, INSIGHT CRIME (Sept. 3, 2014), <http://www.insightcrime.org/news-briefs/report-highlights-rampant-impunity-mexico-forced-disappearances>.

¹²⁵ Rafael Castillo, *Torture in Mexico is ‘Out of Control’ According to Amnesty International*, VICE NEWS (Sept. 9, 2014), <https://news.vice.com/article/torture-in-mexico-is-out-of-control-according-to-amnesty-international>.

¹²⁶ See generally June S. Beittel, *Mexico’s Drug Trafficking Organizations: Source and Scope of the Violence*, CONG. RES. SERV. (Apr. 15, 2013), <http://fpc.state.gov/documents/organization/208173.pdf>.

¹²⁷ *Id.* at 14.

¹²⁸ See *Mexican President Pena Nieto to Overhaul Police*, BBC NEWS (Nov. 27, 2014), <http://www.bbc.com/news/world-latin-america-30239433>.

members to the gangs.¹²⁹ With the cartels competing for land and drug routes from each other, and fighting to control the extremely few places not controlled by another gang, there is no state in Mexico immune from the violence from the drug cartels.¹³⁰ As such, the collateral crimes connected to the drug trade are widespread in number and in breadth under the Rome Statute's definition.

Additionally, crimes committed by cartel members and their Mexican officials and military in cohort are systematic, meaning they comply with the "organised (sic) nature of the acts of violence and the improbability of their random occurrence." From the cartel's beheading of seven farmworkers whose bodies were displayed in the city Uruapan square,¹³¹ to the six murdered and forty-three kidnapped protesting students,¹³² the drug cartel's crimes are far-from-random actions. They are calculated to spark panic and fear and to force submission and control.¹³³ These and other repeated reports of torture by the conspiring cartels, local police, and federal military show an organized manner of violence that has occurred for decades across Mexico.¹³⁴

3. *Against a Civilian Population*

Third, the crimes in Mexico are committed against a civilian population. International criminal law defines an attack against a "civilian population" as an attack against a group that has at least one common characteristic as opposed to a "random assembly"¹³⁵ of persons.¹³⁶ There are many characteristics that could qualify a group as a civilian population. The students attacked by cartel-linked local police in Iguala, for example, have the common characteristic of being students in protest against a state policy.¹³⁷ Similarly, a common characteristic in sexual violence crimes such as those against indigenous women in Mexico is that the victims are indigenous and

¹²⁹ See Tracy Wilkinson, *In Mexico, Extortion is a Booming Offshoot of Drug War*, L.A. TIMES (Mar. 18, 2012), <http://articles.latimes.com/2012/mar/18/world/la-fg-mexico-extortion-20120319>.

¹³⁰ See Beittel, *supra* note 126.

¹³¹ Shoichet, *supra* note 55.

¹³² Archibold, *supra* note 2.

¹³³ AMNESTY INTERNATIONAL, *supra* note 22.

¹³⁴ *Id.*

¹³⁵ Thomas, *supra* note 26, at 599, 610–11.

¹³⁶ Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-A, Appeals Judgment, ¶ 95 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

¹³⁷ See Archibold, *supra* note 2.

female.¹³⁸ Additionally, there is an abundance of drug cartel extortion and violence towards farmers and business owners, a group which shares the characteristic of being established members of society.¹³⁹

Looking even more broadly, the entire population that is not involved in the drug wars qualify as a “civilian population” for purposes of the Rome Statute. Due to the sheer number of persons involved in the drug wars, involvement in the drug wars versus noninvolvement in the drug wars establishes a qualifying characteristic that separates Mexican society into two populations.¹⁴⁰ Members of the latter category share the common position of being targets of violence and extortion.

4. Committed Under a State or Organizational Policy

Fourth and most controversial, the systematic and widespread crimes in Mexico are committed under a broader organizational policy. On this point, the Rome Statute was careful to point out that the policy under which a crime is committed can be a “State or organizational” policy. A “State policy” is an actual policy that allows for the murder, extermination, torture, and forced disappearance of civilians. Past global crises, unfortunately, embodied State-sponsored policies (e.g., Germany’s extermination of all non-Aryan races; State-sponsored ethnic cleansing in the Bosnian War). In modern time, however, blatant extermination policies are rare; instead, some countries have a culture that fosters such violence.¹⁴¹ Fortunately, the Rome Statute contemplates this subtlety through its inclusion of “organizational policies,” which are policies not explicitly codified in the laws of a State.

The importance of the Rome Statute’s inclusion of both State policies and organizational policies can be seen in *Prosecutor v. Tadic* where the Tribunal emphasized that the essence of a crime against humanity is that it results from “a deliberate attempt to target a civilian

¹³⁸ See BRICKER, *supra* note 60.

¹³⁹ See José De Córdoba, *The Violent Gang Wars Behind Your Super Bowl Guacamole*, WALL STREET J. (Jan. 31, 2014, 10:36 PM), <http://online.wsj.com/articles/SB10001424052702303277704579349283584121344>.

¹⁴⁰ See Thomas, *supra* note 26.

¹⁴¹ See Liana E. Reyes & Jorge de Cardenas, *Latin America: A Culture of Violence?*, FOREIGN POL’Y J. (May 2, 2014), <http://www.foreignpolicyjournal.com/2014/05/02/latin-america-a-culture-of-violence/>.

population.”¹⁴² In *Prosecutor v. Tadic*, Bosnian Serb politician Duško Tadić was charged for crimes against humanity (among other crimes) for the beating, sexual assault, torture, murder, and other mistreatment of non-Serb civilians in Bosnia and Herzegovina in the early 1990s by the ICTY.¹⁴³ As stated by the Trial Chamber, he “committed all of these acts against non-Serbs with the intent of furthering the establishment of a Greater Serbia and that he shared the concept that non-Serbs should forcibly be removed from the territory.”¹⁴⁴ This deliberate, calculated attack on a population, the Tribunal stated, was the type of crime and organizational policy that warranted international intervention.¹⁴⁵ The Tribunal rejected the traditional understanding that the Rome Statute required a State-sponsored policy; thus, such restrictions were no longer necessary.¹⁴⁶ The ICTY reiterated this understanding in *Prosecutor v. Nikolic*, again stating that the defining feature of a war crime—whether accomplished under State-based policy or not—is that it is committed on a large, calculated scale and not on an isolated basis by rogue individuals.¹⁴⁷

Turning to Mexico, the policies that qualify as war crimes under the Rome Statute are organizational policies. In many countries, especially those in Central America, South America, and the Caribbean, organized crime and drug-trafficking groups wreak havoc across every cross-section of society, aiming to dominate factions of society as seen in Tadić’s goals of dominating non-Serbs in *Prosecutor vs. Tadic*.¹⁴⁸ Cartels and Mexican officials do this by having policies and plans that exert control over communities and any group challenging their actions.¹⁴⁹ Their goal is to protect and promote drug trafficking, and routinely use methods of torture, murder, forced disappearance, and other violent crimes against those who challenge them or interfere

¹⁴² *Prosecutor v. Du [Ko Tadi]*, Case No. IT-94-1-T, Opinion and Judgment ¶ 653 (May 7, 1997).

¹⁴³ *Id.* ¶ 53.

¹⁴⁴ *Id.* ¶ 714.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* ¶ 654.

¹⁴⁷ *Prosecutor v. Nikolic*, Case No. IC-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, ¶ 26 (Oct. 20, 1995).

¹⁴⁸ *Prosecutor v. Tadic*, Case No. IT-94-1-T, ¶ 714.

¹⁴⁹ See Kathy Gilsinan, *Why Would a Mexican Drug Gang Target Student Protesters? The Discovery of Mass Graves Prompts Charges that Officials Hired Cartel Hit Men to go After Rivals*, THE ATLANTIC (Oct. 10 2014), <http://www.theatlantic.com/international/archive/2014/10/why-would-a-mexican-drug-gang-target-student-protesters/381358/>.

with them.¹⁵⁰ Tactics of control also quickly bleed into the local police and government systems, offering police and government officials protection and money.¹⁵¹ Consequently, Mexican authority figures' cooperation enlarges the drug cartels' resources, giving them a greater workforce to implement their policies and to quash opposition from local communities. Such cooperation further solidifies the organizational policy and plan to dominate areas and peoples of Mexico.

5. With Knowledge of Context

The fifth and final characteristic of a crime against humanity is that the attacks against the civilian population are committed with knowledge of the broader context of the crimes.¹⁵² The “knowing” element is present to prevent random, isolated crimes from being characterized as crimes against humanity.¹⁵³ Drug gangs—and the Mexican police and military working with them—act with the goal of protecting and promoting the interests of the drug trade and the growth of the cartel. Thus, these actors commit their crimes with the knowledge required by the Rome Statute because the gangs and Mexican officials intentionally further their goals by the numerous, systematic crimes they commit across Mexico as detailed in earlier Parts of this Article.

In conclusion, the extreme crimes in Mexico of Mexican officials acting in cohort with drug cartels clearly meet the requirements under international criminal law's prevailing legal analysis of crimes against humanity. Just as Germany, Rwanda, Yugoslavia, and others have examined their respective crises and attached the relevant definition of crimes as crimes against humanity to their own circumstances, so now should Mexico prosecute its crimes against humanity to address its unique, legally-unprecedented international criminal crises.

IV

INTERNATIONAL LAW'S RESPONSE: A SPECIAL TRIBUNAL FOR MEXICO

In order to address the widespread and long-term atrocities occurring in Mexico, the United Nations Security Council should create a hybrid

¹⁵⁰ See Reyes & Cardenas, *supra* note 141.

¹⁵¹ See Gilsnan, *supra* note 149.

¹⁵² Rome Statute, *supra* note 31, at art. 7.

¹⁵³ Prosecutor v. Nikolic, Case. No. IC-94-2-R61, ¶ 26.

international tribunal titled the Special Court for Mexico. This tribunal should be modeled loosely after the Special Court for Sierra Leone, but it must have an element in its Charter that is much different than the ICC or any other international criminal law tribunal: it must declare that the Mexican government and military crimes that are collateral to the drug war are crimes against humanity.

A. Identification of the Proper Tribunal

Identifying the best international criminal law intervention is no easy task. Generally, two main options exist for the United Nations to implement: the international tribunal and the hybrid tribunal.

1. International Tribunal

The first type of international criminal law intervention is a purely international tribunal. Such a tribunal is not geographically located within the country at issue,¹⁵⁴ and it does not involve the domestic governments or domestic laws of the country at issue.¹⁵⁵ Instead, the tribunal is created by the United Nations Security Council through a charter establishing the court and its accompanying rules. Though this option worked well for the conflicts in Yugoslavia and Rwanda (which are the two circumstances in which the United Nations created such a tribunal), the use of this type of tribunal in present day is essentially defunct for two reasons.

First, the International Criminal Court created in 2002 by the Rome Statute has replaced the function of any future international criminal tribunal.¹⁵⁶ The crises in Rwanda and Yugoslavia obviated to the international community that consistent international laws—and a consistent court to adjudicate those laws—was needed on the world stage. Using the wisdom from the previously created international tribunals and more than one-hundred years of history and international scholarship, the International Criminal Court (ICC) was created to be the new court for intensive international criminal activity. While this

¹⁵⁴ For example, for the two international tribunals created by the United Nations in the past, the ICTY for Yugoslavia is located in The Hague, Netherlands, and the ICTR for Rwanda is located in Arusha, United Republic of Tanzania. *UN Documentation: International Law*, Dag Hammarskjöld Library Research Guides, UNITED NATIONS (Sept. 17, 2015), <http://research.un.org/en/docs/law/courts>.

¹⁵⁵ SCHAACK & SLYE, *supra* note 86, at 161.

¹⁵⁶ *UN Documentation: International Law*, Dag Hammarskjöld Library Research Guides, UNITED NATIONS, <http://research.un.org/en/docs/law/courts> (last updated Oct. 30, 2015).

Article presents reasons why the ICC is not the ideal court for the conflict in Mexico in Part V, the ICC does negate the need for future international tribunals.

A second reason that such international tribunals are defunct results from international criminal tribunals being notoriously costly and resource-intensive. After the ICTY and ICRT, the Security Council plainly exhibited a “tribunal fatigue,” unwilling to fund a similar tribunal and put forth such resources for the creation of the court and its charter.¹⁵⁷ The Security Council’s position is obvious by all tribunals created since the ICTY, ICTR, and the ICC; all are hybrid or mixed tribunals, while none are purely international tribunals.¹⁵⁸

2. *Hybrid Tribunal*

Besides an international tribunal, the second option for international law adjudication is a hybrid tribunal. A hybrid, or “mixed,” tribunal receives its name from its cooperative approach between the international legal community and the domestic structure of the country in conflict.¹⁵⁹ These tribunals are extremely variable depending on the nature of the conflict and the consistency of the country’s stability and judicial foundation.¹⁶⁰ A hybrid tribunal will contain a mixture of international and domestic judges, will have jurisdiction over international and domestic criminal law, and will use a mixed funding source from both the host country and from the members of the United Nation and the Security Council.¹⁶¹

This option, used most often since the creation of the ICC, has its benefits and drawbacks. Hybrid tribunals have lower startup and maintenance expenses since they are able to use the county-in-conflict’s existing buildings and structures and use a portion of domestic judges and administrative resources.¹⁶² They also are geographically central to the crimes they are investigating and the

¹⁵⁷ See AVRIL McDONALD, *Sierra Leone’s Shoestring Special Court*, 84 INT’L REV. RED CROSS 121, 124 (2002), <https://www.icrc.org/eng/assets/files/other/121-144-mcdonald.pdf>.

¹⁵⁸ *UN Documentation: International Law*, *supra* note 156.

¹⁵⁹ SCHAACK & SLYE, *supra* note 86, at 161.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

perpetrators they are trying, which means the lasting effects of the tribunal's work toward long-term peace building is more effective.¹⁶³

Though more practical and effective, there are two major drawbacks of hybrid tribunals. First, the host country must willingly take part in the hybrid tribunal's function. If the host country does not fully support the hybrid tribunal, violence and corruption within the tribunal is likely.¹⁶⁴ Second, a hybrid tribunal does not enjoy the safeguard of Chapter VII of the United Nations Charter,¹⁶⁵ which provides for United Nations' military forces to restore order, curb violence, or help to carry out the prosecutions of the tribunal.¹⁶⁶ Despite these disadvantages, a hybrid tribunal used to address the multi-dimensional, long-lasting, and high-stake crisis in Mexico is the most effective and efficient means to end its violence.

B. The Special Court for Mexico

Considering the different models available for international criminal law intervention, the tribunal in Mexico should be modeled after recent special tribunals such as the Special Court for Sierra Leone, which was arguably the most successful of the hybrid tribunals. Like many hybrid tribunals, the Special Court for Mexico would be established by treaty between host government of Mexico and the United Nations.

This Special Court will not take over the role of Mexico's current judicial system. Rather, because Mexico does not have any domestically codified laws on crimes against humanity, genocide, or any traditional international law, it will function to adjudicate the crimes that are so widespread and systematic that they do not fit within the domestic law's purview. In order to glean support from the Mexican government, some form of Mexican law will be used. Mexico's law, however, should be limited to procedural rules and to sentencing guidelines as much as is possible. Using Mexico's procedural rules will give a sense of ownership and familiarity to Mexico's judicial system. This is important to build since the Special Court will eventually complete all cases or turn cases over to Mexico, if appropriate, as did the Special Court for Sierra Leone. Additionally, using Mexico's

¹⁶³ LAURA A. DICKINSON, *The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo*, 37 NEW ENG. L. REV. 1059, 1068–71 (2003).

¹⁶⁴ SCHAACK & SLYE, *supra* note 86, at 162–74, 194–98.

¹⁶⁵ MCDONALD, *supra* note 157.

¹⁶⁶ *Chapter VII: Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression*, CHARTER OF THE UNITED NATIONS, <http://www.un.org/en/documents/charter/chapter7.shtml>.

sentencing guidelines (with review from the other international judges on panel) will not only enable Mexico to better enforce sentences since the criminals will be in Mexican prisons; it will also give a sense of authority to Mexico over its own nationals, since it is Mexican nationals being prosecuted for these crimes.

The benefit of the international and domestic balance is crucial the Special Court's success. Trials will be recognizable to the Mexican courts and will be rooted in the Mexico's judicial traditions, which is positive for Mexico having a sense of ownership and inclusion in the proceedings. Additionally, the structure of sentencing is also important; as in a domestic court, this will be Mexico sentencing its own people. This makes the sentencing more legitimate and again puts the power of the trial's result into the traditions of the Mexican judiciary. Such a format helps to ensure results that are acceptable to the Mexican citizenry and will prevent upheaval of the results after the Court's work is complete and the Special Court dissolves.

The Special Court's structure and adjudicators is also critical to establish. As in tribunals before it, the Special Court will consist of three sections; the Registry, Chambers, and the Office of the Prosecutor. The Registry is the administrative arm of the court, while the Chambers is the actual trial and appeal court chambers. The Office of the Prosecutor will serve to select, investigate, and prosecute in the Special Court. The judges will be a mixture of domestic and international judges. The Trial Chamber(s) will consist of three judges, while the Appeals Chamber will have five. Mexico will appoint two Trial Chamber judges per Chamber, and will appoint one Appeals Chamber judge. The United Nations Security Council will appoint the remainder of judges. Thus, the Security Council will be appointing the clear majority of judges to the Special Court. Additionally, the Prosecutor and Registrar for the Special Court will be appointed by the Secretary General of the Security Council, and will be assisted by a Mexican deputy Prosecutor.

Arguably the most important element of creating this Special Court is its jurisdictional requirements. The Special Court will prosecute all persons who bear the greatest responsibility for the commission of international crimes in Mexico against Mexican citizens.¹⁶⁷ While the Prosecutor would focus on political and military leaders, the

¹⁶⁷ Agreement Between the United States and the Government of Sierra Leone on the Establishment of Special Court for Sierra Leone, U.N.-Sierra Leone, Jan. 16, 2002. 2178 U.N.T.S. 38342, <http://legal.un.org/avl/pdf/ha/icty/legalinstruments.pdf>.

jurisdiction of the Special court does not exclude other high-ranking drug lords working either in cohort with government actors or working outside of government circles. It will be the job of the Prosecutor and of the Special Court to identify, through investigation, such persons with each separate charge.

Additionally, the subject matter jurisdiction will consist of traditional international criminal laws, namely: war crimes, crimes against humanity, genocide, and crimes of aggression. The most relevant crimes under Mexico's circumstances, though, are crimes against humanity and war crimes. Additionally, using the analysis provided in Part III of this Article, the Special Court will have opportunity to prosecute crimes collateral to the drug wars as crimes against humanity. Further, the Special Court will have personal jurisdiction over Mexican nationals and over all persons who commit an international crime in Mexico's territory.

The Special Court will have jurisdiction only over international crimes committed December 11, 2006, until present. This date is significant because it was the day former Mexican President began the militarization against the drug war with "Operation Michoacán," and the start of the sharp rise in drug-related violence against Mexican citizens. The life of the Special Court will not be unrestricted though. As in the Special Court of Sierra Leone, the Special Court for Mexico's charter will specifically establish that a subsequent agreement between Mexico and the United Nations will be made either when all prosecution is complete, the Special Court is able to transfer cases wholly to domestic courts, or the upon the unavailability of funds.

Financially, the Special Court will be funded from a variety of sources. Similar to other hybrid tribunals, the Special Court's funding will come domestically from Mexico and internationally from United Nations member countries.¹⁶⁸ As detailed in Part V of this Article, the United States should be a key member to the support of the Special Court. It will do so by re-routing the billions of Merida Initiative dollars given annually to Mexico since 2008 to fight its drug wars and bolster systematic infrastructure.¹⁶⁹ Similar to international and hybrid tribunal structures, the funding for the Court will be set up in a percentage system between the various funding sources. Each funding source, be it the United Nations, United Nations Member States, the United States,

¹⁶⁸ See VAN SCHAACK & SLYE, *supra* note 86, at 194–98.

¹⁶⁹ See Clare Ribando Seelke & Kristin Finklea, *U.S.-Mexican Security Cooperation: The Mérida Initiative and Beyond*, CONG. RES. SERV. (May 7, 2015), <http://fas.org/sgp/crs/row/R41349.pdf>.

the Mexican government, or other contributors, will contribute a percentage of the total costs towards the operation of the Court. These percentages can either be established in the Charter or assessed at an established timeframe. Though an expensive endeavor, this Special Court has promise for stable funding; in 2014 to 2015, the ICTY cost \$180 million to operate,¹⁷⁰ while last year *alone*, the United States gave \$194.2 million to Mexico in Merida Initiative funds to address drug war violence and trafficking.¹⁷¹

The Special Court structure proposed here is a viable solution because it is the structure most likely to be seen as legitimate in the eyes of Mexico and on the international stage. As compared to International Tribunal such as ICTY and ICTR, this Special Court has legitimacy because it *does* involve Mexico and Mexican leaders. First, it will be taken seriously by the Mexican government because it is a solution in which Mexico is taking part. Second, and equally important, a joint venture with majority-international leadership appeals to the Mexican citizenry; angry and fearful for almost two decades, Mexicans have felt frustrated and voiceless under Mexico's leadership.¹⁷² Speaking to the success of the Kosovo Hybrid Tribunal that faced similar obstacles as Mexico in its construction, post-tribunal reports stated:

[T]he appointment of foreign judges to domestic courts to sit alongside local judges, and the appointment of foreign prosecutors to team up with local prosecutors, helped to create a degree of collaboration that generally enhanced the perception of the institution's legitimacy. By working together and sharing responsibilities, not only were perceptions enhanced, but international and local officials necessarily began consulting with each other.¹⁷³

Thus, with the backing of the United Nations and its member states, Mexicans themselves can have confidence that effective prosecution and eventual peace can come with the international intervention of the Special Court.

The Special Court is also an effective tribunal structure for Mexico because it can provide long-term solutions using Mexican

¹⁷⁰ *The Cost of Justice*, INT'L CRIMINAL TRIBUNAL FOR YUGOSLAVIA, <http://www.icty.org/sid/325> (last visited Oct. 2, 2015).

¹⁷¹ Seelke & Finklea, *supra* note 170.

¹⁷² See "*I've Had Enough*": Mexican Protesters Decry Years of Impunity After Apparent Massacre of 43 Students, DEMOCRACY NOW (Nov. 10, 2014), http://www.democracynow.org/2014/11/10/ive_had_enough_mexican_protesters_decry.

¹⁷³ See Dickinson, *supra* note 164, at 1069.

infrastructure. The startup and maintenance costs for this Court are significantly lower than having an international tribunal in some other part of the world. Practically, because Mexico and South America are so far away from The Hague, investigation and enforcement would be extremely difficult and expensive. Investigations and prosecutions would inevitably take much longer, and it would be more difficult to build a sound case so far from the site of the alleged crimes. Overall, having an international tribunal to address the crimes perpetrated in Mexico would be more burdensome, more time-intensive, more expensive, and less effective than a hybrid tribunal working in cooperation with Mexico's government and citizenry.

V

AN INTERNATIONAL TRIBUNAL IS THE BEST SOLUTION TO MEXICO'S CRIMINAL LAW PROBLEMS

An international criminal hybrid tribunal is the best solution for Mexico's brutal crime problems, and no other entity—domestically or internationally—is capable of sufficiently prosecuting the crimes.

A. The ICC Is Not Legally or Practically Able to Prosecute Crimes of Mexico

One of the most natural places that an international crisis would be prosecuted is the relatively newly established International Criminal Court, complete with the Rome Statute neatly explaining the crimes of concern to the international legal community and how to try them.¹⁷⁴ The ICC, however, is not fit to prosecute the crimes occurring in Mexico for both legal and practical reasons.

1. ICC Is Legally Unable to Prosecute

Legally, the ICC is not currently able to prosecute the perpetrators of the heinous crimes that have occurred and are occurring in Mexico because of the drug war. Although the Rome Statute is the most thorough document of international criminal crimes, it does not include any mention of prosecuting drug-related trafficking or crimes, despite it being an enormous problem affecting many areas of the world.¹⁷⁵ While many are hopeful that the ICC will expand its jurisdiction to

¹⁷⁴ See Rome Statute, *supra* note 31.

¹⁷⁵ See generally Molly McConville, *A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75 (2000).

allow for prosecuting drug-related crimes against civilians by drug-traffickers and any State official working in cahoots with them, that change is unlikely to occur soon.¹⁷⁶ Thus, under the current legal constructs of the Rome Statute, the ICC does not have clear jurisdiction to prosecute anyone who is not an obvious State official.¹⁷⁷

The first main issue for the ICC is its ability to prosecute the Mexico's perpetrators. The broad spectrum of different perpetrators in the Mexican drug gangs or working in cahoots with the gangs, such as local Mexican police, federal Mexican military, and drug lords, will be difficult for the ICC to prosecute under its requirement that crimes must be pursuant to a State or organizational policy.¹⁷⁸ While this Article argues that violence committed by drug gangs is committed under a broader policy in Part III, the ICC itself has not recognized such an argument and would not likely recognize it under Mexico's circumstances now.¹⁷⁹ On the issue of Mexico's federal militarization policy, former ICC Prosecutor Luis Moreno Ocampo stated that the ICC will not judge "political decisions" or "political responsibility."¹⁸⁰

The second main legal issue with the ICC's prosecution is one of complementarity.¹⁸¹ This issue has been much debated in legal

¹⁷⁶ Ackerman, *supra* note 80.

¹⁷⁷ See Rome Statute, *supra* note 31.

¹⁷⁸ *Id.* at art. (7)(2)(a). First, to prosecute crimes under the Rome Statute in the ICC, the state in which the crimes occurred must have accepted the jurisdiction of the ICC by becoming a ratifying member of the Rome Statute under Article 12. *Id.* at art. 12(1) ("A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5."). Mexico availed itself to the Rome Statute in 2005 as a member state, thus making persons within Mexico that are perpetrators of crimes under the Rome Statute also availed to the prosecution of the ICC under Article 12. *The Rome Statute in the World 119 States Parties, 32 Signatories, 44 Non Signatories (195)*, Coalition for the International Criminal Court (Nov. 10, 2011), http://www.iccnw.org/documents/signatory_chart_Nov_2011_EN.pdf; Rome Statute, *supra* note 31, at art. 12. Additionally, the ICC has jurisdiction of crimes either that occurred in a Rome Statute member state, or that were perpetrated by persons that are nationals of a Rome Statute member state. *Id.* at art. 12(2). In the current situation of Mexico, both circumstances are met. The atrocities discussed in Parts I and II all occurred on the soil of Mexico, and the perpetrators of the crimes—be it drug lords, gang members, local Mexican police, or federal Mexican military troops—are Mexican nationals. See Parts I and II, *supra* and accompanying notes.

¹⁷⁹ In fact, the ICC in a statement preceding Mexican human rights activists filing a complaint to the ICC, the ICC former Prosecutor Luis Moreno Ocampo stated that the ICC will not judge "political decisions" or "political responsibility." Ackerman, *supra* note 80.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

literature¹⁸² and remains an important point in ICC admissibility. Article 17 of the Rome Statute states that the ICC cannot exercise jurisdiction over any matter that is or has been investigated or prosecuted in a domestic court.¹⁸³ The Statute is written to give domestic courts priority over a case before it goes to the jurisdiction of the ICC.¹⁸⁴ The ICC can, however, exercise jurisdiction over a matter if the State is “unable or unwilling genuinely to prosecute.”¹⁸⁵ Thus, a State must fail to prosecute a case before it can go to the ICC, making the ICC only complementary and not prime over any one case.¹⁸⁶ While a sound argument can be made that Mexico *is* unable and unwilling to prosecute criminals, especially State officers and military officials, Mexico has strong arguments that it should retain domestic primacy over its cases. From the arrest of Jose de Jesus Mendez Vargas (“The Monkey”), the alleged head of La Familia Michoacán cartel, to the arrest and sentencing of former Tijuana cartel leader Benjamin Arellano Felix, to the capture of infamous Beltran Levya, drug lord of Los Zetas, the Mexican forces tout a list of cartel members captured under their strategies.¹⁸⁷ While this fact realistically does not scratch the surface of the needed prosecutorial needs nor take into account a corrupt police and military justice structure within Mexico, it would likely be enough for the ICC to keep primacy of prosecution into the hands of Mexico.¹⁸⁸ Mexican officials might also argue that it has the actual police forces to capture the criminals, while the ICC has no such enforcement mechanism.¹⁸⁹ These arguments combined would take the bite out of the ICC’s jurisdictional admissibility and maintain that the

¹⁸² See, e.g., Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT’L CRIM. JUST. 86, 89 (2003) (arguing that inadequate substantive laws can render a case admissible before the ICC); Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 70–72 (2001) (arguing that the ICC should not hold a case admissible based solely on the nature of the crime charged by the state).

¹⁸³ Rome Statute, *supra* note 31, at art. 17.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Mexico Drug War Fast Facts*, CNN (Sept. 23, 2015), <http://www.cnn.com/2013/09/02/world/americas/mexico-drug-war-fast-facts/>; Tomas Kellner & Francesco Pipitone, *Inside Mexico’s Drug War*, 27 WORLD POL’Y J. 29, 33 (2010).

¹⁸⁸ Thomas, *supra* note 26.

¹⁸⁹ *Id.*

ICC's complementary structure reaches too far into Mexico's domestic system.¹⁹⁰

2. Practically, the ICC Will Not Prosecute These Crimes

Practically, the ICC will not prosecute the drug-related crimes in Mexico, or any other drug related crimes. Under Article 9 of the Rome Statute, the ICC or the judges can choose issues to investigate by proposal to the ICC.¹⁹¹ After repeated requests from countries most affected by international drug trafficking, neither the ICC legal commissions nor the Prosecutor of the ICC has shown any interest in investigating international drug trafficking and the crimes against humanity that accompany them.¹⁹²

Ever since Trinidad and Tobago's initial plea for an international criminal court to address transnational illicit drug trade was left out of the final Rome Statute,¹⁹³ the ICC continues to balk at the request of countries to address the matter.¹⁹⁴ Trinidad and Tobago, however, made a second desperate plea in 2010.¹⁹⁵ In a statement to the Ninth General Assembly of State Parties to the Rome Statute, Trinidad and Tobago's permanent representative pointed out that even after four conventions discussing the atrocities that coincide with international drug trade, the ICC has still refused to address the matter in its court. He explained:

[D]rug barons continue to operate with impunity within the international community. In fact, trans-boundary criminal activities

¹⁹⁰ *Id.*

¹⁹¹ Rome Statute, *supra* note 31, at art. 9(b)(c).

¹⁹² H.E. Ambassador, *supra* note 1 (noting Trinidad & Tobago's 2010 plea for the ICC to take up drug-trafficking and its related crimes); Letter dated Aug. 21, 1989 from the Permanent Representative of Trinidad and Tobago to the United Nations addressed to the Secretary General, UN doc. A/44/195 (Aug. 21, 1989), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/44/195 (explaining Trinidad & Tobago's first plea to the United Nations in 1988 to open an international criminal court specifically for addressing transnational illicit drug crimes); Ioan Grillo, *Does Mexico Need the ICC*, GLOBAL POST (Nov 28, 2011), <http://www.globalpost.com/dispatch/news/regions/americas/mexico/111128/does-mexico-need-the-icc> (explaining Mexico's first 2011 plea to the ICC to investigate government leaders and drug-related crimes in Mexico); *Human Rights Groups Call on the ICC to Proceed with the Preliminary Examination into Situation in Mexico*, WORLDWIDE MOVEMENT FOR HUMAN RIGHTS (Dec. 9, 2014), <http://www.fidh.org/en/americas/mexico/16028-human-rights-groups-call-on-the-icc-to-proceed-with-the-preliminary> (explaining Mexico's 2014 plea to the ICC again imploring it to investigate the crimes resulting from Mexico's drug war).

¹⁹³ Draft Statute for an International Criminal Court, 1994, http://legal.un.org/docs/?path=../ilc/texts/instruments/english/draft_articles/7_4_1994.pdf&lang=EF.

¹⁹⁴ *Id.*

¹⁹⁵ H.E. Ambassador, *supra* note 1.

by international drug barons in the form of murder, extortion and money laundering constitute serious crimes of concern to the international community. No member State of the international community is immune from the deleterious socio-economic effects of international drug trafficking. The security of the State and the well-being of individuals are at stake.¹⁹⁶

Additionally, Mexicans have made two requests to the ICC that the ICC has not answered.¹⁹⁷ The first complaint, filed by Netzai Sandoval and a host of Mexican lawyers, academics, and human rights activists, pleaded the ICC to take up the crimes responsible for the overwhelming violence and death in Mexico.¹⁹⁸ The complaint requested a preliminary investigation into then-President Felipe Calderón's policy of using armed forces to battle the drug cartels.¹⁹⁹ Before the complaint was even filed, though, then-Prosecutor of the ICC Luis Moreno Ocampo stated that the ICC will not judge "political decisions" or "political responsibility" regarding that policy even though it is widely cited that the beginning of Calderón's use of military has had direct relationship with rise of torture and murder of Mexican civilians.²⁰⁰ With no reported reply from the ICC, a second group filed a letter to the ICC in 2014 pleading the Prosecutor to investigate crimes reportedly committed by federal army troops and State officials in the state of Baja California, to which the ICC has yet to respond.²⁰¹

Even the United States, who has famously not ratified its membership to the ICC, *has* recognized the need for international intervention in international drug trafficking.²⁰² The Anti-Drug Abuse

¹⁹⁶ *Id.*

¹⁹⁷ Webb & Rueda, *supra* note 27.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Ackerman, *supra* note 80; KIMBERLY HEINLE, OCTAVIO RODRÍGUEZ FERREIRA & DAVID A. SHIRK, *Drug Violence in Mexico*, U. OF SAN DIEGO (Nov. 10, 2011), <http://justiceinmexico.files.wordpress.com/2014/04/140415-dvm-2014-released1.pdf> (demonstrating the history of violence in Mexico through an empirical approach); *Mexico Drug War Fast Facts*, *supra* note 188 (showing the rise in violence since 2006 in timeline format); Shoichet, *supra* note 55 (describing the growth of violence during Felipe Calderon's presidency and citing specific heinous acts of violence). Luis Moreno Ocampo was speaking in Mexico City several days before the Netzai Sandoval and other backers were planning on filing the complaint to the ICC, and reportedly was responding to the political hype surrounding the complaint in Mexico. *Id.*

²⁰¹ INT'L FED'N FOR HUMAN RIGHTS, *supra* note 81.

²⁰² Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102, Stat. 4108 (1988) [hereinafter ADAA] ("It is the sense of the Senate that the President should begin discussions with foreign governments to investigate the feasibility and advisability of establishing an International Criminal Court to expedite cases regarding the prosecution of

Act stated, “[i]t is the sense of the Senate that the President should begin discussions with foreign governments to investigate the feasibility and advisability of establishing an International Criminal Court to expedite cases regarding the prosecution of persons accused of having engaged in international drug trafficking or having committed international crimes.”²⁰³

Thus, despite numerous pleas to the ICC, the ICC has remained staunch in its position to not take up crimes related to international drug trafficking. Because this avenue of justice for Mexicans remains closed, an international criminal tribunal remains the key way that the multitude of crimes suffered by Mexican nationals at the hands of State officials and drug cartels can be justly investigated.

B. Mexican Domestic Courts Are Not Sufficient to Adequately Prosecute Collateral Crimes of Drug War

In the face of these challenges, Mexico’s criminal justice system has exhibited significant dysfunctions, contributing to extraordinarily high levels of criminal impunity.

-David Shirk, law professor and author of
“Justice Reform in Mexico”

Since the ICC has not shown itself willing, and is likely not legally able, to prosecute the crimes against humanity of drug traffickers and State officials, an alternative entity is Mexican domestic courts. Like the ICC, however, the Mexican courts have both practical and legal obstacles that would prevent them from adequately prosecuting the perpetrators of drug-related crimes.

Practically, the problem of impunity of Mexico’s military and state officials described in previous Parts of this Article has plagued the country’s hope for a just legal system.²⁰⁴ The problems of impunity began early for Mexico.²⁰⁵ In 1933, Mexican President Abelardo L. Rodriguez announced the Code of Military Justice for the country.²⁰⁶ Because this new policy came as a presidential decree, it was not voted

persons accused of having engaged in international drug trafficking or having committed international crimes.”).

²⁰³ *Id.*

²⁰⁴ BRICKER, *supra* note 60.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 5.

upon or discussed by Mexico's congress.²⁰⁷ President Abelardo, an army general, was not elected by Mexicans but rather appointed by congress in 1932.²⁰⁸ The all-encompassing Code of Military Justice dictates that "crimes against and failure to abide by military discipline" fall under the Code.²⁰⁹

Such a broad scope of power in the hands of the military courts since the early 1900s has resulted in a near-century of military impunity.²¹⁰ Another aspect of the Code adding to impunity stated that all participating members of military courts—including judges, public defenders, and military prosecutors—must be active-duty military.²¹¹ Moreover, every member is not only appointed by the secretary of defense, but is also supervised under the secretary of defense.²¹² Such a structure created a system in which judges and lawyers were inclined to decide cases that reflect well on the Defense Ministry, especially under the knowledge that the Code gives the Secretary of Defense the power to close investigations, issue pardons on convictions, and remove any military-court member from the court as he saw fit.²¹³ These regulations have also opened the door to impunity of military officers for decades; the Courts of Military Justice are merely investigating themselves.²¹⁴ For example, out of the 3,021 complaints of human rights violations against the military to the Mexican Commission on Human Rights, only five cases were investigated by the military prosecutor.²¹⁵

In a positive step, the Mexican Congress passed legislation in April 2014 codifying the Mexico Supreme Court ruling that all crimes by military members against civilians must be prosecuted in a civilian court.²¹⁶ This move came after years of pressure from human rights groups both regionally and internationally in light of the unprecedented judicial corruption.²¹⁷ However, this change does not hold much promise for victims. The Secretariat of Public Administration, the

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 4.

²¹⁰ See generally BRICKER, *supra* note 60.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* at 5.

²¹⁶ INT'L JUSTICE RES. CTR., *supra* note 63.

²¹⁷ *Id.*

Mexican entity in charge of investigating criminal or administrative abuse by federal police and executive officials, reported that they issued 50,000 administrative sanctions for corruption between 2006 and 2012.²¹⁸ Out of these cases, the Secretariat recommended 2,000 cases to be criminally prosecuted, and only 100 perpetrators served a sentence.²¹⁹

Moreover, even though crimes committed by military members against civilians are now tried in the civil justice system, a fair trial is not guaranteed. Mexican courts are notorious for conducting behind-closed-doors trials, declining to investigate crimes, and allowing judges to be bribed.²²⁰ The Mexican judicial system's infamous reputation of impunity was recently recognized by Mexican President Peña Nieto, stating "[s]ociety is rightly sick of feeling vulnerable. It is tired of impunity and crime . . . the Mexican state has a decades-old debt with its citizens, and it's time to pay it."²²¹ Former President Felipe Calderón also stated that he knew judges that had received bribes for privately negotiating with or freeing criminals.²²²

Overall, Mexico's problem of impunity disadvantages victims on every level, and has yet to demonstrate an effective trial of perpetrators. The victims of crimes committed by military members before the April 2014 legislation have little chance of ever seeing their case come to trial since the legislation affects only future trials of military members. Additionally, even a trial in the civil system does not accomplish justice; low percentages of convictions, reported bribery, and extreme lack of trust by Mexican citizenry still plague Mexico's ability to adequately try its most prominent police, military, and political criminals. Such problems reiterate the need for an international intervention into the domestic system to effectively prosecute the persons most responsible for the crimes against humanity in Mexico.

²¹⁸ U.S. DEP'T OF STATE, *supra* note 23.

²¹⁹ *Id.*

²²⁰ See *Grappling with Protests, Mexico President Urges Swift Judicial Reform*, REUTERS (Nov. 21, 2014, 9:41 PM), <http://www.reuters.com/article/2014/11/22/us-mexico-violence-idUSKCN0J52DV20141122>.

²²¹ *Id.*

²²² Patrick Corcoran, *Mexico Judicial Reforms Go Easy on Corrupt Judges*, INSIGHT CRIME (Feb. 16, 2012), <http://www.insightcrime.org/news-analysis/mexico-judicial-reforms-go-easy-on-corrupt-judges> ("I've known, for example, of judges who have received money or who engage in dialogue with criminals, who free criminals").

C. Establishing the Special Court Is in the Best Interest of the United States and Surrounding Countries

It's time to work together to find the best practices that work across the hemisphere [to combat drug violence], and to tailor approaches to fit each country.

-President Barack Obama²²³

The Special Court will not only make great strides in alleviating Mexico's drug-based criminal activity, it will also benefit the United States. By increasing accountability of Mexico's government and decreasing the amount of drug trafficking spillover violence into the United States, the Special Court will provide crucial improvement to Mexico's crippling drug war and thus provide a safer, more thriving association between Mexico and the United States.

1. What the United States Stands to Lose

The United States has much at stake in its relationship with Mexico. From politics, to trade, to migration, to American drug use, the border with Mexico rightly attracts much attention on a political, economic, and practical scale. With the United States' past and present high-cost investment of resources to combat Mexico's drug wars, the United States has little or nothing to lose by the creation of this Special Court that will strategically address Mexico's international criminal problem.

a. History of the United States' Involvement in Mexico's Drug Wars

The United States has long seen the importance of combating the drug crimes of Mexico, investing money and resources into combating drug-related crimes for decades. In 1988, the United States took a definite position in its fight of drug-trafficking and related crimes through Congress's passage of the Anti-Drug Abuse Act (ADAA).²²⁴ The ADAA called for "securing agreement to the formation of a multinational drug force to conduct operations against international illegal drug smuggling organizations."²²⁵ It also provided for \$15 million initial funds to Mexico²²⁶ and called for the creation of regional

²²³ Associated Press, *U.S. Gives Mexico \$197 Million to Battle Cartels*, NBC NEWS, (Dec. 4, 2008, 5:45 AM), http://www.nbcnews.com/id/28039287/ns/world_news-americas/t/us-gives-mexico-million-battle-cartels/.

²²⁴ See generally ADAA.

²²⁵ *Id.* § 4101(b).

²²⁶ *Id.* §4304(a).

and international drug forces to be created in cooperation with the United Nations and Organization of American States.²²⁷

Then, in 2008, the United States passed new legislation titled the Merida Initiative which “is an unprecedented partnership between the United States and Mexico to fight organized crime and associated violence while furthering respect for human rights and the rule of law.”²²⁸ The Initiative has four goals: disrupting organized criminal groups, institutionalizing the rule of law, creating a twenty-first century border, and building strong and resilient communities.²²⁹ Since the Initiative began in 2008, the United States has provided \$2.5 billion in aid to Mexico.²³⁰ This project is not without controversy; according to Mexico’s National Human Rights Commission, the majority of funds will go to the same police forces and military who have been responsible for torture, rape, and murder of innocent civilians.²³¹ In fact, President Felipe Calderón himself said more than half of state and local police cannot be trusted, and federal ranks are rife with corrupt officers.²³² Now, the Merida Initiative had \$194.2 million allocated for Mexico for fiscal year 2014, and the President has requested \$115 million for fiscal year 2015.²³³

Beyond resource support, the Federal Bureau of Investigations and the Department of State²³⁴ stated that Mexico and the United States share the responsibility of fighting drug trafficking and its related crimes.²³⁵ The FBI reports that American drug consumers pay \$18-39 billion annually for illicit drugs from Mexico, all of which pass through the Southwest border and, from the Mexican perspective, fuel the

²²⁷ *Id.* § 1401–4108.

²²⁸ *Merida Initiative*, U.S. DEPT. OF STATE, <http://www.state.gov/j/inl/merida/> (last visited Dec. 2, 2014).

²²⁹ Clare Ribando Seelke & Kristin Finklea, *U.S.-Mexican Security Cooperation: The Mérida Initiative and Beyond*, CONG. RES. SERV., (Apr. 8, 2014), <http://fas.org/sgp/crs/row/R41349.pdf>.

²³⁰ *Id.*

²³¹ Associated Press, *supra* note 223.

²³² *Id.*

²³³ Clare Ribando Seelke & Kristin Finklea, *U.S.-Mexican Security Cooperation: The Mérida Initiative and Beyond*, CONG. RES. SERV., (Apr. 8, 2014), <http://fas.org/sgp/crs/row/R41349.pdf>.

²³⁴ *Merida Initiative*, *supra* note 229.

²³⁵ Kevin L. Perkins & Anthony P. Placido, *Testimony, U.S. Senate Caucus on International Narcotics Control*, FED. BUREAU OF INVESTIGATION (May 05, 2010), <http://www.fbi.gov/news/testimony/drug-trafficking-violence-in-mexico-implications-for-the-united-states>.

corruption gripping their society.²³⁶ Explaining why the fight of drug trade and corruption is also America's battle, the FBI's testimonial report finds that "[t]he strategic consequence of the continuous seeping of illicit proceeds into the Mexican economy discourages the long-term growth of—indeed even the incentive to sustain—legitimate businesses and institutions. For all of these reasons, the U.S. and Mexican governments share the responsibility to defeat the threat of drug trafficking."²³⁷

b. America's Next Step

Instead of investing millions of dollars into Mexico's broken government, judicial, and enforcement systems, the United States should instead channel these funds into the Special Court for Mexico. First, the Merida Initiative—though ambitious and well-funded—has not been successful in actually curtailing drug-trafficking or its related violence. As described in Part I of this Article, Mexico has seen worse violence and corruption at a police and military level than ever before, with no end in sight to the rising violence.

Even if the Merida Initiative had been successful, this proposed Special Court is a more meaningful venue for the United States to invest resources into curtailing Mexico's drug trade and violence. Because this Special Court uses a top-down approach of investigating and prosecuting persons *most responsible* for the crimes, it will tackle the problem at its source by prosecuting the masterminds behind the drug routing and the plans of violence. Moreover, the hybrid approach using domestic and international support and resources actually increases the support the United States will have in its efforts.

In fact, the United States has already expressed a desire to use a multilateral approach toward drug-trafficking and its violence. In 1988, the Anti-Drug Abuse Act openly contemplated a hybrid approach to Mexico's drug and violence problem, stating that the United States was ready to "provide equipment, training, and financial resources to support the establishment and operation of such an anti-narcotics force," while also stating that resources should be provided by the country "facing the most serious threat" by drug-trafficking and its accompanying violence.²³⁸

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ ADAA § 4101(a).

Many Americans are also calling for the United States to stop the Merida Initiative.²³⁹ Because it is funding Mexican governmental programs and enforcement, many Americans feel it is also directly funding the violence by Mexican officials described in Part I of this Article.²⁴⁰ The outcry cites to the “Leahy Amendment” which requires rigorous vetting procedures on human rights conditions from countries that receive aid from the United States.²⁴¹ In fact, the United States has withheld Merida Initiative funds from Mexico because human rights conditions failed the Leahy Amendment requirements.²⁴² Such a circumstance only reiterates the need for the United States’ funds to be better facilitated toward a solution like the Special Court.

2. What America and Mexico Will Gain

Beyond the more effective spending of American dollars in Mexico, the United States’ support of this Special Court alleviates many strains currently existing between Mexico and the United States. First, with international and domestic support, there is less pressure on the United States alone to “fix” the drug war in Mexico. Many critics find that the United States is either doing too little²⁴³ or doing too much²⁴⁴ to assist Mexico; with this Court, the weight of Mexico’s crisis does not rest on the shoulders of the United States.

Second, the increased effectiveness of the Special Court over any other attempted judicial process brings a higher assurance of Mexican criminal prosecution. Instead of perpetrators going back into the notoriously corrupt Mexican courts, the United States is assured that they are prosecuted in an unbiased hybrid court where they can be tracked under the eye of the United Nations and all member countries.

Third, more effective and efficient prosecutions reduce the amount of violence experienced in Mexico, and thus reduce the spillover violence into the United States.²⁴⁵ Directing prosecution against the

²³⁹ Carolina Moreno & Christy Havranek, *43 Cities Stage Symbolic Protest Demanding U.S. Stop Funding Mexican Drug War*, THE HUFFINGTON POST (Apr. 30, 2015, 1:59 PM), http://www.huffingtonpost.com/2014/12/03/ustired2-protests_n_6264530.html?ncid=fbklnkushpimg00000048.

²⁴⁰ *Id.*

²⁴¹ 22 U.S.C. § 2378(d) (2014); *see also* Seelke & Finklea, *supra* note 230.

²⁴² Seelke & Finklea, *supra* note 229.

²⁴³ Martínez, *supra* note 9.

²⁴⁴ Moreno & Havranek, *supra* note 239.

²⁴⁵ Perkins & Placido, *supra* note 235. (“[S]pillover violence entails deliberate, planned attacks by the cartels on U.S. assets, including civilian, military, or law enforcement

persons most responsible for the crimes against humanity committed will slow trafficking, weaken the cartels, and reduce violence in Mexico and along the border.

Fourth, decreasing violence in Mexico means the United States will likely see a lessening of immigration surges across the United States-Mexico border. Slower migration of children is likely, for example, since less violence and fear will yield more opportunity to attend schools, get jobs, live and contribute to society within their communities.

Fifth, and finally, the above benefits resulting from prosecutions in the Special Court will lead to a more stable relationship with Mexico for the United States. Still an important trade partner, the opportunity to strengthen economic and political partnership between Mexico and the United States can greatly increase the United States' economic success and safer American communities.

Turning to Mexico, the simplest yet most crucial thing Mexico will gain from entering into an agreement for the Special Court is accountability. By working with the United Nations through the hybrid tribunal, Mexico will have every member of the United Nations invested into this Court since the United Nations will be a major funder of the Court. This universal accountability brings important global attention to Mexico's violence and corruption, forcing it to address impunity issues and solutions to the drug trafficking that cripples its safety and economy.

CONCLUSION

Mexico has reached a true breaking point. With every aspect of society deeply affected by violence from drug trafficking and drug cartels, Mexicans are unable to live peacefully or pursue opportunities. Even more unfortunate is the rampant corruption of Mexican military officials, local police officers, and judges of the courts. Mexicans are left with no escape from drug cartels, and no option of justice from the authorities employed to keep them safe.

To address these issues, Mexico should enter into an agreement with the United Nations creating an international hybrid tribunal titled the Special Court for Mexico. This Court will employ both domestic and international adjudicators, and use a mixture of international and domestic law in its proceedings. To properly adjudicate the crimes

officials, innocent U.S. citizens, or physical institutions such as government buildings, consulates, or businesses.”).

occurring in Mexico, the crimes should qualify as crimes against humanity under the Rome Statute and thus be tried as international crimes in the newly created Court.

This new Court is critical for Mexico to successfully alleviate the collateral crimes of drug trafficking. Since the International Criminal Court has refused to hear the crimes, and the Mexican domestic courts unwilling and unable to prosecute due to corruption and lack relevant laws, this new Court provides an avenue to prosecute Mexican officials and drug lords most responsible for the crimes. Moreover, this Court is a worthwhile entity for the United States to invest the billions of dollars it has allotted and plans to allot towards alleviating Mexico's drug war. With international attention, and investment into addressing Mexico's deplorable violence and corruption, Mexico does have hope for overcoming the conditions that have plagued its growth and peace for decades.

