



UNIVERSITEIT VAN AMSTERDAM

**ENFORCED DISAPPEARANCES IN MEXICO'S 'WAR ON DRUGS':
PROSECUTING FORMER PRESIDENT CALDERÓN AT THE ICC?**

by

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Introduction

The 'War on Drugs' in Mexico

For several years, news items from Mexico are dominated by stories about violence and drug cartels. International headlines often mention the civilian victims of this violence or the arrest of a drug cartel leader. Ciudad Juarez, a city in the north of the country, has even developed into the 'murder capital of the world'.¹ With thousands of drugs related casualties reported over the last years, it is clear that Mexico is suffering. The story mostly turns around the presence of drug cartels within its borders, which has led to the surge of violence, crimes and corruption across the country. The story is however much more complicated.

The so-called 'War on Drugs' that is often mentioned in relation to Mexico, refers to the policy against drug cartels and organized crime that was implemented by Mexico's former president and leader of the PAN party, Felipe Calderón. This policy was introduced in 2006 when the PAN party entered into office and aimed to defeat the existing drug cartels in the country with the use of military force. Mexico had been dealing with drug violence years before the PAN party formed a new government, but statistics show that the scale of the violence during Calderon's term is unprecedented.²

It may be one of the reasons that the Mexican population voted a new national president into office on 1 July 2012. Enrique Peña Nieto, frontman of the formerly governing PRI party, has been elected as Mexico's new head of state. With regard to the drug violence in Mexico, Peña Nieto has claimed to drastically break with the strategy that was applied by the former government.³ The president-elect has argued that this strategy has not resolved the country's tremendous problems with drug cartels and has only aggravated them. Peña Nieto has claimed to be ready for an open debate among the country to discuss a new type of national policy on the issue.⁴ The end of the Calderón years prompts a critical analysis of his time in office and the extent to which responsibilities can be assigned to the surge in violence.

Enforced disappearances

A crime that has highly increased during the drug war is the crime of enforced disappearances. Since 2006, more than 3.000 people have disappeared in Mexico. It is often suggested that these disappearances involve criminal acts between drug cartels. But disturbingly, complaints before the

¹ www.movies.nytimes.com

² www.cfr.org

³ www.crimesite.nl

⁴ www.crimesite.nl

National Human Rights Commission relating to enforced disappearances were since 2006 often directed against the Ministry of Defense.⁵ Similarly, Mexican human rights activists have argued that over 200 migrant kidnappings have been committed in cooperation with police or military personnel.⁶

The crime of enforced disappearances is articulated as crime against humanity in the Rome Statute and the International Criminal Court has not yet convicted a person under this provision.⁷ The crime of enforced disappearances is a relatively new crime in international law and it was brought to the attention due to a large amount of disappearances in Latin American countries from the 1960's. Over the past ten years, the crime became successfully recognized at the international level: besides the codification in the Rome Statute, it has also led to the adoption of the International Convention for the Protection of All Persons from Enforced Disappearances and the Inter-American Convention on Forced Disappearance of Persons.

Prosecuting enforced disappearances before the International Criminal Court

On 25 November 2011, human rights activists filed a report to the International Criminal Court requesting prosecution for war crimes and crimes against humanity committed during the 'War on Drugs' in Mexico. The advocates demanded prosecution of Felipe Calderón, the former government's high security personnel and drug cartel leader Joaquin 'El Chapo' Guzmán.⁸ They required a *proprio motu* action⁹ by the public prosecutor of the International Criminal Court in order to investigate among others the disappearances of persons in Mexico.

By focusing on the specific crime of enforced disappearances, several requirements would have to be met in order to prosecute for this crime. First of all, the International Criminal Court should have jurisdiction. Secondly, in case the ICC would have jurisdiction, all requirements of the crime of enforced disappearances under the Rome Statute need to be fulfilled. The human rights activists have asked for prosecution of the former president. In order to hold the Felipe Calderón liable for the enforced disappearances, the ICC Prosecutor should explore the possibilities of prosecuting through the doctrine of individual criminal responsibility or command responsibility.¹⁰

⁵ Mexican Commission for the Defense and Promotion of Human Rights (CMDPDH), 'Human Rights in Mexico under the current 'war against organized crime' (2012), p. 3

⁶ www.elcotidianoenlinea.com.mx

⁷ Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 7(1)(i) and 7(2)(i)

⁸ www.bbc.co.uk

⁹ Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 27(2)

¹⁰ Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 28(a)

Research question and structure

This research will draw attention to the enforced disappearances that may fall under the liability of the former president of Mexico. The main research question is:

“Have there been cases of enforced disappearance as crimes against humanity in Mexico, would the International Criminal Court have jurisdiction to prosecute these crimes and could the former Mexican president Felipe Calderón be held liable for these crimes committed by armed forces?”

In order to answer this main research question, the research will firstly look into the history of drug related violence in Mexico. The emergence of drug trafficking between Mexico and the United States, the evolvement of powerful drug cartels inside the country and the government’s policy towards related problems will be covered. In chapter two, the emergence and development of the crime of enforced disappearance will be researched. Chapter three will discuss cases of enforced disappearances in Mexico that have been researched by human rights organizations. These cases will be tested to the chapeaux elements of crimes against humanity and the contextual elements of the crime of enforced disappearance. The fourth chapter will provide information on Mexico’s ratification and accession to the International Criminal Court. The fourth chapter will also discuss the complementarity principle of the International Criminal Court and whether this court would have jurisdiction to prosecute enforced disappearances that took place in Mexico. Lastly, chapter five will look into the question whether crimes committed by armed forces can be attributed to the former Mexican president through individual liability.

Chapter 1

The development of a 'War on Drugs' in Mexico

Mexico has been a transit country and production hub for illicit drugs from Latin America to the United States since its early ages.¹¹ During the last decade, the effects of this drug trafficking situation have led to a critical and sometimes even life-threatening situation for Mexican civilians. Its effects have also expanded beyond the borders of Mexico. According to a recent US Justice Department report, the Mexican drug cartels now represent the biggest organized crime threat to the United States. Moreover, the drug related problems have been considered as one of the most important security threats in the Western Hemisphere.¹² Drug cartels have diversified their domestic operations over the years, with participants expanding into kidnapping, extortion, contraband and human smuggling.¹³ This chapter provides an historical analysis of the drug trafficking situation in Mexico. Firstly, the history of Mexico in relation to the transition and production of drugs are discussed. After that, the development of the Mexican drug cartels is researched. Felipe Calderón's policy towards drug issues and its effects are discussed in the last part of the chapter.

Drug trafficking to the United States

The Mexican illicit drug production and smuggling situation has an extensive history. The Prohibition years in the United States, from 1917 to 1933, can be considered as an important catalyzer for illegal drug trade from Mexico to the United States, although illegal drug trade towards the United States started off earlier. Morphine and heroin transportation to the United States already became big business during the American Civil War, and later during the two World Wars.¹⁴ Smoking of cannabis leaves was introduced into the United States via illegal Mexican migrant workers in the 1920's. In the 1950's and 1960's, Mexico functioned as an important gateway for cocaine smuggling to supply the illegal markets for high-class civilians in the main cities of the United States.¹⁵ And the use of synthetic drugs was uprising in the United States in the 1990's. The Mexican drug cartels were the most important suppliers of this new type of drug for the United States.¹⁶

One of the internal factors that caused the large amount of drug trafficking towards the United States seems to be the introduction of free market reforms in the 1980's and 1990's. These free

¹¹ www.gov.harvard.edu

¹² David A Shirk, 'The Drug War in Mexico: Confronting a Shared Threat', *Council for Foreign Relations Special Report* (2011) p. viii

¹³ Shannon O'Neal, 'Real War in Mexico – How Democracy can defeat the Drug Cartels,' *Foreign Affairs* 88, (2009) 63, p. 67

¹⁴ www.relooney.fatcow.com

¹⁵ www.relooney.fatcow.com

¹⁶ www.relooney.fatcow.com

market reforms produced mixed results and the gradual implementation of the reforms pushed many ordinary Mexicans to find alternative employment in an expanding underground economy that accounted for 40 per cent of all economic activity. Increases of US consumption of illicit psychotropic products – mainly cocaine - shifted traffic routes and drug production to Mexico in the 1980's.¹⁷ This situation created many employment options in the underground economy for Mexican citizens.

Another factor has been the decline of drug problems in Colombia. After years of drug related violence, the United States introduced 'Plan Colombia' in 2000. The demise of the Colombian cartels as a result to this policy allowed the Mexican cartels to take over.¹⁸ The Caribbean route to the United States was closed, which led to the strengthening of the Central America-Mexico route over land and the Pacific Ocean route towards Mexico's Western coast.¹⁹ Nowadays, Mexico is still an important transit country for cocaine, because 70 per cent of the cocaine consumed in the world is produced in Colombia.²⁰ 'Plan Colombia' resulted in the strengthening of the Colombian state and its capacity to strike against guerrillas and paramilitary groups.²¹ But the violence and drug cartels shifted towards surrounding countries.

A last self-evident, but important factor, is the geographical position of Mexico. During the 1980's, Mexican drug traffickers discovered that their actual product was not the illicit product itself, but the three thousand kilometers of border they shared with the United States. Like other Mexican industries, drug cartels operating in Mexico learned to maximize the comparative advantage of sharing a border with the world's largest consumer.²²

The emergence of drug violence: drug cartels

For trying to understand what the drug war in Mexico is about and how the situation became so violent, one must look into the history of the drug cartels in the country.²³ These cartels play a leading role in today's Mexican drug war.

Miguel Angel Felix Gallardo may be considered as the 'Godfather' of the drug business in Mexico. Gallardo created the Guadalajara cartel and it is highly likely that he was the world's biggest drug smuggler in the beginning of the 1980's.²⁴ Gallardo was responsible for the death of an American DEA (Drug Enforcement Administration) agent in 1985 and therefore condemned to jail. After Gallardo

¹⁷ David A Shirk, 'The Drug War in Mexico: Confronting a Shared Threat', Council for Foreign Relations Special Report (2011), p. 7

¹⁸ www.relooney.fatcow.com

¹⁹ www.relooney.fatcow.com

²⁰ www.cesifo-group.de

²¹ www.relooney.fatcow.com

²² Shannon O'Neal, 'Real War in Mexico – How Democracy can defeat the Drug Cartels,' *Foreign Affairs* 88, (2009) 63, p. 66

²³ Ed Vulliamy, *Amexia oorlog langs de grens*, Amsterdam: Ambo Anthos uitgevers (2011), p. 32

²⁴ Ed Vulliamy, *Amexia oorlog langs de grens*, Amsterdam: Ambo Anthos uitgevers (2011), p. 36

got arrested, his Guadalajara cartel fell apart. The establishment of new cartels in the country immediately filled up this power vacuum. Out of the former cartel, old members of the Guadalajara cartel created three new cartels: the Tijuana cartel, the Sinaloa cartel and the Juarez cartel. Among others, these drug cartels are still of important matter in the Mexican drug war.

In the early 1990's, conflicts between the Sinaloa cartel and the Tijuana cartel engulfed the entire country into violence and resulted into the assassinations of the Catholic archbishop Cardinal Juan Jesus Posados Ocampo – because he was confused with a drug cartel leader – and the PRI's presidential candidate Luis Donaldo Colosio.²⁵ Joaquin Guzman was the founder of the Sinaloa cartel and still is the leading man of this powerful cartel. The Sinaloa cartel is often described as the most powerful drug cartel in the Western Hemisphere. It controls much of the flow of cocaine, marijuana and methamphetamines into the US and is believed to have links in about 50 countries.²⁶ He got arrested in 1993, but escaped from prison in 2001. Human rights activists claim he should face the International Criminal Court for his role in the drug war.²⁷

A relative new actor is Los Zetas. The Zetas are a paramilitary enforcer group comprising elite former military forces recruited by the Gulf cartel, but acts nowadays independently. Their existence brought new forms of extreme violence, and resulted in the fact that other organized drug groups started to use the same methods.²⁸ The members of Zetas are recruited from the impoverished countryside, rural street gangs or the trainings-centers for police and army. According to Vulliamy, the main goal of the Zetas is securing a route next to the Golf coast all the way to Central America. This route would provide them direct access to Colombia, the original producer of cocaine, and to new markets in Peru and Venezuela.²⁹ To be ensured of a safe route, the Zetas fight a guerrilla-war against the Sinaloa cartel in Guatemala. The Zetas have the best connections with markets in Great Britain and the European mainland.³⁰ O'Neil states that *'its name has come to signify bloodshed and terror for many Mexicans'*.³¹

Nowadays, seven cartels are of major influence in the country. The report 'Mexican Drug Cartels: Two Wars and a Look Southward' distinguishes the following seven drug cartels in the state of Mexico: the Sinaloa cartel, Los Zetas, the Gulf cartel, the organization of the Beltran Leyva Brothers,

²⁵ Shannon O'Neal, Real War in Mexico – How Democracy can defeat the Drug Cartels, *Foreign Affairs* 88, 2009 63 p 68

²⁶ www.bbc.co.uk II

²⁷ www.bbc.co.uk III

²⁸ David A Shirk, 'The Drug War in Mexico: Confronting a Shared Threat', Council for Foreign Relations Special Report (2011), p. 10

²⁹ Ed Vulliamy, *Amexia oorlog langs de grens*, Amsterdam: Ambo Anthos uitgevers (2011), p. 45

³⁰ Ed Vulliamy, *Amexia oorlog langs de grens*, Amsterdam: Ambo Anthos uitgevers (2011), p. 45

³¹ Shannon O'Neal, Real War in Mexico – How Democracy can defeat the Drug Cartels, *Foreign Affairs* 88, (2009), p 67

the Tijuana cartel (or the Arellano Felix Organisation), the Juarez cartel and the La Familia cartel.³² Overtime, cartels have changed their influence and role in the 'War on Drugs'. According to Vulliamy, the Mexican drug war has basically developed into an armed conflict between three main parties: the Mexican army, Guzman (leader of the Sinaloa cartel) and the Zetas.³³



SOURCE: STRATFOR

RICH CLABAUGH/STAFF

www.stratfor.org: The seven drug cartels and their positions in Mexico

The Mexican government and the drug cartels

For more than seventy years, the Institution Revolution Party (PRI) governed the Federal state of Mexico. After the Mexican Revolution in 1917, the PRI became the single hegemonic party in the country. The party was famously called 'the perfect dictatorship' and its reach went beyond politics. It

³² Human Rights Watch, *Neither Rights nor Security, Killings, Torture and Disappearances in Mexico's 'War on Drugs'*, United States (2011), p. 6, obtained via:

http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf

³³ Ed Vulliamy, *Amexia oorlog langs de grens*, Amsterdam: Ambo Anthos uitgevers (2011), p. 47

created Mexico's ruling economic and social classes. It granted monopolies to private sector supporters, paid off labor leaders and distributed thousands of public sector jobs.³⁴

According to O'Neil, ties between the PRI and the illegal drug traders began during the Prohibition period.³⁵ Through its ministries and federal police forces, it established patron-client relationships with the drug traffickers. The unwritten pact between the traffickers and the government resulted in the following consequences: it limited violence against public officials, top traffickers and civilians. Secondly, upper ranks of cartels would be prosecuted. And lastly, it defined the rules for trafficking.³⁶ The PRI authorities tolerated the work of the drug cartels if these cartels would respect the ten rules provided by the PRI government:

1. No dead people in the streets
2. No drugs in schools
3. No media scandals
4. Periodic seizure of illegal drugs and imprisonment of lower level traffickers
5. Generation of economic revenues for small, poor communities
6. No gangs
7. No deals with other levels/branches of government or bureaucracy
8. Mistakes are to be punished with imprisonment, not death
9. Order and respect of territories
10. Revenues must return to Mexico in the form of investments.³⁷

The drug cartels eventually broke the pact by trying to take control of other territories in order to increase their profits. But the pact was also broken due to the political opening in the 1980's and 1990's. As the PRI monopoly slightly ended, so too did its agreement with the illegal drug traffickers. Power shifts inside the Mexican states resulted in an uprising of drug violence. For example, after the PRI lost its governorship in Chihuahua drug related violence surged in the region. When the PRI won its governorship back in 1992, the violence moved to Juarez Ciudad, a city that was not dominated by the PRI party.³⁸

³⁴ Shannon O'Neal, Real War in Mexico – How Democracy can defeat the Drug Cartels, *Foreign Affairs* 88, (2009) 63 p 65

³⁵ Shannon O'Neal, Real War in Mexico – 'How Democracy can defeat the Drug Cartels', *Foreign Affairs* 88, (2009) 63, p. 65

³⁶ Shannon O'Neal, Real War in Mexico – How Democracy can defeat the Drug Cartels, *Foreign Affairs* 88, (2009) 63, p. 65

³⁷ www.gov.harvard.edu

³⁸ Shannon O'Neal, 'Real War in Mexico – How Democracy can defeat the Drug Cartels', *Foreign Affairs* 88, (2009) 63, p. 65

Drug related violence has intensified since the early 2000s as a consequence of the Mexican government's crackdown on drug cartels.³⁹ Vicente Fox, political leader of the PAN party, took office in 2000. He got elected at what has been seen as the first democratic elections in the country. As Freeman stated above, the drug traffickers took advantage of the situation in order to provide autonomy or to expand their territories. Fox purged and reorganized the federal police forces and tried to extradite alleged drug lords to the United States.⁴⁰ The new policy was not able to defeat the drug cartels. On the contrary, the capture of two leading persons of the Tijuana cartel and the Gulf cartel led to a vicious war within and among the drug cartels. The new police forces appeared to be vulnerable to high amounts of corruption. According to Gonzalez, the whole situation got intensified and started to transform into the horrifying situation that Mexico faces today.⁴¹

The Calderón administration and the 'War on Drugs'

In September 2006, Felipe Calderón won the presidential elections in Mexico. Calderón was the second PAN leader in Mexico after Vicente Fox. He declared 'war' on the drug cartels immediately after he got elected. Some argue this was a smoke screen in order to distract attention from the difficult elections.⁴² Soon after Calderón entered into office in 2006, he sent army troops to Nuevo Leon, Michoacán and Tijuana.

The Mexican government has made the 'War on Drugs' its top priority during the Calderón administration and called in the military to support the country's weak police and judicial institutions. The Mexican government assumed that making them fall apart would defeat the drug cartels. This should have resulted in a decrease of drugs smuggling and violence in the country.⁴³

Although Calderón's military-led effort has splintered the major drug cartels, it has been argued that it has not diminished their strength – or political influence – sufficiently to prosecute them in the courts rather than in the streets.⁴⁴ *"Instead of reducing violence, Mexico's 'War on Drugs' has resulted in a dramatic increase in killings, torture, and other appalling abuses by security forces, which only make the climate of lawlessness and fear worse in many parts of the country,"* according to José Miguel Vivanco, America's director at Human Rights Watch.⁴⁵

³⁹ www.relooney.fatcow.com

⁴⁰ www.relooney.fatcow.com

⁴¹ www.relooney.fatcow.com

⁴² www.policymic.com

⁴³ Ed Vulliamy, *Amexia oorlog langs de grens*, Amsterdam: Ambo Anthos uitgevers (2011), p. 53

⁴⁴ David A Shirk, 'The Drug War in Mexico: Confronting a Shared Threat', Council for Foreign Relations Special Report (2011), p. vii. viii

⁴⁵ Human Rights Watch, *Neither Rights nor Security, Killings, Torture and Disappearances in Mexico's 'War on Drugs'*, United States (2011), p. 125, obtained via: http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf

Since 2006, more than 35.000 people have died in drug-related violence in Mexico.⁴⁶ On the Economic World Forum for Latin America in April 2012 Felipe Calderón responded to this fact by stating that his 'War on Drugs' was failing in Mexico. A controversial statement, now that the former president basically argued that the Mexican government was on the losing side in the fight between the government and the drug cartels.⁴⁷ During the presidential campaigns in 2012, none of the presidential candidates planned to continue Calderón's 'War on Drugs'.

Conclusion

Mexico is an important transport country and production hub for illicit drugs towards the United States. Its effects have expanded beyond its borders. Seven drug cartels strive among each other for power and territories. The Mexican cartel war has developed into an armed conflict between three major parties: the Mexican army, Guzmán and the Zetas. The amount of violence and casualties has highly increased since the Calderón administration entered into office. In the end of his term as president, Calderón renounced his policy of the 'War on Drugs' by arguing that it was failing.

⁴⁶ David A Shirk, 'The Drug War in Mexico: Confronting a Shared Threat', *Council for Foreign Relations Special Report* (2011), p. vii

⁴⁷ www.nos.nl

Chapter two

The Crime of Enforced Disappearance

The crime of enforced disappearance is a relatively new crime. The first widely recognized practice of this crime took place in the Second World War and after that on a large scale in Latin America. Overtime, the crime has been codified in several international conventions and in the Rome Statute. This chapter looks into the crime of enforced disappearance and the development of the crime since the Second World War.

Enforced disappearances

The act of enforced disappearance is one of the most serious human rights violations. The crime affects several human rights, like the right to security of the person, the right not to be arbitrarily deprived of one's liberty and the right not to be subjected to torture or other inhumane treatment or punishment. In some cases it might also violate certain rights like the right to life, the right of the family and the freedom of expression.⁴⁸

Reports of secret detentions date back to the age of French absolutism.⁴⁹ But the crime of enforced disappearance can be considered as a relatively new crime in the international order. Enforced disappearances were one of the most prevalent violations of the last decade that brought forward much activism by relatives and human rights activists. This activism has resulted in several conventions relating to the crime.⁵⁰ Enforced disappearances have become a universal phenomenon, which takes place in approximately 90 countries all over the world and affecting thousands of people.⁵¹ The essential characteristics of this crime are basically the following: a person is deprived of his liberty and in the course of that deprivation of his liberty, deprived of the protection of the law by the refusal to acknowledge the deprivation of liberty or to provide information concerning that person's fate or whereabouts.⁵²

In all cases of enforced disappearances, the disappearances have served different purposes depending on the specific circumstances. Each case of enforced disappearance has its own logic. The most common kind of enforced disappearance has been to fight political opponents and their

⁴⁸ Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, Leiden: Martinus Nijhoff Publishers (2007), p. 1

⁴⁹ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 3

⁵⁰ Antonio Cassese, *Oxford Companion to International Criminal Justice*, New York: Oxford University Press (2009), p. 310

⁵¹ Kirsten Anderson, How effective is the International Convention for the Protection of all Persons from Enforced Disappearance likely to be in holding individuals criminally responsible for acts of enforced disappearance? *Melbourne Journal of International Law*, Volume 7 (2006) p 2-3

⁵² Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008), Baden Baden: Nomos, p. 221-222

supporters.⁵³ The disappearances are used as a tool to frighten the population or the victim's relatives. The main purpose of all cases of enforced disappearances carried out by State officials seems to be to eliminate opponents and to spread terror among the population.

According to Scovazzi and Citroni, the crime consists of several stages. In the first stage, the victim is deprived of its liberty. The abduction is carried out by a group of armed people who often operate in civilian clothes. The second stage is secret detention. The victim is transferred to secret places of detention. The victim is often subjected to several transfers, to make it impossible for relatives to find out where he is and to prevent him from communicating with other prisoners. The third stage of enforced disappearance is interrogation. The aim at this stage is to break any kind of resistance and to obtain information, turning the prisoner into a collaborator of the regime. In most cases the last stage takes place as well, which is the killing of the victim. These killings are generally done by summary execution. In the meantime, relatives do not obtain any information about the situation. Any trace of the victim is lost in the outside world. This often leads to a serious level of psychological deterioration for these relatives.⁵⁴

The Night and Fog Decree

The first recognized instance of enforced disappearances took place in the Third Reich. Adolf Hitler's Night and Fog Decree was released on 7 December 1941 and its aim was to seize persons in occupied territories 'endangering German security' who were not to be immediately executed and make them vanish without a trace into the unknown in Germany.⁵⁵ As a result of this decree, thousands of people were secretly transferred from the occupied territories to Germany.⁵⁶ These enforced disappearances were used by the Nazi regime to deliberately spread terror throughout the population and to suppress persons who did not share the thoughts and beliefs of the Nazis.⁵⁷ According to Wilhelm von Ammon, the Justice Ministry's expert on international law who supervised the Night and Fog program: 'The

⁵³ Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, Leiden: Martinus Nijhoff Publishers (2007), p. 7

⁵⁴ Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, Leiden: Martinus Nijhoff Publishers (2007), p. 8-10

⁵⁵ Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008), Baden Baden: Nomos, p. 221

⁵⁶ Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, Leiden: Martinus Nijhoff Publishers (2007), p. 2

⁵⁷ Kirsten Anderson, How effective is the International Convention for the Protection of all Persons from Enforced Disappearance likely to be in holding individuals criminally responsible for acts of enforced disappearance? *Melbourne Journal of International Law*, Volume 7 (2006), p. 2

*essential point of the Night and Fog decree consisted of the fact that the Night and Fog prisoners disappeared from the occupied territories and that their subsequent fate remained unknown.*⁵⁸

The crime of enforced disappearance was not expressly included in the Nuremberg Charter. But Field Marshal Wilhelm Keitel, Chief of the Armed Forces High Command, was convicted of carrying out such enforced disappearances before the Tribunal. The judgment did not expressly state whether it was a war crime, a crime against humanity or both. To resolve this issue, lawyers simply stated that the committed crimes were part of both of the crimes.⁵⁹ Keitel was sentenced to death and hanged.⁶⁰

Enforced disappearances after the Second World War

After the Second World War, cases of enforced disappearances as a systematic policy of State repression started in Guatemala and Brazil in the 1960's and 1970's. These disappearances came to be practiced extensively throughout other parts of Latin America in the 1970's and 1980's, resulting in thousands of victims.⁶¹ The enforced disappearances carried out by State officials were particularly widespread during the 'Dirty War' in Argentina. The total number of disappearances in this war has been estimated at 8.960 cases, but the actual figure could be higher.⁶² A large increase of cases was in this period also found in Latin American countries like Brazil, Uruguay, Colombia, Honduras, Peru and Chile.⁶³ The main purpose of these enforced disappearances was to dispose of political opponents secretly while evading domestic and international legal obligations, and to sow intimidation into the fabric of society.⁶⁴ The cases of enforced disappearances were not only limited to these countries of Latin America. For example, many enforced disappearances took place in Iraq and Sri Lanka during this period as well.

⁵⁸ Brian Finucane, *Enforced Disappearance as a Crime Under International Law, A Neglected Origin in the Laws of War*, Yale Law School

⁵⁹ Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008), Baden Baden: Nomos, p 221

⁶⁰ Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, Leiden: Martinus Nijhoff Publishers (2007), p. 7

⁶¹ Kirsten Anderson, *How effective is the International Convention for the Protection of all Persons from Enforced Disappearance likely to be in holding individuals criminally responsible for acts of enforced disappearance?* Melbourne Journal of International Law, Volume 7 (2006) p. 5

⁶² Kirsten Anderson, *How effective is the International Convention for the Protection of all Persons from Enforced Disappearance likely to be in holding individuals criminally responsible for acts of enforced disappearance?* Melbourne Journal of International Law, Volume 7 (2006) p. 5

⁶³ Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2008), Baden Baden: Nomos, p 221

⁶⁴ Kirsten Anderson, *How effective is the International Convention for the Protection of all Persons from Enforced Disappearance likely to be in holding individuals criminally responsible for acts of enforced disappearance?* Melbourne Journal of International Law, Volume 7 (2006) p. 6

Since the 1980's, the use of enforced disappearances has increased exponentially and has spread throughout all regions of the world.⁶⁵ Today, enforced disappearances usually occur within countries that suffer from internal conflicts. Human Rights Watch estimates that approximately 5.000 people have been disappeared in the Russian Federation. The same human rights organization has argued that over 1.200 people have been disappeared in Nepal since 2000.⁶⁶ In recent years, the high numbers of disappearances in Asian countries like India, the Philippines, Indonesia, Sri Lanka and China cause particular concern.⁶⁷ And a relatively new trend has occurred in the context of the 'War on Terror'. Enforced disappearances of perceived members of terrorist organizations take place as a practice of 'extraordinary renditions'.⁶⁸

International legal instruments since the Second World War

As mentioned above, the Nuremberg Statute did not include the crime of enforced disappearance. After the Second World War, the crime of enforced disappearance has been codified in several international conventions and statutes. The formulation of the crime seems to be slightly different in every codification.

In 1992, the United Nations General Assembly adopted the UN Declaration on the Protection of all Persons from Enforced Disappearance. The Declaration does not contain a formal definition of enforced disappearance, because no complete definition had been brought forward during the negotiations and because the drafters did not want to limit the Working Group on Enforced and Involuntary Disappearances' discretion on which cases to admit.⁶⁹ The preamble did mention a working description:

'Persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned

⁶⁵ Kirsten Anderson, How effective is the International Convention for the Protection of all Persons from Enforced Disappearance likely to be in holding individuals criminally responsible for acts of enforced disappearance? Melbourne Journal of International Law, Volume 7 (2006) p. 6

⁶⁶ Kirsten Anderson, How effective is the International Convention for the Protection of all Persons from Enforced Disappearance likely to be in holding individuals criminally responsible for acts of enforced disappearance? Melbourne Journal of International Law, Volume 7 (2006) p. 7

⁶⁷ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p.5

⁶⁸ Kirsten Anderson, How effective is the International Convention for the Protection of all Persons from Enforced Disappearance likely to be in holding individuals criminally responsible for acts of enforced disappearance? Melbourne Journal of International Law, Volume 7 (2006) p. 7-8 and Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 5

⁶⁹ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 16

or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.'

This working description brings forward three aspects of the crime: the deprivation of liberty may take place in whatever form, there needs to be some sort of government involvement and the victim must have been placed outside the protection of the law. A state is obliged to acknowledge deprivations of liberty and to disclose the fate and whereabouts of the disappeared person.⁷⁰

The Inter-American Convention on Human Rights was adopted in 1994 and its definition was based on the wording chosen in the UN Declaration. In the Inter-American Convention on Human Rights, authorities do not only have to admit that there was a deprivation of liberty, but authorities also have to provide information on the location and fate of the victim.⁷¹ The Convention contains the following definition:

*"Forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the State or by person or groups of persons acting with the authorization, support, or acquiescence of the State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees."*⁷²

The first codification of the crime as a crime against humanity was formulated in the Code of Crimes of the International Law Commission in 1996.⁷³ The commentary of this crime stated: *"Although this type of criminal conduct is a relatively recent phenomenon, the Code proposes its inclusion as a crime against humanity because of its extreme cruelty and gravity."*⁷⁴ The crime of enforced disappearance was articulated as crime against humanity in article 18 of the Code of Crimes. The Code of Crimes defined enforced disappearances as crime against humanity as 'when committed in a systematic matter or on a large scale and instigated or directed by a Government or any organization or group'.

In Article 7 of the Rome Statute, enforced disappearances are described as crime against humanity. The International Criminal Court is the first international criminal tribunal that criminalizes the crime of enforced disappearance. The Rome Statute mentions ten acts that involve crimes against humanity when committed 'as part of a widespread or systematic attack directed against any civilian

⁷⁰ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 17

⁷¹ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 17

⁷² OAS Doc. OEA/Ser.P/AG/Doc.3072/94 (1994), article 2

⁷³ ILC draft Code of Crimes Against the Peace and Security of Mankind, Article 18

⁷⁴ Yearbook 1996, UN Doc. A/CN.4/SER.A/1996/Add.I (Part 2), p. 47 ('Forced disappearance of persons').

population, with knowledge of the attack. Article 7(2)(i) of the Rome Statute defines the crimes of enforced disappearance of persons as:

*Enforced disappearance of persons means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.*⁷⁵

The definition in the Rome Statute limits the ways in which the deprivation of liberty may take place: as an arrest, detention or abduction. The definition also introduces two new elements. It names political organizations as possible perpetrators and the perpetrators of enforced disappearances have to act with the intention to place the victim outside the protection of the law for a prolonged period of time.⁷⁶ The Elements of Crime complement the definition in the Rome Statute. These will be extensively discussed in chapter three. But one aspect of these Elements of Crime is already mentioned here: the Elements determine that for a perpetrator to be liable for the crime, he must have been involved in one or two actions. He either took part in the deprivation of liberty or in the refusal to provide any information on the deprivation of liberty.⁷⁷

After the criminalization of the crime of enforced disappearance in the Rome Statute, the international legal order has created another initiative to prevent and solve cases of enforced disappearances of persons. On 23 June 2006, the United Nations Human Rights Council adopted the International Convention for the Protection of All Persons from Enforced Disappearance. It was hoped that the Convention would increase the accountability of individual perpetrators of acts of enforced disappearance by extending international criminal jurisdiction to these acts.⁷⁸ The United Nations Commission on Human Rights had been considering a Draft International Convention on the Protection of All Persons from Enforced Disappearance since 1999 and the final draft was completed in September 2005.⁷⁹ According to Human Rights Watch, this convention should be considered as a significant victory for the human rights movement and as an extremely important development in the

⁷⁵ Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 7

⁷⁶ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 18

⁷⁷ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 20

⁷⁸ Kirsten Anderson, How effective is the International Convention for the Protection of all Persons from Enforced Disappearance likely to be in holding individuals criminally responsible for acts of enforced disappearance? Melbourne Journal of International Law, Volume 7 (2006), p. 1

⁷⁹ Kirsten Anderson, How effective is the International Convention for the Protection of all Persons from Enforced Disappearance likely to be in holding individuals criminally responsible for acts of enforced disappearance? Melbourne Journal of International Law, Volume 7 (2006) p. 3

international fight against enforced disappearances worldwide.⁸⁰ The international convention is a binding convention and signals strong international condemnation of this crime against humanity.⁸¹ However, the international community still has to encounter whether the convention will contribute on a practical level. The International Convention for the Protection of all Persons from Enforced Disappearance was adopted in 2010. Enforced disappearances are in this international Convention defined in article 2 as:

‘Enforced Disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.’

This Convention contains a non-exhaustive list of the different forms of deprivations of liberty that may lead to enforced disappearance. There has to be some sort of link between the perpetrator and the State. The convention does not determine whether the placement of the victim outside the protection of the law has to be part of the perpetrators intent or not.⁸² Furthermore, in article 3 the Convention does not argue that non-State actors may execute enforced disappearances, but it underlines the duty of member States to prosecute and punish these acts.⁸³ The scope of the International Convention for the Protection of all Persons from Enforced Disappearance differs from the Statute of the International Criminal Court. It differs in requiring state involvement at all stages, and in omitting any reference to the specific intent of perpetrators to remove the victim from the protection of the law.⁸⁴

International jurisprudence

The International Criminal Court is the first international criminal tribunal to criminalize the crime of enforced disappearance. So far, no person has been prosecuted for this crime before the International Criminal Court. Jurisprudence on enforced disappearances can therefore only be found at the Human Rights Committee, Inter-American Court of Human Rights, European Court of Human Rights, Human

⁸⁰ Human Rights Watch, Progress on Disappearances, Wins and Losses as UN Session Ends 26 april 2011

⁸¹ Kirsten Anderson, How effective is the International Convention for the Protection of all Persons from Enforced Disappearance likely to be in holding individuals criminally responsible for acts of enforced disappearance? Melbourne Journal of International Law, Volume 7 (2006) p 4

⁸² Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 20

⁸³ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 20

⁸⁴ Antonio Cassese, *Oxford Companion to International Criminal Justice*, New York: Oxford University Press (2009), p. 309

Rights Chamber for Bosnia and Herzegovina and the African Commission on Human and People's Rights.

Due to the fact that enforced disappearances occurred on a large basis in Latin America in the 1980's, the Inter-American Court of Human Rights and national courts in that region have extensively identified the crime during this period. In frequently cited cases like the Vélasquez-Rodríguez v. Honduras case and the Kurt v Turkey case, the Inter-American Court of Human Rights and the European Court of Human Rights have both ruled that such enforced disappearances of persons violate fundamental human rights.⁸⁵⁸⁶ The International Criminal Tribunal for the former Yugoslavia has recognized the fact that the crime of enforced disappearance should be considered as a crime against humanity. The Trial Chamber accepted this in the Kvočka case and the Appeals Chamber in the Kupreskic case.⁸⁷

There is a considerable body of interpretation by the Human Rights Committee and jurisprudence in the Inter-American Court of Human Rights, the European Court of Human Rights and the Human Rights Chamber of Bosnia and Herzegovina identifying the human rights violated in individual cases of enforced disappearance. States began defining enforced disappearances as crimes under their own laws but are now defining such cases after implementation of the Rome Statute in national criminal codes as crimes against humanity.⁸⁸

Conclusion

The first instance of enforced disappearances in modern times took place during the Second World War. After that, enforced disappearances emerged on a large scale in Latin American countries. Nowadays, cases of enforced disappearances in Asian countries as well as the practice due to the 'War on Terror' seem to be alarming. The crime has been codified since the 1990's in several international conventions and statutes. The crime was firstly codified as a crime against humanity in the ILC Code of Crimes in 1992. The formulation of the crime has developed overtime. The last codification of the crime has been the International Convention on the Protection of all Persons from Enforced Disappearances in 2010. No jurisprudence on enforced disappearances has been developed before the International Criminal Court yet.

⁸⁵ Vélasquez-Rodríguez v. Honduras (IACHR 1988, Series C. No. 4 155-158. Kurt v Turkey EHCR, Judgment 25 May 1988 133-134.

⁸⁶ <http://www.un.org/documents/ga/res/47/a47r133.htm>

⁸⁷ Kvočka (Trial Chamber Judgment) paragraph 208: Prosecutor v Kvočka, Case no. I-98-30/1-A, Appeals Chamber, 28 February 2005. Prosecutor v Kupreskic, case no IT-95-16-A Appeals Chamber 23 October 2001, paragraph 566.

⁸⁸ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 163

Chapter 3

Enforced disappearances in Mexico

According to human rights organizations, the number of enforced disappearances has exponentially increased since the Calderón administration entered into office. Individuals can be held responsible for these disappearances, if the acts of enforced disappearance are subsumed under the legal regimes of crimes against humanity, war crimes or torture.⁸⁹ Enforced disappearances are adopted in the Rome Statute as a crime against humanity. This chapter firstly provides facts and data of the enforced disappearances during the 'War on Drugs'. After that, the chapter looks into crimes against humanity under the Rome Statute. In the last part of this chapter, it is researched whether the acts committed in Mexico would fall inside the scope of enforced disappearances as crimes against humanity under the Rome Statute.

Enforced disappearances in the 'War on Drugs'

The development of a 'War on Drugs' in Mexico is discussed in chapter one. The country today has a serious problem with enforced disappearances, which appear to have become a more common practice in this 'War on Drugs'.⁹⁰ Recently, both Human Rights Watch and the Mexican Commission for Defense and Promotion of Human Rights (CMDPDH) have released a report on the human rights situation in Mexico. These two reports have elaborately researched the situation regarding enforced disappearances within the country.

The Human Rights Watch Report

According to the Human Rights Watch Report '*Neither Rights nor Security, Killings, Torture and Disappearances in Mexico's 'War on Drugs'*', the military and police forces would have been involved in acts of enforced disappearances of persons. Human Rights Watch documented 39 disappearances where it is highly likely that Mexican security forces were involved.⁹¹ All cases investigated by Human Rights Watch follow the same pattern: police agents or soldiers arbitrarily detain victims, their

⁸⁹ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 187

⁹⁰ Human Rights Watch, '*Neither Rights nor Security, Killings, Torture and Disappearances in Mexico's 'War on Drugs'*', United States (2011), p. 125, obtained via:

http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf

⁹¹ Human Rights Watch, '*Neither Rights nor Security, Killings, Torture and Disappearances in Mexico's 'War on Drugs'*', United States (2011), p. 6, obtained via:

http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf

detentions are never officially registered and they are not handed over by prosecutors.⁹² Besides this pattern, Human Rights Watch has documented several other findings.

Firstly, the Human Rights Watch Report states that State officials have been involved in the disappearances. Even though witnesses saw security forces carry out the abductions in these cases, State officials have always denied having detained the victims or even having held them in custody.⁹³ Moreover, Amnesty International claims that local human rights organizations have reported hundreds of cases that involved enforced disappearances. They claim that in 40 per cent of these cases State personnel would have been involved.⁹⁴

Another finding described in the Human Rights Watch Report is the fact that the Mexican government does not acknowledge that these disappearances have been taken place. State officials often classify these acts as 'levantones', which means that a disappearance is carried out by organized crime rather than by State officials and often the State officials suggest that the victim was a member of a rival criminal group.⁹⁵ The fact that these State officials label disappearances as levantones before investigations have been undertaken, would reveal an inherent bias in the government approach to the grave problem of disappearances. Pre-emptively classifying the disappearances in the country as levantones is an abdication of the duties of State officials, because it assigns responsibility to criminal groups before conducting an investigation.⁹⁶

Human Rights Watch found that cases are not investigated, or found serious shortcomings in those investigations, including not interviewing key witnesses, not visiting the crime scene and failing to pursue possible leads.⁹⁷ Prosecutors often fail to start investigations in the days following the abductions, which lead to failing to act in the time most critical to preventing torture or execution.⁹⁸ Human Rights Watch has also found strong evidence that military prosecutors classify disappearances

⁹² Human Rights Watch, *Neither Rights nor Security, Killings, Torture and Disappearances in Mexico's 'War on Drugs'*, United States (2011), p. 126, obtained via:

http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf

⁹³ Human Rights Watch, *Neither Rights nor Security, Killings, Torture and Disappearances in Mexico's 'War on Drugs'*, United States (2011), p. 6, obtained via:

http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf

⁹⁴ <http://www.amnesty.org/en/news/mexican-states-must-end-impunity-enforced-disappearances-2012-01-18>

⁹⁵ Human Rights Watch, *Neither Rights nor Security, Killings, Torture and Disappearances in Mexico's 'War on Drugs'*, United States (2011), p. 129, obtained via:

http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf

⁹⁶ Human Rights Watch, *Neither Rights nor Security, Killings, Torture and Disappearances in Mexico's 'War on Drugs'*, United States (2011), p. 130, obtained via:

http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf

⁹⁷ Human Rights Watch, *Neither Rights nor Security, Killings, Torture and Disappearances in Mexico's 'War on Drugs'*, United States (2011), p. 132, obtained via:

http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf

⁹⁸ Human Rights Watch, *Neither Rights nor Security, Killings, Torture and Disappearances in Mexico's 'War on Drugs'*, United States (2011), p. 125, obtained via:

http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf

as lesser crimes. The military has not sentenced a single officer for the crime of enforced disappearance during the Calderón administration.⁹⁹

Lastly, the Human Rights Watch Report mentions the immense increase of cases of enforced disappearances during the 'War on Drugs'. The rising incidences of disappearances have been reflected in the growing number of cases documented by human rights defenders and civil society groups. Human rights organizations claim they see an increased number of kidnappings since the Calderón administration started the counternarcotic operations.¹⁰⁰

The CMDPDH Report

The Mexican Commission for the Defense and Promotion of Human Rights (CMDPDH) has released the Report '*Human Rights in Mexico under the current 'War against Organized Crime'*'. The Report states that since 2006 more than 3.000 people have been enforcedly disappeared.¹⁰¹ The increase in the number of disappearances since the Calderón administration began has been worrying. Thirteen per cent of the complaints directed against the Ministry of Defense in 2010 were related to enforced disappearances.¹⁰²

The Report states that the increase of enforced disappearances in Mexico responds directly to the security strategy undertaken by Felipe Calderón. More than 45.000 members of the military are deployed in the streets exercising police functions that should be under civilian authority.¹⁰³ As a consequence of this use of the military cases of, among other crimes, enforced disappearances by the army, the Police and paramilitary groups have alarmingly increased. The Working Group on Enforced or Involuntary Disappearances of the United Nations uses the same argument: '*The deployment of thousands of military personnel to perform public safety tasks has encouraged the commission of crimes because the Armed Forces are not limited to act as supporting civil authorities and accept their orders, but to perform tasks that exclusively correspond to civil authorities.*'¹⁰⁴

According to the CMDPDH Report, four main groups are particularly vulnerable to enforced disappearances: people with some kind of political activism or social movements, people who live in

⁹⁹ Human Rights Watch, *Neither Rights nor Security, Killings, Torture and Disappearances in Mexico's 'War on Drugs'*, United States (2011), p. 135, obtained via:

http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf

¹⁰⁰ Human Rights Watch, *Neither Rights nor Security, Killings, Torture and Disappearances in Mexico's 'War on Drugs'*, United States (2011), p. 126-127, obtained via:

http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf

¹⁰¹ Mexican Commission for the Defense and Promotion of Human Rights (CMDPDH), '*Human Rights in Mexico under the current 'war against organized crime'*' (2012), p. 3

¹⁰² Mexican Commission for the Defense and Promotion of Human Rights (CMDPDH), '*Human Rights in Mexico under the current 'war against organized crime'*' (2012), p. 3

¹⁰³ Mexican Commission for the Defense and Promotion of Human Rights (CMDPDH), '*Human Rights in Mexico under the current 'war against organized crime'*' (2012), p. 1-2

¹⁰⁴ Mexican Commission for the Defense and Promotion of Human Rights (CMDPDH), '*Human Rights in Mexico under the current 'war against organized crime'*' (2012), p. 3

regions that have registered increased violence due to the fight between State forces and organized crime, human rights defenders and migrants.¹⁰⁵ But the victims of these disappearances can also be found in people who are no social or political activists, who are identified or stigmatized as members of criminal organizations by the State or were in the midst of military or police operations.¹⁰⁶

The lack of effective judicial remedies extends the vulnerability of people against the crime of enforced disappearances. The Report suggests that Mexico should develop more effective protocols for police action while investigating the facts and prosecution of the crime in order to allow beginning immediately the inquiries as soon as they have notice. The State should also allocate more resources and develop more specialized tools for the investigation of enforced disappearances, such as the creation of an independent and impartial body that will serve as a specialized body in charge of conducting the search for missing persons.

Crimes against humanity

The crime against humanity has developed overtime as a reaction to historical horrifying events like the Holocaust, deportations in former Yugoslavia and genocide in Rwanda. The crime against humanity was firstly developed at the London Peace Conference on 24 May 1915 and articulated in the Nuremberg Charter. Article 6 of the Charter for the International Military Tribunal stated:

‘Crimes against humanity: namely murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian or religious grounds in execution or in connection with, any other crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.’¹⁰⁷

Despite several attempts, no other definitions of crimes against humanity were developed until the International Criminal Tribunal for the former Yugoslavia came into existence in 1993.¹⁰⁸ The list of offences that involve an attack under the concept of a crime against humanity was exhaustively described under the Statutes of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds and other

¹⁰⁵ Mexican Commission for the Defense and Promotion of Human Rights (CMDPDH), ‘Human Rights in Mexico under the current ‘war against organized crime’ (2012), p. 5

¹⁰⁶ Mexican Commission for the Defense and Promotion of Human Rights (CMDPDH), ‘Human Rights in Mexico under the current ‘war against organized crime’ (2012), p. 4

¹⁰⁷ 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 279.

¹⁰⁸ Crimes against humanity are articulated under article 5 of the ICTY Statute

inhumane acts.¹⁰⁹ But the crime of enforced disappearance was not added to this list. This crime was firstly codified as crime against humanity in the Rome Statute.

The provision of enforced disappearances in the Rome Statute is considered to be the most troublesome one of the crimes against humanity articulated in the Rome Statute. In the Committee of the Whole at the Rome Conference, concerns were expressed that the unclear wording of the provision might be used in reference to liberation movements fighting for their freedom and to regain their territory. Some delegations at the conference argued that the provision should not be adopted in the Rome Statute; some other delegates argued they had difficulties with some parts of the provision. And Latin American countries insisted it be retained in view of their unfortunate experience.¹¹⁰ The Elements of Crimes provision on the act of enforced disappearance of persons has turned out to be the most extensive provision of the crimes against humanity.¹¹¹

Codifications of enforced disappearance as crime against humanity

The qualification of enforced disappearance as a crime against humanity leads to important legal consequences. No reservations or limitations are allowed when it comes to crimes against humanity. Therefore, States are entitled to establish universal jurisdiction in order to prosecute and punish suspected perpetrators of enforced disappearances.¹¹² The Rome Statute has not been the first codification of enforced disappearance as crime against humanity. Other legal instruments have articulated enforced disappearances as crime against humanity as well.

The connection between enforced disappearances and crimes against humanity was firstly articulated in the 1983 Resolution 666 of the General Assembly of the Organization of American States. Any act of enforced disappearance was considered to be a crime against humanity. In 1992, the United Nations General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance. The declaration described the phenomenon as ‘of the nature of a crime against humanity’.¹¹³ After that, the 1994 Inter-American Convention on Enforced Disappearance of Persons described enforced disappearances as crimes against humanity as well, now that it stated that ‘*the systematic practice of enforced disappearances of persons constitutes a crime against humanity*’.¹¹⁴

The Code of Crimes Against Peace and Security for Mankind of the International Law Commission was released in 1996 and defined crimes against humanity as: ‘*a crime against humanity*

¹⁰⁹ Crimes against humanity are mentioned in article 5 of the ICTY Statute and article 3 of the ICTR Statute

¹¹⁰ UN Doc. A/CONF.183/C.1/SR.3, paragraph 23.

¹¹¹ Elements of Crimes (2002), ICC-ASP/1/3 (Part II-B), 9 september 2002, article 7(1)(i)

¹¹² Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 162

¹¹³ William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, Oxford, Oxford University Press 2010 p. 180

¹¹⁴ <http://www.ohchr.org>

means any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or any organization or group'.¹¹⁵ The Code of Crimes also included enforced disappearances as a crime against humanity. In 2006, The International Convention on the Protection of All Persons Against Enforced Disappearances that was adopted. The Convention states: *'The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.'*

Enforced disappearances as crime against humanity under the Rome Statute

The facts and data documented in the human rights reports will now be tested to the requirements of the Rome Statute, in order to research whether these disappearances can be qualified as crime against humanity of enforced disappearance under the Statute of the International Criminal Court. Firstly, the requirements for crimes against humanity are tested. The contextual elements of enforced disappearances will be researched in the last part of this chapter. For the sake of clarity, criminal acts have been committed by drug cartels as well as by State personnel. In this research, only the acts committed by State personnel are researched. Therefore in order to determine whether crimes against humanity have been taken place in the country, only those crimes committed by State personnel are included.

Article 7 – Crimes against humanity
<p>1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:</p> <ul style="list-style-type: none"> (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

¹¹⁵ www.ohchr.org

2. For the purpose of paragraph 1:
- (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
 - (b) "Extermination" includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
 - (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
 - (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
 - (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
 - (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
 - (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
 - (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
 - (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.
3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

Chapeaux elements for crimes against humanity

Crimes against humanity are distinguished from other international crimes by the fact that they are committed *'as part of a widespread or systematic attack and the fact that they are directed against any civilian population'*.¹¹⁶ Article 7(1) and 7(2)(a) of the Rome Statute provide the overall requirements for crimes against humanity: there needs to be an 'attack' which is 'widespread or systematic' and directed against any 'civilian population', a link or 'nexus' between the acts of the accused is required and the attack and the perpetrator should have had 'knowledge' of the attack. In this paragraph, these five requirements will be explained and tested to the 'War on Drugs' in Mexico.

¹¹⁶ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 165

An attack

The first requirement for crimes against humanity is that an attack must have been committed. An attack is defined as '*a course of conduct involving the commission of acts of violence*'.¹¹⁷ According to case law, an attack is not limited to the use of armed force, but also encompasses any mistreatment of the civilian population.¹¹⁸ The attack may consist of any of the acts listed in article 7 of the Rome Statute. A perpetrator can be held liable for a crime against humanity when he has committed only one act, as long as he acted within the context of an overall attack.¹¹⁹ For example, a perpetrator can be prosecuted for the crime against humanity of one single murder, if this act has been part of a widespread attack on a civilian population. In that case, the single murder would fall inside the scope of crime against humanity.

Should the situation in Mexico be considered as an attack as referred to in the Rome Statute? There has been a course of conduct involving the commission of acts of violence in Mexico. During the 'War on Drugs', several acts of article 7 of the Rome Statute seem to have been committed: murder, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, enforced disappearance of persons and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.¹²⁰ So far, it can be concluded that an attack committed by State officials has been taken place in Mexico. However, it needs to be researched whether this attack may be considered 'widespread or systematic'.

Widespread or systematic

A single case of enforced disappearance committed outside the framework of a widespread or systematic attack is not a crime against humanity as it is understood in international criminal law and cannot be prosecuted under the Rome Statute.¹²¹ In the Tadic case, the International Criminal Court for the Former Yugoslavia argued that one act of enforced disappearance constitutes a crime against humanity if that crime has occurred within a greater 'widespread and systematic' action. Even an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or prosecution. The language of 'widespread and systematic' is copied from the definition given in the Statute of the International Criminal Tribunal for Rwanda. The terms 'widespread' and 'systematic' are not specifically defined in the Rome Statute. The two conditions are disjunctive, in that

¹¹⁷ Naletilic et al. (IT-98-34-T), Judgment, 31 March 2003, paragraph 233

¹¹⁸ Kunarac et al. (IT-96-23/1-A), Judgment, 12 June 2002, paragraph 86

¹¹⁹ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 171

¹²⁰ These acts are listed in article 7(1) of the Rome Statute

¹²¹ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 162

if a Chamber is satisfied that the attack is widespread it needs not also to consider whether it is systematic.¹²²

Widespread: The element of ‘widespread’ describes the quantitative criterion. Ad hoc tribunals consider the term ‘widespread’ as ‘*encompassing an attack carried out over a large geographical area or an attack in a small geographical area, but directed against a large number of civilians*’.¹²³ The requirement of ‘widespread’ is often referred to as a large-scale nature of the attack and the number of targeted persons.¹²⁴ In the Blaskic case, the ICTY stated that the condition of ‘widespread’ refers to the scale of the attack and the number of victims.¹²⁵ But an attack has also been defined widespread if it has taken place on a wide geographic territory. “Widespread” may include a massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.¹²⁶ There is no set number of victims that would make an attack ‘widespread’.

Systematic: ‘Systematic’ has been defined as the organized nature of the acts of violence and the improbability of their random occurrence. Furthermore, patterns of crimes, in the sense of the non-accidental repetition of similar criminal conduct on a regular basis, are a common expression of such systematic occurrence. This was described in the Bashir case. The Chamber stated that the term ‘systematic’ pertains to ‘*the organized nature of the acts of violence and to the improbability of their random occurrence*’ and was ‘systematic’ because ‘*it lasted for well over five years and the acts of violence of which it was composed followed to a considerable extent, a similar pattern*’.¹²⁷ There is no requirement that this policy must be adopted formally as the policy of a State. There must however be some kind of preconceived plan or policy.¹²⁸

There should have been patterns of crimes in Mexico, in order to fall under the scope of ‘systematic’. It is highly unlikely that this has been the case in Mexico. For several years, many killings have taken place as well as other crimes, but there is no evidence that these involve a particular pattern. The policy requirement will more extensively be researched in the next paragraph.

Could the attack be described as ‘widespread’? The attack should have taken place at a large geographical area or against a large amount of civilians. The criminal acts have been taken place in several regional states in Mexico. But international criminal tribunals have argued that in the light of

¹²² William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, Oxford, Oxford University Press 2010 p. 148

¹²³ Katanga et al. (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, paragraph 397-398

¹²⁴ Prosecutor v Blaskic paragraph 101

¹²⁵ 122 ILR 1 (ICTY) Trial Chamber I, 2000).

¹²⁶ ICTR, Prosecutor v. Akayesu, TC, paragraph 579-580

¹²⁷ Bashir (ICC-02/05-01/09), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, paragraph 81 and Katanga et al. ((ICC-01/04-01/07), Decision on the confirmation of the Charges, 30 September 2008, paragraph 394-397

¹²⁸ ICTR, Prosecutor v. Akayesu, TC, paragraph 580

the purpose behind the prosecution of crimes against humanity, the protection of individuals from violations of their basic human rights, the size of a territory concerned cannot be a decisive factor.¹²⁹ It would be 'widespread' if the attack has been a massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. During the 'War on Drugs', terrifying crimes have been committed against a large number of Mexicans. Moreover, crimes have also been committed on a large scale against migrants inside the country.¹³⁰ There is no set number of casualties that would result into a qualification of 'widespread'. Now that a large amount of persons have become victim of the 'War on Drugs', it is concluded that the drug war involves a widespread attack.

Policy Element

If the attack would have been 'widespread and systematic', the Rome Statute explicitly requires a State or organizational policy element. International customary law does not require such a policy element for crimes against humanity. The policy element is mentioned in article 7(2)(a) of the Rome Statute. The definition in the Rome Statute is not only limited to actions of public officials, but also involves acts of non-state actors. This element is necessary in order to distinguish ordinary large-scale crimes from widespread international crimes. It leads to the conclusion that widespread and systematic crimes can only be defined as crimes against humanity if they can be connected to a type of governmental or organized power.¹³¹ The Elements of Crime determine that a policy to commit an attack requires that the State or organization actively promotes or encourages such an attack against a civilian population.¹³² Furthermore, the Elements of Crime mention that in exceptional circumstances, the attack may be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. But the existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.

The Mexican government explicitly introduced the 'War on Drugs' in 2006. This policy aimed at defeating the drug cartels within the country. The plan was to reduce the drug-related violence in Mexico. But this resulted into more violence and casualties. The government did not bring this policy into force in order to enlarge the drug related violence. It cannot be concluded that the 'War on Drugs' introduced by the Calderon administration should be considered a policy as described in the Rome Statute.

Moreover, the CMDPDH Report and the Human Rights Watch Report have described the acts

¹²⁹ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 167-168

¹³⁰ Mexican Commission for the Defense and Promotion of Human Rights (CMDPDH), 'Human Rights in Mexico under the current 'war against organized crime' (2012), p. 3

¹³¹ Ambos, *Internationales Strafrecht*, p. 231

¹³² Elements of Crime, Introduction, paragraph 3

committed by the military and security personal. The amount of crimes did increase since the 'War on Drugs'. As to the attacks committed by State personnel, the military capacity increased largely during this period. The military was not trained to work on the civilian field. It is therefore more likely that the increase of the untrained military seems to be the reason for the large amount of acts on the side of the government, instead of a planned policy to attack the civilian population. This requirement for crimes against humanity does therefore not seem to be fulfilled.

The attack cannot be considered as a 'policy of the State' and therefore the chapeaux elements for crimes against humanity are not fulfilled in the Mexican situation. The other requirements of the crimes against humanity of enforced disappearances will be tested below, in the hypothetically situation that the 'policy' element would have been fulfilled.

Nexus requirement

In order to appoint the enforced disappearances as crimes against humanity, there must be a nexus between the acts perpetrated by the accused and the attack directed against the civilian population. Each offence is part of a consistent pattern of misbehavior and thus must have a link to the overall attack. The crime in question does not have to be the same kind of attack as the other acts committed within the attack. The necessary requirement is that the underlying act has not occurred completely without a link to the attack. The act could otherwise not be identified as a crime against humanity.¹³³ These specific acts with which the accused is charged need not be shown to be widespread or systematic. In the Bemba case, the Pre-Trial Chamber II argued that *'even a single act of murder by a perpetrator may constitute a crime against humanity as long as the legal requirements with regard to the contextual element of crimes against humanity, including the nexus element, are met'*.¹³⁴

The question that needs to be answered for this particular element is whether the enforced disappearances committed in Mexico should be considered as part of the overall attack in Mexico. Even though some elements for an attack are already not fulfilled, we assume that the attack would involve all acts committed by State officials in order to fight the drug cartels. The enforced disappearances seem to link to this overall attack: victims were arbitrarily abducted and detained, because it was often assumed that these victims were linked to the drug cartels. The nexus between the attack and the enforced disappearances is therefore present.

Directed against a civilian population

For crimes against humanity, the civilian population must be the primary target of the attack, not merely the individual. A 'civilian population' comprises every plurality of persons that are connected

¹³³ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 166-167

¹³⁴ Bemba (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-pierre Bemba Gombo, 15 juni 2009, paragraph 151

with each other by common characteristics, which make them the target of an attack.¹³⁵ This attack against the civilian population does not have to occur on discriminatory motives, neither is required that the whole population of a country or a region is targeted. The Trial Chamber of the International Criminal Court stated that *'there is no need to show that the entire population of a geographic entity was targeted by the attack, as long as it is not directed against a limited and randomly selected number of individuals'*.¹³⁶ The notion of 'civilian population' reminds of the historical nexus of crimes against humanity with armed conflicts.¹³⁷ It is further still subject to some speculation, which groups of persons fall under a civilian population against whom crimes against humanity must be directed, although the ICTY has determined that the concept should be interpreted broadly.¹³⁸ In a case outside an armed conflict, the ICTR also stated: *'A wide definition of civilian is applicable and, in the context where there was no armed conflict, includes all persons except those who have the duty to maintain public order and have the legitimate means to exercise force. Non-civilian would include, for example, member of the police and the Gendarmerie Nationale'*.¹³⁹

The 'War on Drugs' is taken place between several drug cartels and the government. Like the drug cartels, the government has caused many victims. It has been researched that these victims are mainly members of the drug cartels. Ten per cent of the victims caused by the 'War on Drugs' are innocent civilians.¹⁴⁰ But these victims are generally not the main targets of an attack. Even though many civilians have suffered due to the 'War on Drugs' strategy, the attack is directed against a limited number of individuals. Although the concept 'civilian population' should be interpreted broadly, it is highly unlikely that the aimed victims of the 'War on Drugs' would fall inside this definition.

Knowledge of the attack

Another requirement is the fact that the perpetrator must have had knowledge of the attack. This specific requirement can be found under article 7(1) Rome Statute. An accused that lacks such knowledge cannot be found guilty of crimes against humanity before the International Criminal Court. The view of the International Criminal Court on the issue of 'knowledge of the attack' is in line with the ad hoc tribunals. The Pre-Trial Chamber I stated in the Katanga Case on the issue: *'It may be noted that the ad hoc tribunals have understood the reference to knowledge of the attack to mean that the perpetrator knew that there was an attack on a civilian population, and that his or her acts were a part of that attack. Therefore, in the view of the Chamber, knowledge of the attack and the perpetrator's*

¹³⁵ http://werle.rewi.hu-berlin.de/04_Crimes%20against%20Humanity-Summary.pdf

¹³⁶ Bemba (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 juni 2009, paragraph 76 and 77

¹³⁷ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 173

¹³⁸ ICTY, Prosecutor v. Jelisić, TC, paragraph 54

¹³⁹ ICTR< prosecutor v. Kayishema, TC, paragraph 127

¹⁴⁰ www.laht.com

*awareness that his conduct was part of such attack may be inferred from circumstantial evidence, such as the accused's position in the military.*¹⁴¹ Case law has also determined how evidence for 'knowledge of the attack' will be inferred. This will be inferred from factors as the historical and political circumstances in which the acts of violence occurred, the functions of the accused when the crimes were committed, the responsibilities of the accused within the political or military hierarchy, the direct and indirect relationship between the political and military hierarchy, the scope and gravity of the acts perpetrated, the nature of the crimes committed and lastly, the degree to which these acts are common knowledge.¹⁴²

Usually, a crime against humanity is committed in the context of an attack that is well known, and an accused could not credibly deny knowing about the attack. The 'War on Drugs' has had a lot of attention in media in Mexico. Perpetrators of the acts should have known about this. It must have been common knowledge for perpetrators to know they were taking part in the struggle between drug cartels and the government. It is highly unlikely that perpetrators were unaware of this situation. It must therefore be concluded that State officials knew about the attack against drug cartels.

No armed conflict

At last, no connection between a crime against humanity and an armed conflict is required. Crimes against humanity may occur before, during or after an armed conflict, as well as independently from an armed conflict.¹⁴³ Before the Rome Statute entered into force, this nexus was required for crimes against humanity. The situation during the 'War on Drugs' does therefore not need to be qualified as an armed conflict, now that crimes against humanity under the Rome Statute do not require such a link.

Contextual elements for enforced disappearances

Even though some of the required chapeaux elements for crimes against humanity have not been fulfilled, in this paragraph the contextual elements for the crime of enforced disappearance of persons are tested. As mentioned before, there is no case law of the international criminal tribunals on the crime of enforced disappearance yet. Interpretation must therefore be based on the Elements of Crime and case law of international human rights bodies. The Elements of Crimes provision on the act of enforced disappearance of persons is the most extensive provision of the crimes against humanity.¹⁴⁴ The actus reus and mens rea elements of this provision are mentioned in this paragraph.

¹⁴¹ Katanga et al. (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, paragraph 401-402

¹⁴² William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, Oxford, Oxford University Press (2010), p. 156

¹⁴³ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 162

¹⁴⁴ Elements of Crimes (2002), ICC-ASP/1/3 (Part II-B), 9 september 2002, article 7(1)(i)

Elements of Crime

Crime against humanity of enforced disappearance of persons [1][2]

1. The perpetrator:
 - (a) Arrested, detained[3] [4] or abducted one or more persons; or
 - (b) Refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons.
2.
 - (a) Such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or
 - (b) Such refusal was preceded or accompanied by that deprivation of freedom.
3. The perpetrator was aware that:[5]
 - (a) Such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons;[6] or
 - (b) Such refusal was preceded or accompanied by that deprivation of freedom.
4. Such arrest, detention or abduction was carried out by, or with the authorization, support or acquiescence of, a State or a political organization.
5. Such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization.
6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time.
7. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
8. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

Footnotes:

[1] Given the complex nature of this crime, it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose.

[2] This crime falls under the jurisdiction of the Court only if the attack referred to in elements 7 and 8 occurs after the entry into force of the Statute.

[3] The word "detained" would include a perpetrator who maintained an existing detention.

[4] It is understood that under certain circumstances an arrest or detention may have been lawful.

[5] This element, inserted because of the complexity of this crime, is without prejudice to the General Introduction to the Elements of Crimes.

[6] It is understood that, in the case of a perpetrator who maintained an existing detention, this element would be satisfied if the perpetrator was aware that such a refusal had already taken place.

Actus reus elements of enforced disappearances

The crime of enforced disappearance consists out of two actions: the perpetrator has been involved in the deprivation of liberty or in the refusal to acknowledge the detention. The perpetrator may also be

guilty of both acts. Moreover, the Rome Statute requires that the perpetrator acted on behalf of a State or a political organization.

Members of the State or Political Organization

Firstly, the question should be answered who must have committed the acts in order to fulfill the criteria of crimes against humanity. Under the Rome Statute, the perpetrator has to have acted on behalf of, or with the authorization, support or acquiescence of a State or a political organization.¹⁴⁵ The persons committing the acts may be police officers, prison guards, other member of government or of the political organization as well as private individuals acting with the help or support of a State or political organization.¹⁴⁶

In the case of the 'War on Drugs', the perpetrators who kidnapped the victims or who withhold information about the victims were mainly police officers or the military. These State officials fall inside the scope of the perpetrators under the Rome Statute, because they can be considered members of the State organization.

Deprivation of liberty

Secondly, the perpetrator must have arrested, abducted or detained a person in order to deprive this victim of his liberty according to the Rome Statute. However, in international case law it has long been recognized that the deprivation of liberty, which leads to enforced disappearance, can take place in any form. The three examples of deprivation of liberty in the Rome Statute should therefore be interpreted in a wide sense.¹⁴⁷

The data provided by human rights organizations claim that the victims of enforced disappearances were arrested, abducted or detained by State officials. Human Rights Watch has argued that witnesses claim that State officials abducted and detained the victims. It can therefore be assumed that State officials have deprived the victims of their liberty.

Refusal to give information

After deprivation of liberty, the second part of the crime of enforced disappearance is the refusal to give information on the fate and whereabouts of the victim. This is an important factor leading to the victim's removal of the protection of the law.¹⁴⁸

Relatives have claimed that the authorities do not provide any type of information about the disappeared persons. In the immediate aftermath of the detention, relatives routinely asked for

¹⁴⁵ Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 7(2)(i)

¹⁴⁶ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 180

¹⁴⁷ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 178

¹⁴⁸ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 178

information from security forces and justice officials, but those often denied having the victim in custody.¹⁴⁹ The Human Rights Watch Report has expressly stated that State officials never provide evidence to the relatives of victims. Instead, they direct families to police stations and military bases to see if the victim is in custody.¹⁵⁰ All three *actus reus* elements of the crime of enforced disappearances are fulfilled in the case of the 'War on Drugs' in Mexico.

Mens Rea elements of enforced disappearances

A suspected perpetrator of enforced disappearance is accountable if he knew that his act was part of a larger attack and acted with intention regarding the enforced disappearance.¹⁵¹ The acts must have been committed with intent and knowledge. Besides article 7 of the Rome Statute, the mental element is explicitly articulated in article 30 of the Statute. The *mens rea* element for article 7 requires knowledge and intent for the aspects of the criminal act: the perpetrator must have had knowledge that his acts are part of a widespread or systematic attack. The *mens rea* aspect also requires the intent of the predecessor to remove a person from his right of the protection of the law for a certain period of time.¹⁵² And the perpetrator must have been aware of the essential circumstances of the crime, the deprivation of freedom and the refusal of providing information.

Part of a widespread or systematic attack

The perpetrator must have known that the enforced disappearances were part of an overall attack. According to the International Criminal Tribunal for the former Yugoslavia: *'While knowledge is required, it is examined on an objective level and factually can be implied from the circumstances'*.¹⁵³ International tribunals have determined that intent is not a requirement for this question.¹⁵⁴ The ICTY determined: The motives of the accused for taking part in the attack are irrelevant and a crime against humanity may be committed for purely personal reasons.¹⁵⁵

The 'War on Drugs' has been a widely described phenomenon in Mexican media and a well-known situation for the Mexican population. It would therefore be highly unlikely that the perpetrators who committed the acts of enforced disappearance were unaware of the fact that their acts were part of a broader goal to fight the drug cartels.

¹⁴⁹ Human Rights Watch, *Neither Rights nor Security, Killings, Torture and Disappearances in Mexico's 'War on Drugs'*, United States (2011), p. 125, obtained via:

http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf

¹⁵⁰ Human Rights Watch, *Neither Rights nor Security, Killings, Torture and Disappearances in Mexico's 'War on Drugs'*, United States (2011), p. 125, obtained via:

http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf

¹⁵¹ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 180

¹⁵² Elements of Crimes (2002), ICC-ASP/1/3 (Part II-B), 9 september 2002, article 7

¹⁵³ ICTY, Prosecutor v. Tadic, TC, paragraph 657

¹⁵⁴ ICTY, Prosecutor v. Kunarac, AC, paragraph 103

¹⁵⁵ ICTY, Prosecutor v. Kunarac, AC, paragraph 103

Deprivation of liberty and the refusal to provide information

The Rome Statute requires that the perpetrator must have had knowledge and intent to deprive the victim of his liberty and to refuse to provide information on his situation. The perpetrator must be aware that the arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person. And the perpetrator has to have been aware that such refusal was preceded or accompanied by the deprivation of freedom and has to have had intention concerning his conduct.¹⁵⁶

Knowledge and intent regarding these facts seem rather difficult to prove. According to the Elements of Crime, the intent can be inferred from relevant facts and circumstances.¹⁵⁷ The arrests, detentions or abductions must have led to the deprivation of liberty for the victims. It is argued that State officials did not allow relatives or even medical care to the victims. These facts lead to the conclusion that State officials must have known that the abduction led to deprivation of liberty.

In relation to the omission of not providing information on the fate of the victim, it seems like the perpetrators knew about the situation they were in. They immediately stated that the victim would be a 'leventones' without starting an investigation. Moreover, State officials would have denied the abductions and detentions of victims or would have referred relatives to police stations or other institutions, arguing they knew nothing about the disappearance. By providing incorrect information, State officials most have known they provided the wrong information about the fate and whereabouts of the victims.

Removal of the victim from the protection of the law for a prolonged period of time

International human rights bodies and conventions have determined that the removal from the protection of the law is not seen as a necessary subjective element of the crime, but rather as a natural consequence for which intention is not required.¹⁵⁸

If State officials abduct and detain a victim without providing information on the whereabouts of the victim, it can be argued that State officials remove the victim from the protection of the law by performing such acts. The purpose of these acts seems indeed to act outside the normal legal structures of the State.¹⁵⁹ Even though no case law is developed on this element yet, it does not seem to be a high threshold in order to establish liability.¹⁶⁰

¹⁵⁶ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 182

¹⁵⁷ Elements of Crimes (2002), ICC-ASP/1/3 (Part II-B), 9 september 2002, General Introduction, p. 112

¹⁵⁸ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 183

¹⁵⁹ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 184

¹⁶⁰ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 186

The Rome Statute also requires that the victim is removed for a 'prolonged period of time' from the protection of the law and this element is also part of the mens rea elements. The Rome Statute is the first international instrument to introduce this element. Since no case law exists on the fact what would be a correct time factor for the 'prolonged period' requirement, the recent international consent on this issue should be a guiding line. There is international consent on the fact that a person deprived of his liberty must have contact with the outside world without delay and in exceptional circumstances denying such access to the outside world for more than 24 to 48 hours would violate the rights of the person detained.¹⁶¹

In the Mexican situation, this international standard has often been violated. As described by the human rights reports, none of the relatives obtained information about the location or whereabouts of the victim. Moreover, the relatives were often referred to police stations or other institutions, instead of obtaining access to the victims.

Conclusion

Several reports have been released on the human rights situation in Mexico during the last couple of years. These reports have also provided information on cases of enforced disappearances in the country. Enforced disappearances need to fall inside the scope of crimes against humanity, in order to be able to prosecute these crimes before the International Criminal Court. It seems highly unlikely that the requirement of a State policy would be fulfilled. Moreover, the crimes are mainly directed against followers of the drug cartels, and not against a civilian population as required in the Rome Statute. Two chapeaux elements for crimes against humanity are therefore not fulfilled. In contrast, all contextual elements for the crime of enforced disappearance seem to be fulfilled in relation to the 'War on Drugs' in Mexico.

¹⁶¹ Lisa Ott, *Enforced Disappearance in International Law*, Cambridge: Intersentia (2011), p. 187

Chapter 4

Mexico and the International Criminal Court

The International Criminal Court needs to have jurisdiction for prosecuting acts that are criminalized in the Rome Statute. When it comes to jurisdiction, complementarity lies at the heart of the functioning of this international tribunal. Mexico is a State Party to the International Criminal Court since 2005. This chapter researches whether the International Criminal Court would have jurisdiction to prosecute the Mexican cases of enforced disappearances. The chapter firstly looks into the accession of Mexico to the Rome Statute. After that, enforced disappearances as a crime under Mexico's domestic criminal legislation is researched. In the last part of the chapter, complementarity issues that may rise for the International Criminal Court when prosecuting the cases of enforced disappearances are discussed.

Mexico's political difficulties in relation to the Rome Statute

A state needs to ensure compatibility with its own domestic legislation before it can accede to the Rome Statute. According to Socorro Flores Liera, a Mexican legal expert, it has been a very challenging task for Mexico to ensure this compatibility.¹⁶² Mexico faced many problems due to the large amount of details in its Constitution that prevent ratification of treaties when those are inconsistent with its own provisions.¹⁶³ For this reason, the Latin American country had to abstain at the adoption of the Statute at the Rome Conference. Besides constitutional issues, Mexico also dealt with two political difficulties before it became a State Party to the International Criminal Court. Firstly, Mexican delegates mentioned the role of the UN Security Council in relation to the International Criminal Court. According to these delegates, the UN Security Council could be able to undermine the actions and independent position of the International Criminal Court in a given situation.¹⁶⁴ Secondly, Mexico objected to the exclusion of nuclear weapons from the list of weapons in the Rome Statute. In the Statute, the use of nuclear weapons is seen as a war crime during an armed conflict.¹⁶⁵

¹⁶² Roy S. Lee (ed), *States' Responses to Issues Arising from the ICC Statute*, Ardsley: Transnational Publishers, Inc. (2005), p. 275

¹⁶³ Roy S. Lee (ed), *States' Responses to Issues Arising from the ICC Statute*, Ardsley: Transnational Publishers, Inc. (2005), p. 275

¹⁶⁴ Roy S. Lee (ed), *States' Responses to Issues Arising from the ICC Statute*, Ardsley: Transnational Publishers, Inc. (2005), p. 276

¹⁶⁵ Roy S. Lee (ed), *States' Responses to Issues Arising from the ICC Statute*, Ardsley: Transnational Publishers, Inc. (2005), p. 276

Mexico's constitutional contradictions with the Rome Statute

As mentioned above, Mexico faced several constitutional problems that retained the country from acceding to the Rome Statute. In this respect, Mexico had to overcome five difficulties. Socorro Flores Liera has distinguished these and has provided arguments to contradict some of these problems.¹⁶⁶

Firstly, Article 23 of the Mexican Constitution contradicted to Article 20 of the Rome Statute. Article 20 of the Rome Statute deals with the principle of *ne bis in idem* and permits the International Criminal Court to prosecute a person who has already been tried by another court, when the proceedings in the other court were inconsistent with the intent to bring an accused to justice. This possibility for a second trial could not be united with the principle of *ne bis in idem* of its domestic Constitution. Article 23 of the Mexican Constitution prevents Mexico from surrendering any person who has been tried by a national tribunal and whose acquittal is considered *res judicata*.¹⁶⁷

A second difficulty rose in relation to the surrendering of persons. The Mexican Constitution does not permit any surrender of persons to an international tribunal. The Constitution allows the extradition of persons to other states, but does not particularly mention international courts.¹⁶⁸ Although this lack of reference may not be a problem in itself, opponents of extradition to the International Criminal Court did use it as an argument.¹⁶⁹

The Rome Statute holds the possibility to impose a term of life imprisonment on a convicted person when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.¹⁷⁰ This possibility contradicted with Article 22 of the Mexican Constitution that prohibits penalties of a 'transcendental' nature. Although this article does not particularly refer to the conviction of life imprisonment, the Mexican Supreme Court of Justice has determined that life imprisonment is a penalty prohibited by the Constitution.¹⁷¹ But two arguments could be invoked against this argument. Firstly, Article 110 of the Rome Statute may solve this issue, which obliges the International Criminal Court to review a penalty of life imprisonment and to decide on its reduction based on certain factors. Another argument could be that domestic criminal law in Mexico allows a sentence of imprisonment for up to sixty years.¹⁷²

¹⁶⁶ Roy S. Lee (ed), *States' Responses to Issues Arising from the ICC Statute*, Ardsley: Transnational Publishers, Inc. (2005), p. 276 - 279

¹⁶⁷ Roy S. Lee (ed), *States' Responses to Issues Arising from the ICC Statute*, Ardsley: Transnational Publishers, Inc. (2005), p. 276

¹⁶⁸ This is articulated in article 119 of the Mexican Constitution.

¹⁶⁹ Roy S. Lee (ed), *States' Responses to Issues Arising from the ICC Statute*, Ardsley: Transnational Publishers, Inc. (2005), p. 276

¹⁷⁰ Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 77

¹⁷¹ Roy S. Lee (ed), *States' Responses to Issues Arising from the ICC Statute*, Ardsley: Transnational Publishers, Inc. (2005), p. 277

¹⁷² Roy S. Lee (ed), *States' Responses to Issues Arising from the ICC Statute*, Ardsley: Transnational Publishers, Inc. (2005), p. 279-280

A fourth contradiction between the Mexican Constitution and the Rome Statute was found in the right of the accused to be provided with all information that is related to the criminal case. Article 72 of the Rome Statute allows the holding of a hearing *ex parte* to decide on the disclosure of information that involve and may harm the national security interest of a state. The Mexican Constitution grants the right to the accused to have an unlimited access to all information and data that may be necessary in order to prepare the case for the defense. Article 72 of the Rome Statute does not seem to be compatible with this principle. But this contradiction was not an important obstacle due to the fact that Article 72 of the Rome Statute only deals with hearings *ex parte*. Such hearings are not an official part of the trial, but are a separate action aimed at deciding on the presentation of certain evidence at trial.¹⁷³

A last difficulty was the right of immunity of high placed public officials. Article 27(2) Rome Statute states that special procedural rules or immunities, which may be attached to the official capacity of a person, shall not counteract the International Criminal Court from exercising its jurisdiction over such a person.¹⁷⁴ Article 110 of the Mexican Constitution confers immunity on certain public officers. A prosecution can be removed only when the Mexican Congress withdraws this immunity. This last contradiction was not too much of a stumbling block either. Taking into account the gravity of the crimes, the competence of the International Criminal Court and the complementarity regime on which it is based, a withdrawal of immunity and prosecution at the national level may resolve the issue. Immunity for high placed public officers under the Mexican constitution is conferred for the sake of the independent exercise for their functions, but never for it to be used to shield impunity.¹⁷⁵

The domestic Constitutional amendment

The Mexican government took actions to overcome the Constitutional problems in order to become a State Party to the Rome Statute. The Mexican Senate adopted an amendment on 14 December 2002, which enabled Mexico to recognize the jurisdiction of the International Criminal Court. This recognition would take place on a case-by-case basis and would need the approval of the Senate in every single case.¹⁷⁶ By adopting the amendment, Mexico gave recognition to the tribunals established by treaties that have been ratified by Mexico, the jurisdiction of which has been expressly accepted,

¹⁷³ Roy S. Lee (ed), *States' Responses to Issues Arising from the ICC Statute*, Ardsley: Transnational Publishers, Inc. (2005), p. 277

¹⁷⁴ Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 27(2)

¹⁷⁵ Roy S. Lee (ed), *States' Responses to Issues Arising from the ICC Statute*, Ardsley: Transnational Publishers, Inc. (2005), p. 277

¹⁷⁶ <http://www.iccnw.org>

and to enable domestic authorities to comply with requests and verdicts of international tribunals.¹⁷⁷ Ninety-four votes in favor and ten against the amendment resulted in the adoption of the amendment in the Mexican Senate. During the voting procedure, fourteen Senators left the room in protest against the restrictive language that was adopted in the text. The ten Senators that voted against the amendment made clear that they would always doubt the existence International Criminal Court, no matter what the language of this specific amendment would have resulted in.¹⁷⁸ After the adoption of this amendment, no insurmountable constitutional problems remained and Mexico was able to accede to the International Criminal Court. Mexico signed the Rome Statute on 7 September 2000 and ratified it in 2005. By ratifying the Rome Statute, Mexico became the hundredth State Party to the International Criminal Court.

Mexico's possibilities to prosecute enforced disappearances

By ratifying the Rome Statute, Mexico recognizes the crimes in the Rome Statute as international crimes. But this does not mean that the crimes are directly criminalized in the Mexican domestic legislation. On the contrary, until today crimes against humanity are not criminalized in the Mexican legal order. Despite the progress that the ratification of the Rome Statute suggested after implementation of the domestic amendment, inclusion of crimes against humanity incorporated in its domestic criminal legislation still has to be achieved in Mexico.¹⁷⁹

In the Mexican system, each regional state has its own criminal jurisdiction. Mexico consists out of thirty-two regional states. This means that all thirty-two states have their own rules and legislation when it comes to criminal offenses within their own states.¹⁸⁰ The crime of enforced disappearance is interpreted in different forms in the different states of Mexico. Only eight of these regional states have criminalized the act of enforced disappearance. But those eight states use different wordings to define the crime. In the other twenty-four states enforced disappearances are not considered to be a crime. The crime is recognized in the Federal criminal code though, which defines the crime as the following:

¹⁷⁷ Roy S. Lee (ed), *States' Responses to Issues Arising from the ICC Statute*, Ardsley: Transnational Publishers, Inc. (2005), p. 278

¹⁷⁸ Roy S. Lee (ed), *States' Responses to Issues Arising from the ICC Statute*, Ardsley: Transnational Publishers, Inc. (2005), p. 280

¹⁷⁹ Ramiro Garcia Falconi, *The Codification of Crimes against Humanity in the Domestic Legislation of Latin American States*, *International Criminal Law Review* 10 (2010) 453-459

¹⁸⁰ www.amnesty.org

“The public servant who, regardless of whether he has participated in the legal or illegal detention of an individual or various individuals – brings about their secret detention or deliberately conceals information about it.”¹⁸¹

This definition leaves out numerous cases of enforced disappearances. For example, acts committed by private individuals or organized groups are not included in this definition. According to the United Nations Working Group on Enforced and Involuntary Disappearances, this definition fails to include enforced disappearances that are committed by organized groups or private individuals that have been acting on behalf of – direct or indirect – the state.¹⁸² This definition leads to the result that the Mexican government is not able to investigate or prosecute these types of cases.

In 2012, several human rights bodies released their concerns about the enforced disappearance cases in Mexico. On 15 March 2012, a group of independent human rights activists called on the Mexican government to develop effective legislation in order to combat impunity in cases of enforced disappearances.¹⁸³ Human rights organizations have expressed their concerns about enforced disappearances in the country. According to Amnesty International, the country does not prosecute for these crimes. The organization has stated that Mexico should do everything within its power to end impunity for enforced disappearances.¹⁸⁴ The organization argues that non-governmental organizations and victims have found many obstacles when they tried to get their cases of enforced disappearances investigated effectively or get clarified the role played by state agents.¹⁸⁵ More recently, Amnesty International called on Mexico to investigate specific cases of three farmers that were taken away by armed men, believed to be members of the national security forces.¹⁸⁶ Human Rights Watch states that Mexico’s laws fail to adequately criminalize these crimes, because the narrow definitions undermine efforts to prevent investigations and prosecutions of the crime.¹⁸⁷

The fact that Mexico has not yet implemented the crimes against humanity of the Rome Statute in its domestic criminal legislation may also effect the question of which entity has competence to prosecute these crimes. The Mexican Federal criminal code lacks to include all possible

¹⁸¹ Human Rights Watch, *Neither Rights nor Security, Killings, Torture and Disappearances in Mexico’s ‘War on Drugs’*, United States (2011), p 138, obtained via:

http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf

¹⁸² Human Rights Watch, *Neither Rights nor Security, Killings, Torture and Disappearances in Mexico’s ‘War on Drugs’*, United States (2011), p 138, obtained via:

http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf, p. 138

¹⁸³ <http://www.un.org/apps/news/story.asp?NewsID=41545&Cr=disappearances&Cr1=>

¹⁸⁴ <http://www.amnesty.org>

¹⁸⁵ <http://www.amnesty.org>

¹⁸⁶ <http://www.amnesty.org>

¹⁸⁷ Human Rights Watch, *Neither Rights nor Security, Killings, Torture and Disappearances in Mexico’s ‘War on Drugs’*, United States (2011), p 138, obtained via:

http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf

cases of enforced disappearances and the Mexican government is considered to do not press charges for this type of crime. Would this lead to the outcome that the International Criminal Court is the competent Court to prosecute these crimes?

The principle of complementarity at the International Criminal Court

In contrast to the rules for international criminal tribunals like the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda, the International Criminal Court does not automatically have jurisdiction for acts that are criminalized in the Rome Statute. The International Criminal Court is complementary to domestic courts and fills in the gaps when domestic courts are incompetent to prosecute. In this sense the International Criminal Court differs from the ICTY and the ICTR, which both hold a primacy position towards domestic courts.¹⁸⁸ The principle of complementarity lies at the heart of the functioning of the International Criminal Court.¹⁸⁹ It is laid down in the Preamble and in Article 1 of the Rome Statute and further defined in the form of admissibility requirements set forth in Articles 17 to 20. The principle of complementarity is the parameter, which defines the relationship between State Parties and the International Criminal Court.¹⁹⁰ The principle of complementarity is based on respect for the primary jurisdiction of State Parties and it is also based on considerations of efficiency and effectiveness, since State Parties will generally have the best access to evidence and witnesses and they will have the best resources to carry out proceedings.¹⁹¹

Article 17 of the Rome Statute is the cornerstone of the complementarity doctrine of the International Criminal Court. The provision states that the crime should be investigated and prosecuted by the State Party that has jurisdiction over it, unless the State Party is *unable* or *unwilling* to do so.¹⁹² Article 17 of the Rome Statute does not extensively answer the question under what circumstances there is a case of inability or unwillingness. In order to provide some guidelines, international law scholars released the 'Informal Expert Paper: The Principle of Complementarity in Practice' in 2003.

The Informal Expert Paper provides some indications of the content of inability and unwillingness. The Report mentions three scenarios that may fall under Article 17 (1)(a-c): Inactions, unwillingness and inability. Inaction would be the case if no state has initiated any investigation. If this

¹⁸⁸ Rules 9, 10 and 11 of the ICTY and ICTY Rules of Evidence and Procedure

¹⁸⁹ Alexander Zahar and Goran Sluiter, *International Criminal Law: a Critical Introduction*, London: Oxford University Press (2008), p. 455

¹⁹⁰ Jann K. Kleffer and Gerben Kor, *Complementarity Views on Complementarity*, The Hague: TMC Asser Press (2006), P. V

¹⁹¹ ICC Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, ICC-01/07-1008-AnxA, 31 (30 March 2009), p. 3

¹⁹² Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 17

is the situation, none of the alternatives of Article 17(1)(a-c) are satisfied and this leads to the outcome that the International Criminal Court is simply admissible under the clear terms of the Rome Statute.¹⁹³ If the State Party has started or completed its investigations in a particular case, the provision of Article 17 of the Rome Statute comes into play. The International Criminal Court is inadmissible to start prosecutions in this situation, unless the State Party is considered to be unable or unwilling to carry out genuine proceedings.¹⁹⁴

Unwillingness of the State Party

According to the Informal Expert Paper, it may be technically difficult and politically sensitive to prove a situation of unwillingness. It may be possible that a regime or government employs sophisticated tactics to cover up its own involvement in crimes.¹⁹⁵ The Informal Expert Paper mentions the issue of intra-state divergences in willingness.¹⁹⁶ For example, the executive power may be willing to prosecute, but the judiciary may be not. The unwillingness should also be related to the process, not to the outcome of these proceedings. Article 17(2) of the Rome Statute provides some factors that the Pre-Trial Chamber will take into account when determining whether a case is admissible to prosecute:

- The purpose of shielding a person from criminal responsibility;
- Lack of independence and impartiality, inconsistent with intent to bring to a person to justice;
- And unjustified delay inconsistent with intent to bring a person to justice.¹⁹⁷

According to the Informal Expert Paper, whether any of these factors are involved, may be inferred from the following instructions:

- Direct or indirect proof of political interference or deliberate obstruction and delay;
- General institutional deficiencies (political subordination of investigative, prosecutorial or judicial branch);
- Procedural irregularities indicating a lack of willingness to genuinely investigate or prosecute;
- Or a combination of these factors.

¹⁹³ ICC Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, ICC-01/07-1008-AnxA, 31 (30 March 2009), p. 7

¹⁹⁴ ICC Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, ICC-01/07-1008-AnxA, 31 (30 March 2009), p. 8

¹⁹⁵ ICC Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, ICC-01/07-1008-AnxA, 31 (30 March 2009), p. 14

¹⁹⁶ ICC Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, ICC-01/07-1008-AnxA, 31 (30 March 2009), p. 14

¹⁹⁷ Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 17(2)

Inability of the State Party

According to the Informal Expert Paper, the ‘inability’ test seems to be less difficult to prove than the ‘unwillingness’ test.¹⁹⁸ The reason is that for this test the necessary evidence is more easily available, there is no need for hidden motives, and the authorities of the regimes are not being accused of deception.¹⁹⁹ The standard for showing inability should be a stringent one, because the International Criminal Court is not a human rights monitoring organ and its role is not to ensure perfect procedures and compliance with all international standards. When it comes to the complementarity question, the focus of the Pre-Trial Chamber should be on the more basic question of whether the State Party is unable to genuinely carry out a proceeding.²⁰⁰ Article 17(3) of the Rome Statute provides several criteria for determining whether a State Party is unable to prosecute:

“In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”²⁰¹

Article 17(3) of the Rome Statute is a two-pronged inquiry, with the second prong dependent on the occurrence of the first prong. According to the provision, a state is unable to prosecute the accused when there is an inability to obtain the accused, an inability to acquire necessary evidence and testimony, or an inability to otherwise carry out proceedings. Each of these three forms of inability must stem from either the total or substantial collapse of the nation’s judicial system, or the unavailability of the national judicial system.²⁰² The Informal Expert Paper provides facts and evidence that may be relevant for determining whether there is a total or substantial collapse or unavailability of the national judicial system:

- Lack of necessary personnel, judges, investigators, prosecutor;
- Lack of judicial infrastructure;
- Lack of substantive or procedural penal legislation rendering system ‘unavailable’;
- Lack of access rendering ‘unavailable’;

¹⁹⁸ ICC Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, ICC-01/07-1008-AnxA, 31 (30 March 2009), p. 15

¹⁹⁹ ICC Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, ICC-01/07-1008-AnxA, 31 (30 March 2009), p. 15

²⁰⁰ ICC Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, ICC-01/07-1008-AnxA, 31 (30 March 2009), p. 15

²⁰¹ Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 17(3)

²⁰² Spencer Thomas, *A Complementarity Conundrum?: International Criminal Enforcement in the Mexican Drug War*, *Vanderbilt Journal of transnational Law*, 599, 2012, p. 619

- Obstruction by uncontrolled elements rendering system unavailable;
- Amnesties, immunities rendering system ‘unavailable’.²⁰³

Jurisdiction for the enforced disappearances at the International Criminal Court

On the basis of these aforementioned criteria, it can now be tested whether the International Criminal Court would have jurisdiction to prosecute Mexico’s enforced disappearances. Human rights organizations have argued that Mexican authorities do not prosecute cases of enforced disappearances or do not effectively prosecute these crimes.²⁰⁴ If the Mexican government does not prosecute at all, it would be a situation of ‘in-action’. In this particular situation, the provision of Article 17 does not come into play and the International Criminal Court would be admissible to prosecute for these crimes. If the Mexican government does prosecute, but if this would be considered ineffectively, Article 17 of the Rome Statute would come into play. The questions of unwillingness and inability would then have to be answered.

No proof of unwillingness

In the case of the ‘War on Drugs’ in Mexico, there are no facts and evidence available to claim that the Mexican authorities are unwilling to prosecute, as defined in Article 17(2) of the Rome Statute. There has been no unjustified delay and it would be speculative to argue that the authorities are shielding high placed personnel from criminal responsibility or that there is a lack of impartiality and independence. To claim unwillingness, one should have obtained strong evidence to prove that these factors exist. This is particularly needed due to the fact that it is politically speaking very sensitive to make such statements. During this research, certain suspicions have not been aroused.

Inability due to non-implementation of crimes in domestic legal order

It needs to be researched whether Mexico would be unable to prosecute under the ‘substantial collapse of the national judicial system’ or the ‘unavailability of the national judicial system’ prong of article 17(3) of the Rome Statute in order to determine whether the country is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. The prime example of a substantial collapse of the national judicial system would be when other entities are in control of the entire Mexican legal system. There may be some aspects in the Mexican daily life that presume this. Corruption would be the main aspect. Corruption remains an immense problem for

²⁰³ ICC Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, ICC-01/07-1008-AnxA, 31 (30 March 2009), p. 15

²⁰⁴ This is described in the paragraph ‘Prosecuting for crimes of enforced disappearances in Mexico’.

the Mexican society.²⁰⁵ This could lead to trials where witnesses refuse to testify out of fear or it could lead to situations where witnesses are bought off or killed. This may even lead to trials where judges and prosecutors are paid off or threatened.²⁰⁶ But despite these valid concerns for a fair trial in Mexico, the notion of a substantial collapse of Mexico's national judicial system needs to be dismissed.²⁰⁷ Drug cartels do not control the entire legal system in Mexico. A State Party that has lost control of one of its regions but maintains the controller of the judicial system in the rest of the country does not have a substantially collapsed judiciary system under article 17(3) of the Rome Statute.²⁰⁸

Would Mexico be unable under the 'unavailability of the national judicial system' prong? As mentioned above, Mexico has not implemented crimes against humanity in its domestic criminal legislation. In the case of enforced disappearances, the Mexican Federal criminal code has criminalized the crime, but its definition is considered to leave out numerous cases of enforced disappearances. At the local level, regional states in Mexico provide different definitions or have not criminalized the crime of enforced disappearance at all. The Paper has provided several factors that can contribute to this prong: rendering the system unavailable, lack of substantive or procedural penal legislation or obstruction by uncontrolled elements.²⁰⁹ According to this Paper, the lack of judicial infrastructure is a factor that determines whether there is a case of unavailability of the national judicial system. It falls inside the scope of 'unable to carry out proceedings' of article 17(3) of the Rome Statute. If a State Party has not implemented laws conforming to international standards of due process, the International Criminal Court may render that State Party unable to prosecute.²¹⁰

Some scholars have argued that due to the comparatively strong try crimes that Mexico would charge in this situation – probably murder and some other provisions – Mexico is not unable to prosecute a suspect under article 17(1)(a) and article 17(3) of the Rome Statute, despite its failure to domestically implement crimes against humanity.²¹¹ However, if a State Party has not implemented crimes of the Rome Statute in its own domestic criminal code, it acts contrary to the duty of State

²⁰⁵ For example: Stephen D. Morris, *Political Corruption in Mexico: The Impact of Democratization*, Boulder, Lynne Rienner Publishers (2009), obtained via: <https://www.rienner.com/uploads/4a0b19b1192c4.pdf>

²⁰⁶ Spencer Thomas, *A Complementarity Conundrum?: International Criminal Enforcement in the Mexican Drug War*, *Vanderbilt Journal of transnational Law*, 599, 2012, p. 620-621

²⁰⁷ Spencer Thomas, *A Complementarity Conundrum?: International Criminal Enforcement in the Mexican Drug War*, *Vanderbilt Journal of transnational Law*, 599, 2012, p. 620

²⁰⁸ Jakob Pichon, *The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb Before the International Criminal Court*, 8 *International Criminal Law Review*, 185, 196 (2008)

²⁰⁹ ICC Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, ICC-01/07-1008-AnxA, 31 (30 March 2009), p. 15

²¹⁰ Spencer Thomas, *A Complementarity Conundrum?: International Criminal Enforcement in the Mexican Drug War*, *Vanderbilt Journal of transnational Law*, 599, 2012, p. 624

²¹¹ Spencer Thomas, *A Complementarity Conundrum?: International Criminal Enforcement in the Mexican Drug War*, *Vanderbilt Journal of transnational Law*, 599, 2012, p. 637

Parties and this may undermine the International Criminal Court's purpose of punishing international atrocity crimes as such.²¹² The Preamble of the Rome Statute imposes the obligation on State Parties to implement the crimes within its own order: it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.²¹³ If a State Party prosecutes such international crimes as ordinary crimes under its own criminal code, the Pre-Trial Chamber could hold the case admissible before the International Criminal Court, because Mexico would not charge the suspect with an international crime as described in the Rome Statute.²¹⁴ In this situation, the 'unavailability of the national judicial system' prong of article 17(3) of the Rome Statute would lead to inability of Mexico and the International Criminal Court would have jurisdiction to prosecute the particular crimes, even though Mexico would charge comparatively strong charges under its own domestic criminal legislation.

The principle of sovereignty for interpreting national legislation

Finally, the political sensitivity in relation to the ICC's jurisdiction for the enforced disappearances should be taken into consideration. From a legal point of view, it seems like the Pre-Trial Chamber could prosecute for Mexico's enforced disappearances, because Mexico has not codified crimes against humanity within its own legislation. However, complementarity lies at the heart of the functioning of the International Criminal Court. Determination by the Court that a State Party has not implemented its international crimes sufficiently could be seen as a breach of the principle of national sovereignty.

But on the other hand, State Officials are often involved in cases of enforced disappearances. It is one of the core functions of the International Criminal Court to hold perpetrators individually responsible for breaches of crimes articulated in the Rome Statute. The criminalization of enforced disappearances in the Rome Statute is a new phenomenon; international tribunals never criminalized the crime of enforced disappearance before. Therefore, it would be a missed opportunity if the International Criminal Court would not prosecute. It seems to be a breach of the principle of sovereignty if the International Criminal Court determines whether its crimes are implemented sufficiently by State Parties. But if State Parties would be able to shield behind the doctrine of sovereignty when it comes to interpreting national legislation, the International Criminal Court may not be able to prosecute State Officials for enforced disappearances. The codification of enforced disappearances in the Rome Statute may then remain a hollow exercise.

²¹² Spencer Thomas, A Complementarity Conundrum?: International Criminal Enforcement in the Mexican Drug War, *Vanderbilt Journal of transnational Law*, 599, 2012, p. 627

²¹³ Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, preamble paragraph 6

²¹⁴ Spencer Thomas, A Complementarity Conundrum?: International Criminal Enforcement in the Mexican Drug War, *Vanderbilt Journal of transnational Law*, 599, 2012, p. 627

Conclusion

Mexico became the hundredth State Party to the International Criminal Court by ratifying the Rome Statute in 2005. The State has had some difficulties acceding to the Rome Statute, due to contradictions with large amounts of details in its own national Constitution. Mexico has not yet criminalized crimes against humanity in its own criminal code. The crime of enforced disappearances is only criminalized in eight regional states, which all interpreted the crime differently. The International Criminal Court would have jurisdiction to prosecute for these crimes if the State Party is not prosecuting at all, or is unable or unwilling to prosecute for crimes that are mentioned in the Rome Statute. The enforced disappearances in Mexico seem to fall under the 'inability' situation, now that Mexico would only be able to prosecute these as ordinary crimes. But the political sensitivity of the International Criminal Court should also be taken into consideration. On the one hand the International Criminal Court should respect the principle of sovereignty of its State Parties, on the other hand the provision of enforced disappearances in the Rome Statute should not become redundant.

Chapter 5

Félice Calderón's criminal responsibility

The International Criminal Court was developed in order to prosecute individuals for international crimes. Human rights advocates have argued that Mexico's former president should be held liable for crimes committed during the 'War on Drugs'. Human rights reports have described involvement of armed forces in cases of enforced disappearance. This chapter researches to what extent Félice Calderón could be prosecuted for acts committed by the Mexican military. Again, in this chapter it is assumed that the enforced disappearances could be identified as crime against humanity and prosecuted before the International Criminal Court.

The position of the national President in relation to the armed forces

The military has largely increased since Félice Calderón entered into office in 2006. Calderón has sent over 50.000 soldiers onto the public streets in order to fight the drug cartels and to restore the peace within the country.²¹⁵ The involvement of the army in committed crimes has often been assumed by media in human rights reports. In order to determine whether Félice Calderón could be held liable for this involvement, his position in relation to armed forces needs to be clarified.

The role of the national president in the Mexican army is described in the national Constitution. The powers and obligations of the president are mentioned in article 89 of the Constitution. It states that the president has, with approval of the Senate, the power to name colonels and superior officers of the national army and he has the power to use all the permanent armed forces and the army on land for the internal security and external defense of the Mexican Federation.²¹⁶ This basically implies that the president is the supreme commander of the armed forces. The military is subordinated to him and is obliged to obey the President.

Félice Calderón's role in the enforced disappearances

In order to hold the former president liable for the enforced disappearances, his specific role in these cases must be clarified. No evidence has been found that the former president actively ordered to commit these crimes and neither has any information been found on the fact that he knew about the crimes. In relation to the enforced disappearances, the Working Group noted that the increase in enforced disappearances since 2006 in Mexico responds directly to the strategy undertaken by president Calderón to address public safety issues within the country. In its view, the deployment of thousands of military personnel to perform public safety tasks has encouraged the commission of these crimes because the armed forces are not limited to act as supporting civil authorities and accept

²¹⁵ <http://www.cfr.org>

²¹⁶ <http://historicaltextarchive.com>

their orders, but to perform tasks that exclusively correspond to civil authorities.²¹⁷ For this reason, the Working Group recommended the Mexican government to consider the withdrawal of military forces from public security operations in the short term. But during the Calderón administration, the government has never reduced its armed forces on the Mexican streets. The Mexican president neither acted after evidence was released on the fact that State personnel also committed these enforced disappearances. News reports and human rights reports have been published about the circumstances that these acts took place while he was in office. It is unlikely that these news items have not reached him. It seems to be infeasible to prosecute the former president for actively ordering the committed crimes. But due to the fact that the president never withdrew the military troops from the public security operations and did not act after State personnel was involved in the enforced disappearances, it should be researched whether he can be held liable for these omissions.

The Rome Statute and individual responsibility for Felipe Calderón

In order to research whether the former president could be held liable for his inactive role in the enforced disappearances committed by the armed forces, the possibilities provided by the Rome Statute need to be researched. The Rome Statute contains several tools that may lead to the prosecution of individuals: individual criminal responsibility and command responsibility.

Individual responsibility

The Rome Statute holds individuals liable who commit a crime within the jurisdiction of the Court.²¹⁸ Article 25(3)(a) includes three categories of offenders: those who physically commit the crime, those who control the will of the physical perpetrators and those who control the offence because of essential tasks assigned to them. The provision contains the commission of a crime as basic form of criminal liability.²¹⁹

In article 25(3)(b), the Rome Statute holds liable those who order, solicit or induce the commission of crimes under its jurisdiction. Article 25(3)(c) of the Rome Statute also holds liable a person who aids, abets or otherwise assists in its commission or its attempted commission. According to Schabas, paragraph b and c of the provision overlap very considerable and should not be viewed as two different or distinct bases of liability, but rather as an effort to codify exhaustively various forms of complicity by drawing upon concepts familiar to jurists from different legal traditions.²²⁰ In order to

²¹⁷ Mexican Commission for the Defense and Promotion of Human Rights (CMDPDH), 'Human Rights in Mexico under the current 'war against organized crime' (2012), p. 6

²¹⁸ Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 U.N.T.S 3, article 25(1)

²¹⁹ William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, Oxford, Oxford University Press 2010, p. 427

²²⁰ William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, Oxford, Oxford University Press 2010 p. 431

fulfill these criteria, the accused must have acted knowingly. Furthermore, no superior-subordinate relationship is required for this article. But in order to hold an individual liable under article 25 of the Rome Statute, a commission of a crime is required. An omission of acts cannot be prosecuted through this provision. Therefore the options of article 25 of the Rome Statute for individual responsibility cannot be invoked in the case of Félpe Calderón.

Command Responsibility

The doctrine of command responsibility holds the superior liable for a failure to act in order to prevent criminal misconduct of his subordinates. The superior is blamed for his improper supervision, but also for the crimes committed by his subordinates.²²¹ The concept creates on the one hand direct liability for the lack of supervision, and on the other hand indirect liability for the criminal acts of others.²²² The doctrine establishes liability for omission. The superior is punished because of the failure to supervise the subordinates and to prevent or repress their commission of atrocities.²²³

The main reproach towards Félpe Calderón is the omission of not preventing the enforced disappearances or acting when he was noticed about the crimes. Therefore superior responsibility would be a likely possibility for holding Calderón liable for enforced disappearances committed by the military.

Félpe Calderón and the doctrine of command responsibility

For the doctrine to hold, several elements need to be in place: the existence of a superior-subordinate relationship, the superior's failure to take the necessary and reasonable measures to prevent the criminal acts of his subordinates or punish them for those actions and the element that the superior knew or had reason to know that a criminal act was about to be committed or had been committed.²²⁴ Command responsibility can be applicable to military commanders or civilian commanders. Superior responsibility is articulated in article 28 of the Rome Statute, which is the most advanced codification of the command responsibility doctrine. The provision states:

²²¹ Kai Ambos, 'Joint Criminal Enterprise and Command Responsibility', *Journal of International Criminal Justice* 5 (2007), p. 176

²²² Kai Ambos, 'Joint Criminal Enterprise and Command Responsibility', *Journal of International Criminal Justice* 5 (2007), p. 176

²²³ William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, Oxford, Oxford University Press 2010, p. 832

²²⁴ Kai Ambos, 'Joint Criminal Enterprise and Command Responsibility', *Journal of International Criminal Justice* 5 (2007), p. 161

Article 28 Rome Statute - Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Military commander

The first part of article 28 is applicable to the command responsibility of military commanders. Several elements need to be fulfilled in order to determine whether the provision is applicable. In this paragraph, the Mexican situation is tested to these specific requirements.

Military Superior

The first condition for article 28(a) of the Rome Statute is that the superior is supposed to be a *military* superior. The Pre-Trial Chamber II has determined in the Bemba case that the term military commander refers to persons who are formally or legally appointed to carry out a military command function. Moreover, the Chamber stated that the notion of a military commander under this provision also captures those situations where the superior does not exclusively perform a military function. The Chamber argued that this is the situation in some countries where a head of state is the commander in

chief of the armed forces and although this person does not carry out a military duty in an exclusive manner, that person may be responsible for crimes committed by his forces.²²⁵

As described in the first paragraph of this chapter, the national president is the superior commander of the armed forces in Mexico. As commander in chief of the armed forces, he can be defined as military superior under article 28(a) Rome Statute.

Effective command and control

Article 28 of the Rome Statute requires that troops be under the effective command and control of de jure military commanders.²²⁶ The word 'effective' is intended to encompass both de jure and de facto command and to ensure that, when multiple chains of command appear to exist, responsibility is assigned to the chain of command wherein resides the power to give orders.²²⁷ According to the Pre-Trial Chamber in the Bemba case, effective control was mainly perceived as the material ability or power to prevent and punish the commission of offences. Effective control would also refer to the material ability to submit the matter to the competent authorities.²²⁸

The former Mexican president had effective command and control of the military troops. In the Mexican Constitution it is determined that the president is the de jure military commander who has the power to give orders. And since the president has this power as the highest commander of the armed forces in Mexico, he would also have had the ability to prevent or to punish the commission of enforced disappearances or submit these cases to the competent authorities.

Causality

The Pre-Trial Chamber II has stated that a superior cannot be said to have failed to exercise control properly without also showing that the superior actually had effective control. This should be concluded from the words 'as a result of'.²²⁹ In the case of omission, the prosecutor of the International Criminal Court must demonstrate that his failure to exercise his duty to prevent crimes increased the risk that the forces would commit these crimes.²³⁰ According to Ambos, it must be proven that the omission causes the consequence, since the omitted act would have prevented it from

²²⁵ Bemba (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paragraph 408

²²⁶ William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, Oxford, Oxford University Press 2010 p. 460

²²⁷ Ambos p. 840

²²⁸ Bemba (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paragraph 415

²²⁹ William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, Oxford, Oxford University Press 2010 p. 462

²³⁰ Bemba (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paragraph 426

occurring.²³¹ If subordinates do no longer obey the orders of the superior, the committed crimes do not fall within the liability of the superior.

In the Mexican situation it needs to be proven that the omission by the former president of not preventing the committed acts, has caused the actual enforced disappearances. It seems likely that the enforced disappearances would have stopped from occurring, if the president had ordered so. From his position as superior commander of the armed forces, he could have withdrawn the military troops from the Mexican streets. Moreover, the president has also failed to submit the cases to the right authorities after the crimes had been committed. Hardly any of the soldiers have been prosecuted for their involvement in enforced disappearances. The Mexican president should have brought the cases before the right tribunals. It can be concluded that there seems to be a causal relation between his failure to act and the committed enforced disappearances.

Mental element

Article 28 requires a mental element. In order to assume liability of a military commander, the individual knew or should have known that his subordinates were committing or were about to commit a crime within the jurisdiction of the Rome statute. In the first situation, actual knowledge is required. This actual knowledge cannot be presumed, but must be inferred through evidence. Factors that could prove the actual knowledge are: the number of illegal acts, their scope, whether their occurrence is widespread, the time during which the prohibited acts took place, the type and number of forces involved, the means of available communication, the modus operandi of similar acts, the scope and nature of the superior's position and responsibility in the hierarchal structure, the location of the commander at the time and the geographical location of the acts.²³²

The 'should have known' category requires different standards. It requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime. The drafting history of article 28 reveals that it was the intent of the drafters to take a more stringent approach towards commanders and military-like commanders compared to other superiors that fall within the parameters of article 28(b) of the Rome Statute.

In relation to the actual knowledge, some factors are relevant in order to determine whether the Mexican president had actual knowledge of the crimes. According to human rights organizations, over 3.000 enforced disappearances have taken place since 2006. Even though it is unclear which amount of these has been committed by State personnel, it can be assumed that this large number has

²³¹ William A. Schabas, *The International Criminal Court, A Commentary on the Rome Statute*, Oxford, Oxford University Press 2010 p. 830

²³² Bemba (ICC-01/05-01/08), Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, paragraph 429

come to the attention of the former president. The acts have been committed in different regional states and during this whole period the Calderón administration was in office. Communication possibilities in Mexico are sufficient. It is therefore highly likely that the Mexican president has been notified of the acts through media and policy reports. Moreover, from the position of superior commander of armed forces, the president must have heard about the committed crimes from lower ranked superiors. Taken all these factors into consideration, it is highly likely that the former president had actual knowledge of the enforced disappearances.

If the threshold of actual knowledge would somehow not be reached, the situation can be tested to the requirements for the 'should have known' element. The information about enforced disappearances was obtainable during the period that the Calderon administration was in office. In the highly unlikely situation that the former president was not aware of the fact that these crimes were committed, he should have taken the necessary measures to obtain this type of information.

Civilian commander

Article 28(b) of the Rome Statute provides several different conditions for superiors that are no military superiors. The provision states that it is applicable to those superiors that do not fall under the scope of article 28(a). In the Mexican situation, the Mexican Constitution clearly defines the national president as the superior commander of armed forces. Now that this superior-subordinates relation in the Mexican case is covered by article 28(a), the provision of article 28(b) does not need to be researched.

Conclusion

According to the Mexican Convention, the national president is the supreme commander of the Mexican armed forces. The former president may be liable for not preventing the acts and for not submitting the cases to the right authorities. The concept of command responsibility makes the superior liable for his omissions. Article 28 of the Rome Statute is the most advanced codification of the doctrine. All elements required for command responsibility of a military commander can be fulfilled in the case of Felipe Calderón.

Conclusions

The drug war in Mexico is characterized by serious related violence within the country. During the last couple of years, this violence has resulted in thousands of casualties. The former Mexican president Felipe Calderón immediately declared war on the Mexican drug cartels after he was elected into office in 2006. His 'War on Drugs' policy aimed to defeat the drug cartels with the use of military force. But it is often argued that this policy has increased the violence and the amount of crimes within the country. According to human rights reports, one of the more frequently occurring crimes since 2006 are enforced disappearances. Human rights organizations have argued that the former Mexican president should be prosecuted before the International Criminal Court for his involvement in, among others, these particular crimes.

In relation to the abovementioned aspects, this research has aimed to answer the following research question: *"Have there been cases of enforced disappearance as crimes against humanity in Mexico, would the International Criminal Court have jurisdiction to prosecute these crimes and could the former Mexican president Felipe Calderón be held liable for these crimes committed by armed forces?"*

Cases of enforced disappearances in the 'War on Drugs'

The first instance of the crime of enforced disappearance in modern times took place in the Third Reich. After the Second World War, enforced disappearances started to occur in Latin American countries and are nowadays taking place in many parts of the world. Cases of enforced disappearance have increased in Mexico during the last decade. Human rights organizations have argued that since 2006 more than 3.000 people have been enforcedly disappeared within the country.

The crime of enforced disappearance has been codified in several conventions and statutes. The International Criminal Court has been the first international criminal tribunal to criminalize the act of enforced disappearance as crime against humanity. In order to identify committed crimes as cases of enforced disappearance before the International Criminal Court, the chapeaux elements of crimes against humanity and the specific elements of the underlying act need to be fulfilled. This research has argued that in the case of the Mexican drug war some elements for crimes against humanity are not present. The policy requirement is one of the elements for crimes against humanity. A state should have planned an overall policy in relation to the attack. This does not seem to be the situation for the Mexican government. Another missing element is the fact that the attack must have been directed against a civilian population. Since the 'War on Drugs' policy is mainly directed against members of the drug cartels, it cannot be concluded that this group should be interpreted as a civilian population. It must be concluded that the cases of enforced disappearances cannot be prosecuted before the

International Criminal Court, since not all chapeaux elements for crimes against humanity as required by the Rome Statute would be fulfilled. If this had been the situation though, the contextual elements for the underlying crime of enforced disappearance of persons would be present.

ICC's Jurisdiction to prosecute Mexican cases of enforced disappearances

The principle of complementarity lies at the heart of the functioning of the International Criminal Court. In contrast to other international criminal tribunals, the Rome Statute requires that crimes are investigated and prosecuted by State Parties. The International Criminal Court will only have jurisdiction for these crimes if State Parties are unable or unwilling to start investigations or to prosecute. Mexico has not adopted crimes against humanity in its national criminal code. As a result, Mexico would only be able to prosecute enforced disappearances as ordinary crimes like murder and some other grave crimes. The Federal criminal code includes the crime of enforced disappearances, but its definition leaves out numerous cases of enforced disappearances. This lack of domestic legislation falls inside the scope of the 'unavailability of the national judicial system' prong that is an aspect of 'inability of the State' under article 17(3) of the Rome Statute. Therefore the International Criminal Court would have jurisdiction to prosecute Mexican cases of enforced disappearances. It should be taken into account that proceeding to prosecute for these crimes by the International Criminal Court could be interpreted as a political sensitive decision. It may be seen as a breach of the principle of national sovereignty for Mexico.

Individual liability of Felipe Calderón in relation to the enforced disappearances

The International Criminal Court was brought to life in order to prosecute individuals for international crimes. Human rights activists have required the prosecution of, among others, the former Mexican president Felipe Calderón before the International Criminal Court for his role in the 'War on Drugs'. The Rome Statute provides two possibilities for prosecuting individuals: individual responsibility and command responsibility. Felipe Calderón would mainly be accused of omissions: not preventing cases of enforced disappearances and not submitting these cases to the right authorities. The doctrine of command responsibility provides the possibility to prosecute certain omissions. Article 28 of the Rome Statute is the most advanced codification of this doctrine. In the Mexican Convention, the head of state is defined as a military superior. Therefore individual liability of the former president should meet all conditions for command responsibility of a military commander. These elements can be fulfilled in the case of Felipe Calderón. If the committed enforced disappearances could have been prosecuted before the International Criminal Court, the former president could be held liable for these acts through the doctrine of command responsibility.

Some last considerations

In the summer of 2012, the ICC prosecutor denounced that the International Criminal Court will not start investigations for the alleged crimes committed in Mexico. According to the prosecutor, the International Criminal Court will not judge political decisions or political responsibility.²³³ Even though the prosecutor has decided to not proceed investigations, this research has attempted to provide some insides in the situation whether prosecution would be possible for crimes committed in the 'War on Drugs'. The research has also tried to provide a depth understanding of the crime of enforced disappearances, now that no international criminal tribunal has ever convicted a person for this crime.

If the International Criminal Court would somehow decide to start investigations in the near future, it is unlikely that Calderón could invoke the principle of immunity. The Al Bashir case is leading in international criminal law in relation to immunity issues. Omar Al Bashir was the incumbent president of Sudan when the Trial Chamber concluded he should face justice before the International Criminal Court.²³⁴ Being a former president, it is highly unlikely that Felipe Calderón would be able to shield behind the doctrine of immunity and evade a trial if the prosecutor of the International Criminal Court would press charges against him.

This research has argued that enforced disappearances taken place during the 'War on Drugs' do not involve crimes under the Rome Statute. But it has been concluded that the Court would have jurisdiction to prosecute enforced disappearances in Mexico and that liability through command responsibility for the former president can be assumed. At this last point, it needs to be notified that command responsibility is only tested to acts committed by the military. Human rights reports also mentioned the involvement of police personnel in enforced disappearances. This research neither looked into the question whether the former president could be held responsible for crimes committed by drug cartels. The individual liability for these types of State personnel should be tested in a follow-up study.

²³³ <http://www.laht.com>

²³⁴ www.icc-cpi.int

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