

2012

A Complementarity Conundrum: International Criminal Enforcement in the Mexican Drug War

Spencer Thomas

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Criminal Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Spencer Thomas, A Complementarity Conundrum: International Criminal Enforcement in the Mexican Drug War, 45 *Vanderbilt Law Review* 599 (2021)

Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol45/iss2/4>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

A Complementarity Conundrum: International Criminal Enforcement in the Mexican Drug War

ABSTRACT

Drug-related violence in Mexico has claimed over 34,000 lives since Mexican President Felipe Calderón initiated his crackdown on Mexico's drug cartels in 2006 with the deployment of military troops to Michoacán. Somewhat surprisingly, Mexico's drug war has garnered rather little attention from the international community, despite a wealth of headlines in popular media. This Note takes up the question of international criminal enforcement in Mexico against Los Zetas, widely considered Mexico's most violent drug cartel. By setting up a hypothetical—but possible—International Criminal Court (ICC) prosecution of Los Zetas cartel leader Heriberto Lazcano, this Note demonstrates that the ICC Prosecutor could likely show sufficient evidence of Lazcano's liability for Crimes Against Humanity for the purposes of obtaining an arrest warrant from the Pre-Trial Chamber. However, assuming Mexico would in fact prosecute Lazcano domestically, significant admissibility issues would arise given that Mexico lacks a domestic codification of Crimes Against Humanity, the relevant ICC crime. This presents a unique situation to analyze whether a concurrent domestic prosecution for "ordinary crimes" could lead to a finding of "unable to prosecute" under Article 17 of the Rome Statute, which would result in the admissibility of the case before the ICC despite concurrent state action. The ordinary crimes analysis with respect to Mexico's inability (or ability) to prosecute this potential case has broad implications for the nature of the ICC's complementarity regime as an effective guardian of state sovereignty.

TABLE OF CONTENTS

I.	INTRODUCTION	600
II.	ELEMENTS OF THE PROSECUTION.....	605
	A. <i>The Act in Question: The Tamaulipas Massacre</i>	606
	B. <i>Elements of the Crime Against Humanity of Extermination</i>	609
	1. Conduct Element.....	609
	2. Mass Killing and Civilian Population	610
	3. Widespread or Systematic Attack Directed Against a Civilian Population.....	611
	4. <i>Mens Rea</i>	614
	C. <i>Individual Liability: Command Responsibility</i>	615
	1. Effective Control	616
	2. <i>Mens Rea</i>	617
	3. Failure to Act.....	618
III.	ADMISSIBILITY: ARTICLE 17'S "UNABLE TO PROSECUTE" PROVISION	619
	A. <i>Substantial Collapse of the National Judicial System</i>	620
	B. <i>Unavailability of the National Judicial System</i>	624
	1. The Debate on Domestic "Ordinary Crimes" Prosecutions.....	624
	2. The Admissibility of Lazcano's Case.....	628
IV.	THE IMPLICATIONS OF ORDINARY CRIMES PROSECUTIONS	631
V.	CONCLUSION.....	636

I. INTRODUCTION

On December 16, 2009, Mexican naval forces raided the hideout of Arturo Beltran Leyva, one of Mexico's most prominent drug lords.¹ Beltran Leyva was a close ally of Los Zetas, an up-and-coming narco-trafficking organization with extensive paramilitary capabilities.² The "Boss of Bosses," as Beltran Leyva was known, was killed during the raid in a great victory for President Felipe Calderón's ongoing

1. Tomas Kellner & Francesco Pipitone, *Inside Mexico's Drug War*, 27 WORLD POL'Y J. 29, 33 (2010).

2. *Id.* at 32-33.

offensive against the drug cartels.³ Ensign Angulo Cordova of the Mexican Navy also lost his life during the two-hour gunfight.⁴ As President Calderón celebrated Angulo Cordova's bravery and service with a state funeral, armed members of Los Zetas went to the fallen hero's home and murdered his grieving family.⁵

In total, drug-related violence has killed over 34,000 people in Mexico since President Calderón's 2006 crackdown on the cartels.⁶ The violence is affecting neighboring countries as well.⁷ At the heart of this violence is Los Zetas, Mexico's most dangerous trafficking organization that has killed civilians and murdered government officials in defiance of the Mexican state.⁸ Given the pervasive violence and the number of deaths, the Mexican drug war is a situation of serious concern to the international community as a whole, which could warrant attention from the International Criminal Court (ICC).⁹ Using a hypothetical prosecution, this Note focuses on Los Zetas leader Heriberto Lazcano's potential ICC liability stemming from a mass execution of seventy-two migrants by Los Zetas in August 2010.¹⁰ On the charge of the Crime Against

3. Ruth Maclean, *Boost for Calderon's War on Drugs Trade as 'Boss of Bosses' Is Shot Dead in Luxury Hideout*, TIMES (London), Dec. 18, 2009, at 10.

4. Elisabeth Malkin, *Vengeful Fury in Drug War Chills*, N.Y. TIMES, Dec. 23, 2009, at A1.

5. Kellner & Pipitone, *supra* note 1, at 33.

6. William Booth & Nick Miroff, *U.S. Agents Are Shot, 1 Hurt in Mexico*, WASH. POST, Feb. 16, 2011, at A8; Jose De Cordoba & David Luhnow, *In Mexico, Death Toll in Drug War Hits Record*, WALL ST. J., Jan. 13, 2011, at A8.

7. See Booth & Miroff, *supra* note 6, at A8 (describing an attack on two U.S. Immigration and Customs Enforcement Agents between Monterrey and Mexico City); Samuel Logan, *Los Zetas: Evolution of a Criminal Organization*, ISN SECURITY WATCH (Mar. 11, 2009), <http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?lng=en&id=97554> (describing incidents of cartel violence in several U.S. states, including Alabama, Georgia, Texas, and California); *Q&A: Mexico's Drug-Related Violence*, BBC NEWS, <http://www.bbc.co.uk/news/world-latin-america-10681249> (last updated Jan. 12, 2012) (discussing the increase of drug-related violence on the U.S. side of the U.S.-Mexico border).

8. See George Grayson, *Los Zetas: The Ruthless Army Spawned by a Mexican Drug Cartel*, FOREIGN POLY RES. INST. (May 2008), <http://www.fpri.org/enotes/200805.grayson.loszetas.html> (detailing several Zetas-led attacks on government officials); see also "Zetas" *Drug Gang Grows, Sows Gear in Mexico*, REUTERS, Oct. 12, 2010, available at <http://www.reuters.com/article/idUSTRE69B3LZ20101012> (noting the Zetas' responsibility for the murder of a gubernatorial candidate in Mexico and the murder of seventy-two civilian migrants).

9. See Rome Statute of the International Criminal Court art. 5(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] ("The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole." (emphasis added)). Indeed, this past November, a group of Mexican activists petitioned the ICC to investigate possible war crimes and crimes against humanity in Mexico. *Mexico Activists Seek ICC Investigation of Drugs War*, BBC NEWS (Nov. 25, 2011), <http://www.bbc.co.uk/news/world-latin-america-15899687>.

10. For detailed descriptions of the mass execution, see Ken Ellingwood, *72 Bodies Found at Mexican Ranch, Survivor Says Victims of Slaughter in Violence-*

Humanity of Extermination, this Note shows that the ICC Prosecutor could prove the substantive crime and Lazcano's individual liability for the purposes of obtaining an arrest warrant from the ICC Pre-Trial Chamber.

However, critical procedural roadblocks remain that could derail the ICC's perceived legitimacy among its member states. The ICC's complementarity regime is designed to balance the interests of state sovereignty with the international community's collective interest in putting an end to impunity for atrocities.¹¹ Language from the ICC Statute's Preamble indicates that the drafters were acutely aware of these competing interests. The Preamble declares that the states parties enacted the statute "[r]ecognizing that such grave crimes [as atrocities] threaten the peace, security and well-being of the world,"¹² and that the parties are "[d]etermined to put an end to impunity for . . . these crimes."¹³ However, the Preamble also says that the states parties "[r]ecall[] that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,"¹⁴ and "[e]mphasiz[e] that the International Court established under this Statute shall be complementary to national criminal jurisdictions."¹⁵ Codified at Article 17 of the ICC Statute, complementarity is widely referred to as the cornerstone principle of the ICC.¹⁶

Article 17's text, in relevant part, prohibits the ICC from exercising jurisdiction over a case concurrently being investigated or prosecuted domestically, unless the state is "unwilling or unable genuinely to prosecute."¹⁷ The framework gives states parties primacy over the ICC in terms of prosecutorial jurisdiction over alleged atrocities.¹⁸ Only when a state fails to exercise its duty to prosecute or investigate, or undertakes that duty in a way consistent

Racked State Were Migrants Killed by the Drug Gang Zetas, CHI. TRIB., Aug. 25, 2010, at 14; *Dozens of Bodies Found at Mexico Ranch*, BBC NEWS (Aug. 25, 2010), <http://www.bbc.co.uk/news/world-latin-america-11080584>; *Survivor Details Massacre of 72 Migrants by Drug Cartel in Mexico*, FOX NEWS (Aug. 25, 2010), <http://www.foxnews.com/world/2010/08/25/mexican-government-migrants-dead-ranch-killed-zetas-drug-gang>.

11. Nidal Nabil Jurdi, *The Prosecutorial Interpretation of the Complementarity Principle: Does It Really Contribute to Ending Impunity on the National Level?*, 10 INT'L CRIM. L. REV. 73, 73-74 (2010); see also Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Impunity*, 7 MAX PLANCK Y.B. UNITED NATIONS L. 591, 595-97 (2003).

12. Rome Statute, *supra* note 9, pmb. para. 3.

13. *Id.* pmb. para. 5.

14. *Id.* pmb. para. 6.

15. *Id.* pmb. para. 10.

16. Benzing, *supra* note 11, at 593.

17. Rome Statute, *supra* note 9, art. 17(1)(a).

18. Julio Bacio Terracino, *National Implementation of ICC Crimes: Impact of National Jurisdictions and the ICC*, 5 J. INT'L CRIM. JUST. 421, 421 (2007).

with an unwillingness or inability to genuinely prosecute, is the ICC permitted to exercise jurisdiction.¹⁹ Accordingly, the ICC is said to be *complementary* to domestic prosecutions, and merely serves to fill in gaps where domestic prosecutions are inadequate.

As a result, the definitions of “unwilling to prosecute” and “unable to prosecute” are critically important to an effectively functioning complementarity regime.²⁰ While Article 17 provides some guidelines for determining unwillingness or inability, these guidelines are very broad and leave many ambiguities.²¹ The situation in Mexico provides an opportunity to examine the scope of these ambiguous criteria.²² Mexico, it turns out, lacks a domestic codification of Crimes Against Humanity.²³ Thus, Mexico cannot prosecute conduct meeting the elements of Crimes Against Humanity as such a crime, and may only prosecute such conduct as an “ordinary crime”; for example, domestic murder.²⁴ The critical question thus becomes whether Mexico is “unable to prosecute” under Article 17, given that it cannot charge the perpetrator with the relevant international crime.²⁵ If the ICC Pre-Trial Chamber were to hold that Mexico is unable to prosecute, the ICC would then be permitted to try

19. See Rome Statute, *supra* note 9, art. 17(1)(a) (determining that a case is admissible before the ICC only when a state is “unwilling or unable genuinely” to investigate or prosecute a given case).

20. See Benzeng, *supra* note 11, at 601 (“However, all cases and situations before the Court have to be carefully measured against the factors mentioned in article 17 so as not to circumvent the requirements established in article 17, which reflect the above mentioned compromise between state sovereignty and the effective administration of justice.”).

21. See Rome Statute, *supra* note 9, art. 17(2)–(3) (broadly defining the factors of “unwillingness” and “inability”); see also Gregory McNeal, *ICC Inability Determinations in Light of the Dujail Case*, 39 CASE W. RES. J. INT’L L. 325, 327–28 (2007) (discussing the ambiguity of the inability criteria).

22. Compare Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT’L CRIM. JUST. 86, 89 (2003) (arguing that inadequate substantive laws can render a case admissible before the ICC), with Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 70–72 (2001) (arguing that the ICC should not hold a case admissible based solely on the nature of the crime charged by the state). See generally Lisa Laplante, *The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court’s Sphere of Influence*, 43 J. MARSHALL L. REV. 635, 660–61 (2010) (pointing out that scholars often debate the issue of ordinary crimes as it relates to inability under the ICC Statute).

23. Ramiro Garcia Falconi, *The Codification of Crimes Against Humanity in the Domestic Legislation of Latin American States*, 10 INT’L CRIM. L. REV. 453, 458 (2010).

24. See Terracino, *supra* note 18, at 428 (using Colombia as an example to illustrate prosecution of Crimes Against Humanity under its domestic laws).

25. See Michael A. Newton, *The Chameleon Court: The Changing Face of the ICC*, 27 LAW CONTEXT J. 5, 16 (2009) (“It is unclear in the circumstances following prosecution for another formulation of the underlying offense under domestic law whether the prosecution of what is termed an ‘ordinary crime’ would suffice to make a case inadmissible in the ICC framework.”).

the case. Such a result would ensure that the crime would be prosecuted as the atrocity it is, serving the global humanitarian interest in prosecuting such horrific conduct as an international crime.²⁶ But in doing so the ICC would obligate states parties to charge any act potentially meeting the elements of an ICC crime as an international crime, just to ensure they retain jurisdiction.²⁷ This would call into question whether the ICC is truly complementary to domestic prosecutions. On the other hand, if it were to hold that Mexico is able to prosecute, the ICC would respect Mexico's right to prosecute crimes occurring on its sovereign territory.²⁸ But this would allow what is substantively an atrocity crime to be prosecuted as an ordinary crime, thus trivializing the nature of the crime and aiding impunity.²⁹ Given this context, if the ICC initiates an investigation in Mexico, severe consequences could follow for the nature of Article 17's inability definition, and by extension, the ICC's complementarity regime. This Note uses the hypothetical prosecution of Los Zetas leader Heriberto Lazcano to address the oft-debated, but still unanswered question of whether ordinary crimes prosecutions amount to an inability to prosecute under Article 17 of the ICC Statute.³⁰

This Note argues that, assuming Mexico would pursue charges against Lazcano, Mexico is *not* unable to investigate and prosecute Lazcano under the ICC statute, despite its lack of a domestic codification of Crimes Against Humanity as defined under international law.³¹ The ICC would improperly usurp Mexico's sovereign right to prosecute offenses occurring within its territory if it held Lazcano's case admissible based on Mexico's inability to charge him with an international crime. In addition, this Note posits that the ICC would damage its foundational complementarity regime if it were to categorically hold that a state is "unable to prosecute" under Article 17 when it lacks the domestic implementation of an ICC crime.

26. See Kleffner, *supra* note 22, at 93 (envisioning the ICC as a complement to national jurisdiction in order to ensure adequate prosecution of such crimes).

27. See Terracino, *supra* note 18, at 438 (describing how several delegations during the Rome Conference viewed an exception to ordinary crimes prosecutions, such as the ones found in the International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) statutes, as creating an undesirable domestic obligation to characterize acts as international crimes).

28. See Newton, *supra* note 25, at 17 (noting that because the United Kingdom enacted a law "which mirrored the Rome Statute, the UK was able to try its own citizens on its own soil instead of placing them in the hands of the ICC").

29. See Benzing, *supra* note 11, at 615 (noting that the ICTY's decision in *Prosecutor v. Tadic* invoked a similar concern for "trivialization of crimes").

30. See, e.g., Laplante, *supra* note 22, at 660–61 (noting that an ongoing debate exists as to inability under the Rome Statute).

31. Falconi, *supra* note 23, at 458.

Part II gives a brief background on Los Zetas and the particular conduct serving as the *actus reus* for this hypothetical crime, before moving into a discussion of the elements of the charged crime and Lazcano's individual liability. Part III is the heart of this Note, as it discusses Mexico's potential inability to prosecute the case under Article 17, which of course would determine whether the ICC could exercise jurisdiction over the case.³² Part IV suggests that the proper method of criminal sanctions against Lazcano is a domestic prosecution in Mexico, and offers a framework under which the ICC could analyze concurrent ordinary crimes prosecutions for admissibility purposes. Part V concludes, and suggests that the facts pertaining to the admissibility of this hypothetical particular prosecution are applicable to other ICC prosecutions related to drug violence in Mexico.

II. ELEMENTS OF THE PROSECUTION

This Note's hypothetical prosecution focuses, substantively speaking, on Los Zetas leader Heriberto Lazcano's liability for an attack on a group of Central and South American migrants in August 2010 that has become known as the Tamaulipas Massacre.³³ For this conduct, Lazcano could be charged with the Crime Against Humanity of Extermination under Article 7(1)(b) of the statute.³⁴ To issue an arrest warrant, the ICC Pre-Trial Chamber need only have "reasonable grounds to believe" that a crime within the Court's jurisdiction has been committed. Accordingly, to successfully get Lazcano's case before the ICC, the Prosecutor need only demonstrate reasonable grounds to believe that the elements of the crime are met.³⁵

As a preliminary matter, this Note assumes the nonexistence of an armed conflict in Mexico between government authorities and the

32. This Note ignores Mexico's potential inability to prosecute based on insufficient due process or fair trial guarantees in its domestic law, instead focusing on the inability issues stemming from practical concerns regarding corruption and extortion, and more significantly, Mexico's failure to implement Crimes Against Humanity. This "due process" approach to inability is one that may prove to carry weight with the Court. See McNeal, *supra* note 21, at 332 (explaining the ICC's apparent move toward a due process approach to inability under Article 17(3)). But as the current inability statute reads, the due process inquiry has no legal basis with respect to the inability. See Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L.F. 255, 257 (2006) (arguing that nothing in the Article 17(3) as it currently reads permits the lack of due process standards as grounds for an inability determination).

33. Cf. Mark Stevenson & E. Eduardo Castillo, *Drug Cartel Blamed for Death of 72 Migrants*, VIRGINIAN PILOT, Aug. 26, 2010, at A5 (describing the cartel's involvement in the mass killing).

34. Rome Statute, *supra* note 9, art. 7(1)(b).

35. *Id.* art. 58(1)(a).

drug cartels. An armed conflict exists under international law when there is “protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.”³⁶ However, the violence in Mexico is not between government authorities and organized armed groups, nor is it between two distinct organized armed groups.³⁷ The government fights the cartels, and the cartels simultaneously fight each other.³⁸ The conflict lacks two clear, diametrically opposed sides, and is instead a mishmash of competing factions and competing interests.³⁹ The cartels do not wish to take power and would prefer the government leave them alone to run their narcotics businesses.⁴⁰ Before President Calderón initiated his crackdown on the drug cartels in 2006, the cartels had an understanding with the government and rarely instigated violence.⁴¹ Thus, drug violence in Mexico is not one large, protracted armed conflict between parties participating in the conflict, but a collection of violent incidents committed by various individual actors against other various individual actors. It is with the established absence of an armed conflict that this Note turns to the substantive analysis of the crime.

A. *The Act in Question: The Tamaulipas Massacre*

The Los Zetas Cartel is widely considered the most dangerous and tactically advanced criminal trafficking organization currently operating in Mexico.⁴² It formed in 1997 from deserters of the Grupo Aeromovil de Fuerzas Especiales (GAFE), the Mexican military’s elite Special Air Mobile Forces Group.⁴³ The powerful Gulf Cartel, long considered one of the two dominant drug trafficking organizations in

36. Prosecutor v. Boskoski & Tarculovski, Case No. IT-04-82-T, Judgment, ¶ 175 (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008).

37. See Fred Burton & Scott Stewart, *Mexico: The Third War*, WORLD MAG. (Feb. 18, 2009), <http://www.worldmag.com/webextra/15051> (describing the three “wars” in Mexico: the war between the cartels, the war between the government and the cartels, and the war on civilians, which takes form namely in kidnapping and human smuggling operations).

38. *Id.*

39. See *id.* (describing the goals of the various players in the “wars”).

40. Brad Freden, *The COIN Approach to Mexican Drug Cartels: Square Peg in a Round Hole*, SMALL WARS J. (Dec. 27, 2011), <http://smallwarsjournal.com/jrnl/art/the-coin-approach-to-mexican-drug-cartels-square-peg-in-a-round-hole>.

41. Grace Wyler, *Former Mexican Governor Admits Past Presidents Controlled Drug Trade*, BUS. INSIDER (Feb. 28, 2011), <http://www.businessinsider.com/former-mexican-governor-admits-pri-presidents-controlled-drug-trade-2011-2>.

42. Grayson, *supra* note 8; Michael Ware, *Los Zetas Called Mexico’s Most Dangerous Drug Cartel*, CNN WORLD (Aug. 6, 2009), <http://www.cnn.com/2009/WORLD/americas/08/06/mexico.drug.cartels/index.html>; “Zetas” Drug Gang Grows, *supra* note 8.

43. COLLEEN COOK, CONG. RESEARCH SERV., RL34215, MEXICO’S DRUG CARTELS 10 (2008).

Mexico, recruited these ex-GAFEs as its enforcement, paramilitary arm.⁴⁴ However, the Gulf Cartel has taken a major hit since President Calderón's 2006 crackdown, most notably with the November 2010 death of leader Antonio Ezekiel Cardenas Guillen in a shootout with Mexican military forces.⁴⁵ In early 2010, the Zetas split from the Gulf Cartel and began independently running drug-smuggling operations.⁴⁶ Led by ex-GAFE Heriberto "The Executioner" Lazcano,⁴⁷ the Zetas have steadily gained territory and influence as a result of their superior tactical abilities and weaponry.⁴⁸

The Zetas are responsible for many attacks on civilians in northern Mexico.⁴⁹ Some of the heaviest violence centers in the state of Tamaulipas, ground zero for the Zetas' turf war against their former employer, the Gulf Cartel.⁵⁰ One particular mass execution in Tamaulipas against seventy-two Central and South American migrants serves as the conduct element of this hypothetical prosecution. Unfortunately, these migrant attacks are a regular occurrence in Mexico.⁵¹ After drug trafficking itself, migrant extortion is the primary source of income for the cartels.⁵² Mexican officials note that migrant groups are often targeted by the cartels as potential drug mules for smuggling drugs into the United States, or as a source of cash or ransom.⁵³ Other reports show that the cartels,

44. Grayson, *supra* note 8.

45. Tracy Wilkinson, *Mexico Drug Kingpin Slain in Fierce Gun Battle with Military*, L.A. TIMES (Nov. 6, 2010), <http://articles.latimes.com/2010/nov/06/world/la-fg-mexico-druglord-20101106>.

46. *Gulf Cartel Split with Zetas Public: Gulf Cartel Goes Public on Break-up with Former Allies Los Zetas*, BORDERLAND BEAT (Mar. 10, 2010), <http://www.borderlandbeat.com/2010/03/gulf-cartel-split-with-zetas-public.html>; *Mexico Drug Lord Death May Aide Zeta Cartel's Rise*, MSNBC POL. (Nov. 6, 2010), <http://bltwy.msnbc.msn.com/politics/mexico-drug-lord-death-may-aid-zeta-cartels-rise-1667064.story> ("Former allies of the Gulf Cartel, the Zetas went independent earlier this year . . .").

47. Grayson, *supra* note 8.

48. See John P. Sullivan & Samuel Logan, *Los Zetas: Massacres, Assassinations, and Infantry Tactics*, COUNTER TERRORIST (Nov. 24, 2010), <http://www.homeland1.com/domestic-international-terrorism/articles/913612-Los-Zetas-Massacres-Assassinations-and-Infantry-Tactics> (giving general background on the Zetas, including tactical approaches and resources).

49. *Id.*; see Tracy Wilkinson, *Caught Behind Enemy Lines*, CHI. TRIB., Nov. 12, 2010, at 32 (discussing the impact on civilians of the turf war between the Zetas and the Gulf Cartel).

50. Ellingwood, *supra* note 10; Wilkinson, *supra* note 49, at 32.

51. David Agren, *Cartels Target Migrants in Wave of Kidnappings*, UNIVERSE, Nov. 15, 2009, at 10; Claudia Morales & Jorge Nunez, *Big Business for Mexican Cartels: Kidnapping Central American Migrants*, NEW AM. MEDIA (Sept. 1, 2010), <http://newamericamedia.org/2010/09/big-business-for-mexican-cartels-kidnapping-central-american-migrants.php>.

52. Agren, *supra* note 51.

53. See Lizbeth Diaz, *Mexico Cartels Kidnap, Kill Migrants Headed to U.S.*, REUTERS, Sept. 22, 2009, available at <http://www.reuters.com/article/idUSTRE58L3B420090922?pageNumber=2> (discussing migrants used as drug carriers); Morales

in particular the Zetas, use migrants for human trafficking purposes.⁵⁴ A study by the Mexican National Human Rights Commission shows that at least 1,600 migrants are kidnapped in Mexico monthly, which equates to nearly 20,000 annually.⁵⁵ In the particular incident in question, armed members of the Zetas stopped the migrants as they attempted to enter the United States in August 2010.⁵⁶ One survivor claimed that the Zetas offered the migrants work,⁵⁷ while others reported that the migrants were told to pay extortion fees.⁵⁸ When the migrants refused, the execution commenced.⁵⁹ Fifty-eight men and fourteen women were found shot to death roughly ninety miles south of the Texas border.⁶⁰

This particular attack would be the preferred *actus reus* for the ICC Prosecutor for two reasons. First, the attack—dubbed the Tamualipas Massacre—is considered the largest single act of cartel violence since the drug war began in 2006.⁶¹ As a result, it received a significant amount of international media attention.⁶² Second and more importantly, two migrants survived the execution.⁶³ As a result,

& Nunez, *supra* note 51 (discussing migrants held for ransom); *Murdered Bodies Found in Mexico 'Were Migrants'*, BBC NEWS (Aug. 25, 2010), <http://www.bbc.co.uk/news/world-latin-america-11090563> (discussing migrants extorted for their cash).

54. JUNE S. BEITTEL, CONG. RESEARCH SERV., R40582, MEXICO'S DRUG-RELATED VIOLENCE 6 (2009); BLAS NUNEZ-NETO, ALISON SISKIN & STEPHEN VINA, CONG RESEARCH SERV., RL33097, BORDER SECURITY: APPREHENSIONS OF "OTHER THAN MEXICAN" ALIENS 12 (2005); *see also Los Zetas*, BORDERLAND BEAT (Sept. 12, 2009), <http://www.borderlandbeat.com/2009/09/los-zetas.html> (detailing the Zetas' human smuggling operation).

55. MEXICAN NAT'L COMM'N ON HUMAN RIGHTS, SPECIAL REPORT OF THE HUMAN RIGHTS NATIONAL COMMISSION OVER THE KIDNAPPING AGAINST MIGRANTS 5–6 (finding 9,758 victims of migrant kidnappings during a six month period from September 2008 to February 2009).

56. William Booth, *Survivor: Drug Gang Massacred 72 Migrants in Northern Mexico*, WASH. POST, Aug. 25, 2010, at A7.

57. *No Safe Passage: Add Drug Gangs to the Long List of Dangers Facing Migrants*, ECONOMIST, Sept. 11, 2010, at 36; *Murdered Bodies Found in Mexico 'Were Migrants'*, *supra* note 53.

58. Booth, *supra* note 56; Randal Archibold, *Victims of Massacre in Mexico Said to Be Migrants*, N.Y. TIMES, Aug. 26, 2010, at A4; Daniel Hernandez, *Survivor of Migrant Massacre Returns to Ecuador*, LA PLAZA (Aug. 30, 2010, 1:04 PM), <http://latimesblogs.latimes.com/laplaza/2010/08/migrants-bodies-mexico-brazil-tamaulipas.html>.

59. Archibold, *supra* note 58.

60. *Id.*

61. *No Safe Passage*, *supra* note 57.

62. For examples of media attention, see Archibold, *supra* note 58; *72 Bodies Found in Mexico Ranch*, HINDUSTAN TIMES (Aug. 26, 2010), <http://www.hindustantimes.com/72-bodies-found-in-Mexico-ranch/Article1-591920.aspx>; *72 Bodies Found on Ranch in Mexico*, RTE NEWS (Aug. 25, 2010), <http://www.rte.ie/news/2010/0825/mexico.html>; Robin Emmott, *Drug Hitmen Dump 72 Bodies at Mexican Ranch*, REUTERS, Aug. 25, 2010, available at <http://www.reuters.com/article/idUSTRE67O2NF20100826>; *Murdered Bodies Found in Mexico 'Were Migrants'*, *supra* note 57; *Survivor Details Massacre of 72 Migrants by Drug Cartel in Mexico*, *supra* note 10.

63. *No Safe Passage*, *supra* note 53.

eyewitness survivors can recount the events and verify that the executioners identified themselves as members of Los Zetas.⁶⁴

B. *Elements of the Crime Against Humanity of Extermination*

The Crime Against Humanity of Extermination is defined as an act of extermination “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”⁶⁵ The statute defines the act of extermination as “the intentional infliction of conditions of life . . . calculated to bring about the destruction of part of a population.”⁶⁶ There is little doubt that lining up a group of civilians and gunning them down at close range is “calculated to bring about the destruction” of that particular population. However, to prove that the conduct constitutes the Crime Against Humanity of Extermination, the Prosecutor must prove four distinct elements: (1) that the perpetrator killed one or more persons (the conduct element), (2) that the killing occurred as part of a mass killing of members of a civilian population, (3) that the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and (4) that the perpetrator knew or intended the act to be part of a widespread or systematic attack against a civilian population.⁶⁷

1. Conduct Element

The first element is the conduct itself, which is described in Part II.A above. To satisfy this element, the perpetrator must intentionally⁶⁸ “kill[] one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population.”⁶⁹ As discussed above, the Zetas slaughtered seventy-two people with direct gunfire, so the conduct element is not problematic in this case.⁷⁰

64. *Survivor Details Massacre of 72 Migrants by Drug Cartel in Mexico*, *supra* note 10.

65. Rome Statute, *supra* note 9, art. 7(1).

66. *Id.* art. 7(2)(b).

67. Int’l Criminal Court [ICC], *Elements of Crimes* art. 7(1)(b)(1), ICC-ASP/1/3(part II-B) (Sept. 9, 2002) [hereinafter ICC Elements].

68. Rome Statute, *supra* note 9, art. 30.

69. ICC Elements, *supra* note 67, art. 7(1)(b)(1).

70. *See supra* Part. II.A (describing the Tamaulipas Massacre).

2. Mass Killing and Civilian Population

The second element of the Crime Against Humanity of Extermination requires that the killing occur “as part of, a mass killing of members of a civilian population.”⁷¹ This requires defining both “mass killing” and “civilian population.” The decisions of the ad hoc tribunals are informative here, as they carry significant precedential weight in the ICC.⁷² In the *Stakic* judgment, the Appeals Chamber for the International Tribunal for the Former Yugoslavia (ICTY) held that there is no numerical threshold for a “mass killing” under customary international law.⁷³ In *Krajisnik*, the ICTY Trial Chamber determined that ten separate incidents involving the execution of between twenty and seventy people each independently constituted an act of extermination.⁷⁴ Consequently, an act of mass killing does not require hundreds of victims under established international criminal law jurisprudence.⁷⁵ Thus, the simultaneous execution of seventy-two individuals easily satisfies the “mass killing” requirement.

“Civilian population” is also defined broadly in international criminal jurisprudence.⁷⁶ The ICTY held that the Prosecutor need only show that enough civilians were attacked to convince the Court that the attack was directed against a “population” rather than against arbitrarily chosen individuals.⁷⁷ Put another way, members of the population must share some feature that makes them the targets of the attack, as opposed to simply being a random assembly

71. ICC Elements, *supra* note 67, art. 7(1)(b)(1).

72. See Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶¶ 73–89 nn. 97–111 (June 15, 2009) (citing numerous ICTY and ICTR cases in laying out the elements of Crimes Against Humanity).

73. Prosecutor v. Stakic, Case No. IT-97-24-A, Appeals Judgment, ¶ 260 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006). Also note that if the Pre-Trial Chamber is not satisfied that the killing of seventy-two migrants qualifies as a “mass killing,” the chamber is free to amend the charges to the crime against humanity of murder, which does not require the “mass killing” element. ICC Elements, *supra* note 67, art. 7(1)(a). However, the Prosecutor may not charge both murder and extermination because cumulative charges are only permitted when each charge has a materially distinct element that the other crime does not contain, which is not the case with the crimes against humanity of murder and extermination.

74. Prosecutor v. Krajisnik, Case No. IT-00-39-T, Trial Judgment, ¶¶ 720–21 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006).

75. *Cf. id.* (determining that incidents involving between twenty and seventy victims is sufficient to constitute a “mass killing”).

76. Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Judgment, ¶ 643 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

77. Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-A, Appeals Judgment, ¶ 95 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

of individuals that were arbitrarily attacked.⁷⁸ Within the ICC, Crimes Against Humanity may be directed against *any* civilian population.⁷⁹ Consequently, Article 7 extends to all civilian groups that have some common element making them a nonrandom collection of individuals.⁸⁰ The migrant group in the Tamaulipas Massacre is a civilian population within this broad definition. These seventy-two individuals were not selected arbitrarily, but were targeted as an entire group of migrants for the purposes of human trafficking, labor, or ransoms, as the survivors' eyewitness testimony would confirm.⁸¹

3. Widespread or Systematic Attack Directed Against a Civilian Population

The third element the Prosecutor must prove is that the conduct was committed as part of a "widespread or systematic attack directed against a civilian population."⁸² Substantively, this third element separates a Crime Against Humanity from a simple domestic criminal charge of extermination or murder.⁸³ Within the phrase "widespread or systematic directed attack against a civilian population," there are three relevant subelements: (1) widespread, (2) systematic, and (3) attack against a civilian population.⁸⁴ Each subelement is examined in turn below.

First, it is important to note that the phrase "widespread or systematic attack" is disjunctive.⁸⁵ Thus the attack against a civilian population may be either widespread or systematic; it need not be both.⁸⁶ Furthermore, both terms exclude isolated or random acts of

78. See *Prosecutor v. Kunarac*, Case No. IT-96-23/1-A, Appeals Judgment, ¶ 154 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002) (noting that the accused mistreated Muslim girls and women "with the intent of discriminating against [them] because they were Muslim"); see also PETER T. BURNS, INT'L CTR. FOR CRIMINAL LAW REFORM & CRIMINAL JUSTICE POLICY, ASPECT OF CRIMES AGAINST HUMANITY AND THE INTERNATIONAL CRIMINAL COURT 7 (2007).

79. Rome Statute, *supra* note 9, art. 7(1).

80. *Prosecutor v. Katanga & Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on Confirmation of Charges, ¶ 399 (Sept. 30, 2008).

81. Booth, *supra* note 56.

82. ICC Elements, *supra* note 67, art. 7(1)(b)(3).

83. See Darryl Robinson, *Defining "Crimes Against Humanity" at the Rome Conference*, 93 AM. J. INT'L L. 43, 48-49 (1999) (noting that the policy element within the "attack directed against a civilian population" element of crimes against humanity gives "these otherwise domestic crimes the requisite 'international element'").

84. ICC Elements, *supra* note 67, art. 7(1)(b)(3).

85. *Id.*

86. See Rome Statute, *supra* note 9, art. 7(1) (also using the disjunctive phrase "widespread or systematic" (emphasis added)); see also *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 82 (June 15, 2009) (noting that the terms "widespread" and "systematic" are presented in the alternative).

violence.⁸⁷ While the Rome Statute itself defines neither term, they are well defined in the jurisprudence of the ad hoc tribunals.⁸⁸ While the Prosecutor could likely satisfy either “widespread” or “systematic,” systematic is a more comfortable fit for the Tamaulipas Massacre. A systematic attack refers to the organized nature of an attack resulting in a pattern of crimes or methodical plan.⁸⁹ There is lack of randomness, and thus a purpose to the attacks, either from a plan to commit such attacks, or from the nonaccidental, repetitive nature of the attacks that implicitly establish such a plan.⁹⁰ Thus, a systematic attack has a “plan or policy” element to it.⁹¹ The *Blaskic* Trial Chamber identified four elements necessary to prove a systematic attack through this policy element: (1) a political objective or plan, or an ideology, broadly speaking, to destroy, persecute, or weaken the community; (2) perpetration of a large-scale act against civilians or the repeated and continuous commission of inhumane acts linked to each other; (3) use of significant public or private resources, military or otherwise; and (4) implication of high-level political or military authorities in establishing the plan.⁹² However, *Blaskic* also held that it is not necessary to demonstrate an *express* plan or policy.⁹³ The court may examine the means, methods, resources, and results of the attack, in the context of the particular civilian population attacked, to determine whether the attack was systematic.⁹⁴ Evidence of organized, patterned, or recurring attacks of a similar nature implicitly demonstrate a plan and thus a systematic attack.⁹⁵

87. Prosecutor v. Katanga & Ngudjolo Chui, Case No. ICC-01/04-01/07, Decision on Confirmation of Charges, ¶ 394 (Sept. 30, 2008).

88. See Prosecutor v. Galic, Case No. IT-98-29-T, Trial Judgment, ¶ 146 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) (defining “widespread”); Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Judgment, ¶ 648 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) (defining “systematic”).

89. *Tadic*, Case No. IT-94-1-T, ¶ 648.

90. Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-A, Appeals Judgment, ¶ 666 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

91. See *id.* (noting that a repeated pattern commonly demonstrates the “systematic” nature of the acts); *Tadic*, Case No. IT-94-1-T, ¶ 648 (stating that systematicity requires “a pattern or methodical plan”).

92. Prosecutor v. Blaskic, Case No. IT-95-14-T, Trial Judgment, ¶ 203 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); see also Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-A, Trial Judgment, ¶ 179 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001) (applying the four-part *Blaskic* test for a systematic attack).

93. *Blaskic*, Case No. IT-95-14-T, ¶ 204; see also *Galic*, Case No. IT-98-29-T, ¶ 147 (“[T]here is no requirement under customary international law that the attack be connected to a policy or plan. Evidence of a plan or policy may, however, be used in showing that the attack was widespread or systematic.”).

94. Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Appeals Judgment, ¶ 95 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

95. *Id.*; *Tadic*, Case No. IT-94-1-T, ¶ 648; see also *Blaskic*, Case No. IT-95-14-T, ¶ 204 (listing potential events and circumstances under which a court may base a finding of a systematic attack).

There is ample evidence that this attack satisfies the four-part *Blaskic* test. The objective for the attacks is clear, as migrants provide a source of labor as drug mules, meaning that they are forced to smuggle drugs into the United States.⁹⁶ They also provide a good source of cash via kidnapping ransoms or human smuggling operations.⁹⁷ While these are not political objectives as required under a strict reading of *Blaskic*, the cartels are not political organizations.⁹⁸ They are business operations that rationally want to strengthen their operations vis-à-vis the government and each other,⁹⁹ and they use migrants as a means to that end.¹⁰⁰

Regarding the large-scale and connected nature of the attacks, the Mexican National Commission for Human Rights estimated that nearly 10,000 migrants are kidnapped every six months in Mexico, with 75 percent going unreported, as most migrants are undocumented and prefer not to risk exposure to authorities.¹⁰¹ These findings reasonably demonstrate that these attacks are large-scale, repeated, and organized, and are not isolated incidents of violence.¹⁰² As to the use of resources prong, the attacks necessarily require the cartels' private resources, and the objectives of the attacks even implicate the resources of the migrants themselves.¹⁰³ Finally, the repetitive and patterned nature of the attacks gives rise to a

96. See Diaz, *supra* note 53 ("The U.S. Border Patrol says it is now common to see immigrants acting as drug mules.").

97. *Los Zetas*, *supra* note 46; see also Cook, *supra* note 43, at 7–8 (reporting in 2008, before the Zetas split from the Gulf Cartel, that the Gulf Cartel was actively involved in human smuggling).

98. Contrary to the drug war in Mexico, the *Blaskic* case arose in the context of political and ethnic conflict in the Balkans. *Blaskic*, Case No. IT-95-14-T, ¶ 660. In laying out the test for a systematic attack, the *Blaskic* Trial Chamber clearly stated that the elements of the test were phrased to specifically cater to the case at hand, which was of course, a political conflict. See *id.* ¶ 203 ("The systematic character refers to four elements which for the purposes of this case may be expressed as follows . . ." (emphasis added)).

99. Ware, *supra* note 42 (reporting that the Zetas maintain business ledgers and have quarterly meetings); see also Jennifer Griffin & Laura Prabucki, *America's Third War: Mapping the Drug Cartels*, FOX NEWS (Nov. 19, 2010), <http://www.foxnews.com/us/2010/11/19/americas-third-war-mapping-mexican-drug-cartels> (stating that Mexican drug trafficking is a \$40 billion business).

100. See Diaz, *supra* note 53.

101. MEXICAN NAT'L COMM'N ON HUMAN RIGHTS, *supra* note 55, at 5–6; Jose Luis Sierra, *Mexico Dispatch: A Country Turned Upside-Down*, PBS NEWSHOUR (Dec. 29, 2010), <http://www.pbs.org/newshour/rundown/2010/12/mexico-dispatch-4.html>.

102. See *Blaskic*, Case No. IT-95-14-T, ¶ 467 (quoting from a witness's statement that "we saw that the same type of events were taking place at the same time period in different locations, and it would be impossible, in my opinion, for this to have been carried out by uncontrolled groups").

103. See Diaz, *supra* note 53 (noting that migrants are used to smuggle drugs across the border); Morales & Nunez, *supra* note 51 (reporting that the cartels use migrants to extort ransoms from the migrants' families).

reasonable belief that high-level cartel authorities are involved.¹⁰⁴ Given the amount of migrants being kidnapped or killed in Mexico, and given the Zetas' extensive paramilitary capabilities and their presence along trafficking routes, there are reasonable grounds to believe that a prosecutorial investigation would uncover many more incidents of migrant attacks perpetrated by Los Zetas.¹⁰⁵

To prove an attack against a civilian population, the Prosecutor must show the *actual* existence of an organizational plan or policy.¹⁰⁶ Article 7(2)(a) defines an "attack directed against any civilian population" as "conduct involving multiple commissions of acts . . . against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack . . ."¹⁰⁷ Therefore, the Prosecutor must show that the state or nonstate actor had a policy to commit the attack in question. However, there is no requirement of a formal, explicit, or stated organizational plan or policy.¹⁰⁸ The court may infer a plan or policy from the way the acts are committed and from other circumstantial evidence.¹⁰⁹ Evidence of repeated, patterned attacks that target migrants for tangible purposes, as discussed above, would implicitly demonstrate a policy to commit the attacks.¹¹⁰ Thus, the prosecution would clear the "attack directed against a civilian population" hurdle for purposes of an arrest warrant.¹¹¹

4. *Mens Rea*

The fourth and final element is the perpetrator's mental state, or *mens rea*.¹¹² This element applies only to the direct perpetrators of the crime, and not to Lazcano, whose liability would be determined separately under command responsibility doctrine discussed in Part

104. See *Blaskic*, Case No. IT-95-14-T, ¶ 467 ("The planned nature and, in particular, the fact all these units acted in a perfectly coordinated manner presupposes in fact that those troops were responding to a single command . . .").

105. See Ken Ellingwood, *Mexico Says Zetas Drug Gang Figure Arrested*, L.A. TIMES (Jan. 19, 2011), <http://www.latimes.com/news/nationworld/world/la-fg-mexico-zetas-20110119,0,4599136.story> (noting that the Zetas have branched into migrant smuggling, kidnapping, and extortion since breaking from their role as Gulf Cartel hitmen).

106. Rome Statute, *supra* note 9, art. 7(2)(a).

107. *Id.*

108. Prosecutor v. Tadic, Case No. IT-94-1-T, Trial Judgment, ¶ 653 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

109. *Id.*; see also ICC Elements, *supra* note 67, general intro. ¶ 3 ("Existence of intent and knowledge can be inferred from relevant facts and circumstances.").

110. See Prosecutor v. Blaskic, Case No. IT-95-14-T, Trial Judgment, ¶ 204 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (holding that a plan or policy can be inferred from, among other things, "temporally and geographically repeated and coordinated military offensives," and "the scale of the acts of violence perpetrated . . .").

111. Rome Statute, *supra* note 9, art. 58(1)(a).

112. ICC Elements, *supra* note 67 art. 7(1)(b)(4).

II.C below (unless of course the Prosecutor could prove Lazcano was a direct perpetrator).¹¹³ To satisfy this element, the perpetrator must know or intend that the act be part of a widespread or systematic attack against a civilian population.¹¹⁴ However, the perpetrator need not know all characteristics of the attack, nor must he or she know the specific details of the plan or policy.¹¹⁵ The perpetrator's knowledge of the broader attack may be inferred from circumstantial evidence, such as the perpetrator's position in the organization's hierarchy or role in the broader campaign.¹¹⁶ Given the repetitive, purposeful nature of the attacks and the scale on which they reportedly occur,¹¹⁷ it is reasonable to believe that the perpetrators of the Tamaulipas Massacre knew that their conduct was part of a larger systematic policy to attack and extort migrants.¹¹⁸

C. Individual Liability: Command Responsibility

Given the particular circumstances, absent evidence that Heriberto Lazcano was himself at the scene of the crime or that he gave a specific order to execute these seventy-two migrants—evidence that is all but impossible to ascertain even if true¹¹⁹—the Prosecutor would have to establish Lazcano's liability for this execution through command responsibility.¹²⁰ Command responsibility provides liability for a military commander or a “person effectively acting as military commander” when the commander's subordinates commit a crime

113. Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 89 (June 15, 2009).

114. *Id.*

115. ICC Elements, *supra* note 67, art. 7 intro. ¶ 2; *see also Bemba Gombo*, Case No. ICC-01/05-01/08, ¶ 88.

116. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on Confirmation of Charges, ¶ 402 (Sept. 30, 2008).

117. *See MEXICAN NAT'L COMM'N ON HUMAN RIGHTS*, *supra* note 55, at 9 (discovering 9,758 migrant kidnappings over a six month period in 2009); Diaz, *supra* note 53 (reporting that migrants are often targeted for use as “drug mules”).

118. *See Rome Statute*, *supra* note 9, art. 58(1)(a) (requiring “reasonable grounds to believe” that a crime was committed before the Court authorizes an arrest warrant).

119. If the prosecutor can obtain evidence demonstrating that Lazcano was present at the scene of the execution or ordered the execution himself, then the relevant mode of liability would be found within Article 25 of the ICC Statute, which deals with individual criminal responsibility. *See Rome Statute*, *supra* note 9, art. 25(3) (discussing various methods of individual liability). However, this Note assumes such evidence is not present, given the fact that in every account this author has come across, there is not a shred of evidence linking specific individuals to acts of violence committed by Los Zetas. *See, e.g., Ellingwood*, *supra* note 105 (referring to perpetrators as “gunmen”).

120. *See Rome Statute*, *supra* note 9, art. 28(a) (codifying command responsibility).

within the ICC's jurisdiction.¹²¹ The Zetas are not a state-sponsored organization, and thus Lazcano is not a military commander.¹²² However, the ICC Pre-Trial Chamber held that a person effectively operating as a military commander includes a superior who exercises authority over "irregular forces (nongovernment forces) such as rebel groups, [or] paramilitary units."¹²³ Given that the Zetas are ex-Special Forces, have the capacity to run sophisticated armed operations, and have a history as a cartel enforcement arm, the Zetas certainly qualify as a paramilitary organization.¹²⁴ Accordingly, Lazcano would be a person effectively acting as a military commander.¹²⁵

Once the prosecution demonstrates that Lazcano is equivalent to a military commander, it would also have to show that the commander (1) had "effective control" over the subordinates, (2) knew or should have known that the subordinates were committing or were about to commit crimes, and (3) failed to prevent or repress the commission of the crimes.¹²⁶

1. Effective Control

Effective control is determined by a commander's ability to prevent, punish, repress, or submit the offense committed by subordinates to authorities.¹²⁷ The *Bemba* Pre-Trial Chamber listed several factors contributing to effective control: official position, power to issue orders, ability to ensure compliance with issued orders, capacity to order forces to engage into hostile environments or withdraw from hostilities, and capacity to make changes to the command structure or enact personnel changes.¹²⁸ Lazcano's effective control is demonstrable through his official position as the leader of

121. *Id.*

122. See *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor, ¶ 408 (June 15, 2009) (holding that a "military commander" is one with de jure authority, or "legally appointed" authority).

123. *Id.* ¶ 410.

124. "Paramilitary" is defined simply as "of, relating to, or being a group of civilians organized in a military fashion . . ." THE AMERICAN HERITAGE COLLEGE DICTIONARY 1009 (4th ed. 2004). The Zetas certainly meet this minimal definition. See Cook, *supra* note 43, at 6–8 (discussing the complex operations of the Zetas).

125. See *Bemba Gombo*, Case No. ICC-01/05-01/08, ¶ 410 (holding that a person effectively acting as a military commander encompasses a person exercising control over, among other things, paramilitary units).

126. Rome Statute, *supra* note 9, art. 28(a).

127. *Bemba Gombo*, Case No. ICC-01/05-01/08, ¶ 415; *Prosecutor v. Delalic*, Case No. IT-96-21-A, Appeals Judgment, ¶ 256 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

128. *Bemba Gombo*, Case No. ICC-01/05-01/08, ¶ 417.

Los Zetas.¹²⁹ The prosecution could bring evidence showing Lazcano's power to issue orders and ensure compliance based on his authoritarian position.¹³⁰

Furthermore, signs certainly point toward a highly regimented, military-like command structure giving Lazcano the necessary de facto control of his subordinate Zetas.¹³¹ Reports have surfaced of a complex, five-tiered hierarchy within Los Zetas.¹³² In addition, the United States' Drug Enforcement Administration maintains that the Zetas have a very business-like structure and maintain quarterly meetings, business ledgers, and vote on major assassinations.¹³³ The organization also holds extensive training camps for new recruits.¹³⁴ Thus, enough evidence of effective control exists for the Pre-Trial Chamber to issue a warrant of arrest, where the burden on the Prosecutor is merely "reasonable grounds to believe" that the commander exercised effective control.¹³⁵

2. *Mens Rea*

A commander must have one of two mental states to be held liable for the crimes of subordinates.¹³⁶ First, the commander is liable if he had direct knowledge that subordinates were committing or were about to commit such crimes.¹³⁷ The court cannot presume a commander's knowledge of the conduct and must take into consideration the scope, scale, and number of illegal acts, the amount and type of subordinate forces involved, the timing of the acts and location of the commander, the means of available communication,

129. See *id.* ¶ 414 (holding that effective control is "a manifestation of a superior-subordinate relationship between the suspect and the forces or subordinates in a de jure or de facto hierarchical relationship (chain of command)"); see also *id.* ¶ 417 (holding that the official position of the accused is a factor in the effective control analysis).

130. See *id.* ¶ 417 (listing the "power to issue or give orders," and the power to "ensure compliance with the orders issued" as factors contributing to effective control); see also *id.* (holding that proof of the ability to issue orders and ensure that orders are followed helps demonstrate effective control).

131. See *Bemba Gombo*, Case No. ICC-01/05-01/08, ¶ 414 (noting that a superior-subordinate relationship generally demonstrates "effective control").

132. Hal Brands, *Los Zetas and Mexico's Transnational Drug War*, WORLD POL. REV. (Dec. 25, 2009), <http://www.worldpoliticsreview.com/articles/4866/los-zetas-and-mexicos-transnational-drug-war>.

133. Ware, *supra* note 42.

134. Grayson, *supra* note 8; Ware, *supra* note 42.

135. See Rome Statute, *supra* note 9, art. 58(1)(a); Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Warrant of Arrest, at 3-4 (Feb. 10, 2006).

136. See Rome Statute, *supra* note 9, art. 28(a)(i) (explaining that the commander either knew, or should have known under the circumstances about the crimes being committed by his or her subordinates).

137. *Id.*

and the nature of the commander's position.¹³⁸ Secondly, a commander is liable if he should have known that subordinates were committing or were about to commit crimes.¹³⁹ This standard asks whether the commander was negligent in failing to obtain knowledge of the crimes.¹⁴⁰

If indeed Lazcano had effective control over his subordinate forces as this Note proposes, it would be very difficult for him to argue that he should not have known the forces under his control were committing or were about to commit these acts. There is evidence that the attacks on migrants groups are a common part of the Zetas policies and operations.¹⁴¹ Thus one can infer that Lazcano, as the Zetas' leader, was aware of these policies and operations. Even if Lazcano was simply failing to condemn the attacks on migrant groups, without actually authorizing or endorsing them, the Prosecutor should have little trouble inferring that Lazcano knew about the attacks, given his position in the organization's hierarchy.

3. Failure to Act

Finally, the commander must fail to take steps to prevent or repress the crime or to submit the matter to competent authorities.¹⁴² This "failure to act" element contains two subelements: (1) failure to prevent commission and (2) failure to repress commission.¹⁴³ Under failure to prevent, a commander is liable for failing to stop a crime that is or will be committed by subordinates.¹⁴⁴ Failure to repress is essentially a failure to punish the conduct after the fact.¹⁴⁵ By failing to condemn such attacks or punish the principal offenders, Lazcano did nothing to prevent or repress the conduct, and thus failed to act.

138. See *Bemba Gombo*, Case No. ICC-01/05-01/08, ¶ 431 (referencing standards supported by the jurisprudence of the ad hoc tribunals).

139. Rome Statute, *supra* note 9, art. 28(a)(i).

140. See *Bemba Gombo*, Case No. ICC-01/05-01/08, ¶ 432 ("The 'should have known' standard requires the superior to 'ha[ve] merely been negligent in failing to acquire knowledge' of his subordinates' illegal conduct." (alterations in original)); *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Trial Judgment, ¶¶ 331-32 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (finding that if a commander "exercise[s] due diligence in the fulfillment of his duties" and still does not acquire knowledge of the crime, he will not be held responsible for such crimes).

141. See *supra* Part II.A.

142. Rome Statute, *supra* note 9, art. 28(a)(ii).

143. *Id.*

144. *Bemba Gombo*, Case No. ICC-01/05-01/08, ¶ 437.

145. See *Prosecutor v. Delalic*, Case No. IT-96-21-A, Appeals Judgment, ¶ 254 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) ("It is the Trial Chamber's conclusion . . . that persons effectively in command of such more informal structures, with power to prevent or *punish* the crimes of persons who are in fact under their control, may under certain circumstances be held responsible for their failure to do so." (emphasis added)).

III. ADMISSIBILITY: ARTICLE 17'S "UNABLE TO PROSECUTE" PROVISION

Given the probable substantive success of ICC prosecution and the seriousness of the drug violence, Mexico presents an enticing possibility for ICC intervention.¹⁴⁶ However, despite international concern for the crimes and potential substantive success, ICC intervention in Mexico would overlook significant admissibility concerns that may severely undermine the legitimacy of the ICC's bedrock complementarity regime.¹⁴⁷ Accordingly, this Note now turns to the admissibility issues implicated by Mexico's lack of a domestic codification of Crimes Against Humanity.¹⁴⁸ Admissibility in this case would likely turn on whether the ICC would determine that Mexico is "unable to prosecute" Lazcano under Article 17 due to its failure to implement a Crimes Against Humanity statute, thus rendering Mexico incapable of charging Lazcano with the equivalent ICC crime.¹⁴⁹

Article 17(1)(a), in relevant part, explains that a case is not admissible before the ICC if a state is investigating or prosecuting the case, unless the state is "unable to genuinely carry out the investigation or prosecute" the case.¹⁵⁰ In determining a state's inability to prosecute, one must look to the definition of "unable to prosecute" found in Article 17(3). Article 17(3) is a two-pronged inquiry, with the second prong dependent on the occurrence of the first prong.¹⁵¹ As the provision reads, a state is unable to prosecute the accused when there is (1) an inability to obtain the accused, (2) an inability to acquire necessary evidence and testimony, or (3) an inability to otherwise carry out proceedings. Each of these three events, however, must stem from either the (A) total or substantial collapse of the nation's judicial system, or (B) the unavailability of the national judicial system.¹⁵² It is under the "unavailability of the national judicial system" prong that Mexico's failure to domestically implement Crimes Against Humanity could cause the Pre-Trial Chamber to find Mexico unable to prosecute. But before turning to the unavailability of the national judiciary, this Note must first

146. See *supra* Part II.C (demonstrating Lazcano's individual liability for an international crime); see also de Cordoba & Luhnnow, *supra* note 6 (describing the number of lives lost to Mexican drug-related violence, a number that could influence ICC intervention).

147. See Newton, *supra* note 25, at 17 (arguing that holding a case admissible before the ICC due to a domestic "ordinary crimes" prosecution would undermine the purpose of complementarity).

148. Falconi, *supra* note 23, at 458.

149. See Rome Statute, *supra* note 9, art. 17(1)(a) (holding in relevant part that a case is inadmissible before the Court unless the state is unable to prosecute the case).

150. Rome Statute, *supra* note 9, art. 17(1)(a).

151. See *id.* art. 17(3) (defining "inability").

152. *Id.*

address whether Mexico might be unable to prosecute Lazcano under the “substantial collapse of the national judicial system” prong.

A. Substantial Collapse of the National Judicial System

A substantial collapse of the judicial system requires that, overall, the state is not capable of ensuring the prosecution of the individual responsible for the crime.¹⁵³ The ICC’s Informal Paper on Complementarity lists the lack of necessary personnel, judges, investigators, or prosecutors, or the general lack of judicial infrastructure as factors that could contribute to a judicial collapse.¹⁵⁴ Practically speaking, several issues might render Mexico unable to obtain necessary evidence and testimony, or unable to carry out proceedings as a result of a substantial collapse. These issues manifest in the significant corruption of Mexican law enforcement¹⁵⁵ and in the immense resources and tactical abilities of the Zetas.¹⁵⁶ In Mexico, corruption remains a problem; some would argue a significant problem.¹⁵⁷ This could lead to situations where witnesses refuse to testify out of fear, or where witnesses are simply bought off or killed.¹⁵⁸ The Zetas would almost certainly extort witnesses testifying against Lazcano or potentially attempt to kill them.¹⁵⁹ Local government officials could also be at risk, as the Zetas have shown the ability to affect such officials.¹⁶⁰ One could postulate that

153. Benzing, *supra* note 11, at 614.

154. ICC Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, ICC-01/04-01/07-1008-AnxA, 31 (Mar. 30, 2009) [hereinafter *ICC Expert Paper*].

155. LAURIE FREEMAN, WASH. OFFICE ON LATIN AM., STATE OF SIEGE: DRUG-RELATED VIOLENCE AND CORRUPTION IN MEXICO 1–2 (2006).

156. *Id.* at 4–5; see also Cook, *supra* note 43, at 11 (discussing the Zetas’ significant operational capacity and its infiltrations of law enforcement and the civilians).

157. See *Corruption Impedes Mexican Drug Fight*, SYDNEY MORNING HERALD (Feb. 28, 2009), <http://news.smh.com.au/breaking-news-world/corruption-impedes-mexico-drug-fight-20090228-8krm.html> (reporting that the United States believes corruption remains a key obstacle in overcoming Mexico’s drug cartels); *Q&A: Mexico’s Drug-Related Violence*, *supra* note 7 (noting that police corruption in Mexico is still very serious).

158. See Wilkinson, *supra* note 49 (describing how residents were terrified to divulge information about the cartels and only agreed to interview under conditions of the “strictest anonymity”).

159. See Ken Ellingwood, *Mexico Massacre Investigator Missing; Bombs Hit TV and Police Stations*, L.A. TIMES (Aug. 27, 2010), <http://articles.latimes.com/2010/aug/27/world/la-fg-mexico-detectives-20100828> (reporting that the investigator assigned to investigate the Tamaulipas Massacre went missing soon after the massacre occurred).

160. See *id.* (reporting that the investigator for the prosecutor’s office with jurisdiction over the Tamaulipas Massacre went missing a day after the attack); see also Grayson, *supra* note 8 (describing how in 2006, the Zetas forced the resignation of the Nuevo Laredo police chief by dumping three bodies on a road leading into the city).

the Zetas might even pay off or threaten judges and prosecutors.¹⁶¹ This could make obtaining necessary evidence and testimony quite difficult,¹⁶² and in the worst case, could result in an unwillingness to prosecute.¹⁶³ There are also legitimate concerns about the ability of Mexican authorities to obtain the accused, who happens to be the leader of a heavily armed, tactically advanced paramilitary organization.¹⁶⁴

Despite these valid concerns and potential roadblocks to a smooth trial, it is relatively simple to dismiss the notion of a substantial collapse of Mexico's national judicial system. For one, President Calderón has engaged in significant efforts to clean up his government.¹⁶⁵ He also relies heavily on the Mexican military in his fight against the cartels—largely because of his mistrust of law enforcement—thus largely bypassing the problem of local law enforcement corruption.¹⁶⁶ The Mexican military has shown that it is very capable of tracking down, engaging, and eliminating even the nation's most powerful drug lords.¹⁶⁷

161. Ken Ellingwood, *Mexico Traffickers Bribed Former Anti-Drug Chief, Officials Say*, L.A. TIMES (Nov. 22, 2008), <http://www.latimes.com/la-fg-bribe22-2008nov22,0,6884272.story> (describing the arrest of one of Mexico's top organized crime prosecutors, on charges on passing information to the Sinaloa cartel); Tracy Wilkinson, *Kidnapped Chihuahua Attorney Found Dead*, L.A. TIMES (Nov. 6, 2010), <http://articles.latimes.com/2010/nov/06/world/la-fg-mexico-gonzalez-20101106> (describing the kidnapping and murder of Mario Gonzalez, the brother of Chihuahua's Chief Prosecutor, Patricia Gonzalez).

162. Article 17(3) holds that inability can be determined when a state is unable to obtain "the necessary evidence and testimony." Rome Statute, *supra* note 9, art. 17(3). If the Zetas were successfully buying off or extorting witnesses and government officials, obtaining necessary evidence and testimony would no doubt be very difficult.

163. Article 17(2) holds that unwillingness can be determined when a state instigates proceedings "for the purpose of shielding the person concerned from criminal responsibility." Rome Statute, *supra* note 9, art. 17(2). If prosecutors and judges were on the Zetas payroll during the prosecution of Lazcano, then this factor certainly appears to be in play.

164. Bureau of Int'l Narcotics & Law Enforcement Affairs, *Narcotics Reward Program: Heriberto Lazcano-Lazcano*, U.S. DEPT STATE, <http://www.state.gov/j/inl/narc/rewards/123681.htm> (last visited Mar. 1, 2012).

165. Ken Ellingwood, *Mexico Fires 3,200 Federal Police Officers*, L.A. TIMES (Aug. 31, 2010), <http://articles.latimes.com/2010/aug/31/world/la-fg-mexico-police-fired-20100831>; Chris Hawley & Sergio Solache, *Mexico Focuses on Police Corruption*, USA TODAY (Feb. 5, 2008), http://www.usatoday.com/news/world/2008-02-05-mexico-police_N.htm.

166. *Calderon's Military Call-Up*, WASH. POST (Apr. 2, 2009), <http://www.washingtonpost.com/wp-dyn/content/graphic/2009/04/01/GR2009040103531.html>; Ken Ellingwood, *Army's Role in Mexico Drug War Seen as Crucial yet Risky*, L.A. TIMES (June 3, 2008), <http://www.latimes.com/la-fg-mexarmy3-2008jun03,0,7439731.story>.

167. See Maclean, *supra* note 3 (describing the successful raid of drug kingpin Arturo Beltran Leyva); Wilkinson, *supra* note 45 (reporting the death of a Gulf Cartel leader during a Mexican military operation).

In addition, despite the influence of the Zetas and their significant tactical capacity, they do not control the entire Mexican legal system. A nation that loses control of one region but maintains the judicial system in the rest of the country does not have a substantially collapsed judiciary under Article 17(3).¹⁶⁸ The Zetas may openly defy the government in some vital regions along their trafficking routes in Northern Mexico,¹⁶⁹ and may or may not have judges and prosecutors on their payroll in such regions. But in other low-trafficking regions, their presence is minimal.¹⁷⁰ Mexico could easily transfer the case venue to a territory where the Zetas' network and influence is nominal,¹⁷¹ and could do so without disclosing the venue publicly so as to protect the identity of the judges and local government officials. If necessary, protective measures could be instituted for all parties: judges, witnesses, prosecutors, and local officials.¹⁷²

Regarding the potential difficulty in capturing Lazcano, a reasonable mind fails to see how the ICC would solve this problem with more prudence than the Mexican government.¹⁷³ President Calderón has employed the Mexican military to fight against the cartels, and the military has shown the ability to engage the cartels tactically.¹⁷⁴ The ICC meanwhile, lacks any enforcement arm whatsoever.¹⁷⁵ Physically obtaining the leader of a paramilitary narco-trafficking organization requires going out and getting him;

168. Jakob Pichon, *The Principle of Complementarity in the Cases of the Sudanese Nationals Ahmad Harun and Ali Kushayb Before the International Criminal Court*, 8 INT'L CRIM. L. REV. 185, 196 (2008).

169. Tracy Wilkinson, *Mexican Drug Traffickers Blamed in Killing of Second Mayor*, L.A. TIMES (Aug. 30, 2010), <http://articles.latimes.com/2010/aug/30/world/la-fg-mexico-mayor-20100831> (reporting that the suspects held in connection with the murder of the mayor of Santiago confessed they were working for Los Zetas).

170. See Chris Hawley, *Mexico's Violence Not as Widespread as It Seems*, USA TODAY (Aug. 3, 2010), http://www.usatoday.com/news/world/2010-08-03-Mexico-drug-violence_N.htm (reporting that most of Mexico's murders are confined to nine high-trafficking northern states out of Mexico's thirty-one total states, and adding that the state with the lowest murder rate in Mexico has a rate comparable to that of Montana and Wyoming).

171. See *id.* (noting that most of Mexico's murders take place in nine high-trafficking states out of Mexico's thirty-one total states); Terracino, *supra* note 18, at 435.

172. McNeal, *supra* note 21, at 348–49

173. See Jurdi, *supra* note 11, at 87 (discussing the significant problems associated with basing an “inability to prosecute” determination on the fact that the state cannot obtain the accused).

174. *E.g.*, Tracy Wilkinson, *La Familia Cartel Leader Believed Killed in Michoacan Violence*, L.A. TIMES (Dec. 11, 2010), <http://articles.latimes.com/2010/dec/11/world/la-fg-mexico-drug-lord-20101211> (describing a two-day firefight between La Familia cartel gunmen and Mexican federal troops); Wilkinson, *supra* note 45 (describing the death of a top Gulf cartel crime boss during a firefight with military forces).

175. Jurdi, *supra* note 11, at 87.

Lazcano is not going to stroll into a local police station to turn himself in.¹⁷⁶ With an actual enforcement arm and a willingness to use it, the Mexican government is much better equipped than the ICC to obtain Lazcano.¹⁷⁷

Furthermore, Mexico has significantly increased extraditions to the United States since President Calderón took office.¹⁷⁸ In the highly unlikely event that the situation became so catastrophic that closed proceedings and individual protective measures were not enough to ensure a fair trial, Mexico could extradite Lazcano to the United States for prosecution.¹⁷⁹ Of course, by extraditing, one can very plausibly argue that Mexico concedes its unwillingness or inability to prosecute domestically, thus making the case admissible before the ICC.¹⁸⁰ However, Mexico is still using a domestic extradition treaty to facilitate a domestic prosecution.¹⁸¹ The ICC Statute's unwillingness and inability definitions do not require the state precluding ICC admissibility to prosecute the accused on its own soil.¹⁸² In fact, one could argue that by extraditing, Mexico would in fact be acting quite consistent with an intent to bring Lazcano to justice¹⁸³ or carry out proceedings against him.¹⁸⁴ But irrespective of these arguments, if Lazcano was extradited, the United States, as a nonparty to the ICC, is under no obligation to deliver him to the Hague,¹⁸⁵ and it certainly has an interest in prosecuting him domestically.¹⁸⁶ Admissible or not, if Lazcano is extradited to the United States he will not be tried before the ICC.¹⁸⁷

176. *Mexico Announces Capture of One of the Founders of Los Zetas*, CNN (Jan. 18, 2011), http://articles.cnn.com/2011-01-18/world/mexico.violence_1_heriberto-lazcano-cartel-osiel-cardenas-guillen?_s=PM:WORLD (noting that Lazcano remains at large).

177. See Jurdi, *supra* note 11, at 87 (pointing out that the ICC lacks any enforcement arm).

178. Ken Ellingwood, *Mexico Drug Suspects Extradited at Record Pace*, L.A. TIMES (Nov. 30, 2008), <http://www.latimes.com/news/nationworld/world/la-fg-extradition30-2008nov30,0,286509.story>.

179. *Id.*

180. See Rome Statute, *supra* note 9, art. 17(1)(a) (stating that a case is admissible before the ICC when a state is unwilling or unable to prosecute the accused).

181. See generally Extradition Treaty, U.S.–Mex., May 4, 1978, 31 U.S.T. 5059 (describing the extradition obligations between the United States and Mexico).

182. See Rome Statute, *supra* note 9, art. 17(2)–(3) (defining “unwillingness” and “inability”).

183. A state is unwilling to prosecute if the proceedings are not conducted in a manner consistent with an intent to bring the accused to justice. *Id.* art. 17(2)(c).

184. A state is unable to prosecute if it is otherwise unable to carry out proceedings against the accused. *Id.* art. 17(3).

185. *States Parties: Western European and Other States*, INT'L CRIM. CT., <http://www.icc-cpi.int/Menus/ASP/States+Parties/Western%20European%20and%20Other%20States> (last visited Mar. 1, 2012).

186. Penny Starr, *DEA Names Eleven 'Most Wanted' Mexican Fugitives Sought by U.S.*, CNS NEWS (Apr. 13, 2009), <http://cnsnews.com/node/46528> (reporting that

B. Unavailability of the National Judicial System

1. The Debate on Domestic “Ordinary Crimes” Prosecutions

Unavailability of the national judiciary is the more worrisome trigger that may cause an inability to obtain the accused, to obtain necessary evidence and testimony, or to otherwise carry out proceedings.¹⁸⁸ The ICC Informal Paper lists several factors that can contribute to an “unavailable” judicial system. These factors include “obstruction by uncontrolled elements” rendering the system unavailable,¹⁸⁹ and a “lack of substantive or procedural penal legislation” rendering the judiciary unavailable.¹⁹⁰ However, beyond this one informal paper the ICC has provided very little guidance on the inability to prosecute inquiry.¹⁹¹

Mexico’s lack of proper domestic legislation certainly does not render Mexico unable to obtain the accused or necessary evidence and testimony, but it may put the nation within the “otherwise unable to carry out its proceedings” prong of Article 17(3). This prong stems from Mexico’s failure to domestically codify Crimes Against Humanity.¹⁹² As some scholars note, this “unable to carry out proceedings” factor might also implicate due process concerns.¹⁹³ If a state lacks laws conforming to international standards of due process, it may render that state unable to prosecute.¹⁹⁴ However, the language of the statute itself does not comport to this view, as it only permits the ICC to find that a state is unable to prosecute if national

Lazcano is one of the eleven most wanted Mexican fugitives sought by the United States).

187. *Id.*; see also Dane Schiller & Jacquee Petchel, *Under Veil of Secrecy Drug Kingpin Sentenced*, HOUS. CHRON., Feb. 25, 2010, at 11 (describing the twenty-five year prison sentence handed down in U.S. federal court for Osiel Cardenas Guillen, the former Gulf Cartel boss who helped spawn the Zetas in the late 1990s).

188. Rome Statute, *supra* note 9, art. 17(3).

189. *ICC Expert Paper*, *supra* note 154, at 31. An “obstruction by uncontrolled elements” could, under certain circumstances, render the system unavailable due to an inability to obtain the accused or evidence and testimony. See Ellingwood, *supra* note 159 (reporting that the investigator investigating the Tamaulipas Massacre went missing a day after the attack). This factor could arguably capture the corruption in Mexico and the Zetas’ potential to resort to extortive methods, as referenced above. See McNeal, *supra* note 32, at 343 (contending that the security situation in Iraq during the Sadaam Hussein trial could have implicated the “obstruction by uncontrolled elements” factor of the inability analysis).

190. *ICC Expert Paper*, *supra* note 154, at 31.

191. McNeal, *supra* note 21, at 329.

192. Terracino, *supra* note 18, at 428. Of course, Mexico could solve this problem by simply implementing Crimes Against Humanity domestically, but to date this has not occurred. Falconi, *supra* note 23.

193. McNeal, *supra* note 21, at 330; Carsten Stahn, *Complementarity, Amnesties, and Alternative Forms of Justice: Some Interpretive Guidelines for the International Criminal Court*, 3 J. INT’L CRIM. JUST. 695, 713 (2005).

194. McNeal, *supra* note 21, at 330.

proceedings make it more difficult to convict the accused.¹⁹⁵ Furthermore, in 2008, Mexico amended its Constitution to include a presumption of innocence and the allowance for oral trials, putting to rest—at least facially—its most glaring procedural deficiencies.¹⁹⁶ While the ICC may very well become sympathetic to the “due process” approach to inability,¹⁹⁷ the question of whether Mexico’s judicial system conforms to international standards of due process is beyond the scope of this Note’s inquiry. This Note is concerned with Mexico’s inability to prosecute based on its failure to codify the relevant ICC crime domestically. Given that the inability standard regarding ordinary crimes has significant ramifications for the ICC’s ability to exercise jurisdiction despite state activity, an unexplored definition of inability in this respect leaves the foundations of Article 17’s complementarity principle unstable.¹⁹⁸

Some scholars argue that if the ICC were to consider a state unable to prosecute based on a lack of domestic implementation of an ICC crime, the ICC would undermine the legitimacy of its complementarity regime and its respect for national prosecutions. In essence, the ICC would create an express obligation on states to both codify and charge the “proper” substantive crime, simply to preclude ICC jurisdiction and maintain its sovereign right to prosecute.¹⁹⁹ Indeed, the ICC Statute’s Preamble recognizes that the ICC is complementary, not primary, to domestic prosecutions.²⁰⁰ In addition, Article 18 requires that, when the Prosecutor initiates an investigation, it must notify the states parties who could legally exercise jurisdiction over the conduct.²⁰¹ This gives such states the opportunity to exercise their domestic jurisdiction by initiating an investigation or by demonstrating an ongoing investigation or prosecution.²⁰² Accordingly, requiring an ICC state party charge the “proper” ICC crime just to retain jurisdiction intrudes upon a state’s sovereign right to prosecute crimes occurring on its territory as it so chooses.²⁰³

Furthermore, Article 17(1)(c) explicitly recognizes that a case is inadmissible when the ICC is prohibited under Article 20(3) from

195. Heller, *supra* note 32.

196. David Luhnnow, *Presumption of Guilt*, WALL ST. J., Oct. 17, 2009, at W1.

197. See McNeal, *supra* note 21, at 332 (explaining that the ICC may be migrating toward an inability inquiry based on whether the state has adequate fair trial guarantees in its national laws).

198. *Id.* at 330 (“Absent a clear definition of ‘unable,’ states do not know the current scope of the ICC’s jurisdiction or how far it may expand.”).

199. Newton, *supra* note 25, at 17; Pichon, *supra* note 168, at 197.

200. Rome Statute, *supra* note 9, pmbl. para. 10.

201. *Id.* art. 18(1).

202. *Id.* art. 18(2) (holding that a state has one month from notification to “inform the Court that it is investigating or has investigated”).

203. Newton, *supra* note 25, at 17.

exercising jurisdiction.²⁰⁴ Article 20(3), the ICC's provision against double jeopardy, precludes the ICC from exercising jurisdiction over the conduct of a perpetrator when that perpetrator was tried by another court for conduct also within the ICC's jurisdiction.²⁰⁵ This is in contrast to the language of the ICTY and International Criminal Tribunal for Rwanda (ICTR) double jeopardy provisions, which permit the ICTY and ICTR to try a person previously tried domestically if that person was simply charged with an "ordinary crime," such as domestic murder or rape.²⁰⁶ Thus, ICTY and ICTR double jeopardy hinges on whether the *substantive crime* was subject to prior prosecution, whereas ICC double jeopardy is based on whether the *conduct* was subject to prior prosecution.²⁰⁷

The end result of Article 20(3) is that under Article 17(1)(c), the ICC cannot try conduct previously prosecuted domestically. This could influence the ICC, under Article 17(1)(a), to hold inadmissible a case currently being prosecuted domestically, given the right conditions.²⁰⁸ Article 20(3) once again proves useful in determining these conditions.²⁰⁹ Article 20(3) provides exceptions to the rule against double jeopardy when the prior domestic proceedings were undertaken to shield the accused from responsibility or were inconsistent with an intent to bring the accused to justice.²¹⁰ Provided the ordinary crime adequately captures the severity of the conduct and adequately holds the perpetrator accountable for his or her actions, it is difficult to claim that domestic proceedings shield the accused from justice or are inconsistent with an intent to bring the perpetrator to justice.²¹¹ Under this theory, if Mexico's prosecution for an ordinary crime captures the severity of the

204. Rome Statute, *supra* note 9, art. 17(1)(c).

205. *Id.* art 20(3).

206. See Statute of the International Criminal Tribunal for Rwanda art. 9(2)(a), Nov. 8, 1994, 33 I.L.M. 1598 [hereinafter ICTR Statute] ("A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: (a) the act for which he or she was tried was characterized as an ordinary crime . . ."); Statute of the International Criminal Tribunal for the Former Yugoslavia art. 10(2)(a), May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute] (same); see also Benzing, *supra* note 11, at 616 (arguing that the ICC's *ne bis in idem* provision encompasses broader latitude to domestic prosecutions than the ad hoc tribunals).

207. Compare ICTY Statute, *supra* note 206, art. 10(2)(a), and ICTR Statute, *supra* note 206, art. 9(2)(A) (explaining that a person may be tried by the tribunal when the act for which he or she was tried domestically was an "ordinary crime"), with Rome Statute, *supra* note 9, art. 20(3) (explaining that a person cannot be tried by the ICC when the conduct forming the basis of ICC jurisdiction was previously tried by another court).

208. Benzing, *supra* note 11, at 616.

209. See Rome Statute, *supra* note 9, art. 20(3)(a)–(b) (providing exceptions to inadmissibility under specific conditions of improper domestic proceedings).

210. *Id.*

211. Benzing, *supra* note 11, at 616.

Tamaulipas Massacre and provides an adequate sentence for the attack, the ICC should not exercise jurisdiction over the case because Mexico is not "unable to prosecute."²¹²

Other scholars, however, view the ICC's stated mission of ending impunity for international atrocity crimes as likely implicating ICC jurisdiction in the case of a failure to implement ICC crimes domestically.²¹³ Under such a view, if Mexico does not charge Lazcano with an ICC crime, then the ICC could hold the case admissible because Mexico is "unable to prosecute" under Article 17(1)(a). This view is supported by the overwhelming practice of the states parties to domestically implement ICC crimes.²¹⁴ Additionally, these scholars point to the statute's Preamble as imposing an obligation on states parties to implement the ICC's substantive crimes.²¹⁵ Paragraph six of the Preamble to the Rome Statute recalls "the duty of every state to exercise its criminal jurisdiction over those responsible for *international crimes*."²¹⁶ Paragraphs four and five of the Preamble affirm the desire to punish the most serious international crimes and end impunity for such crimes.²¹⁷ Simply prosecuting conduct as an ordinary domestic crime, when in fact the conduct satisfies the elements of an international crime, may be contrary to the duty of states parties and may undermine the ICC's stated purpose of punishing international atrocity crimes as such.²¹⁸ Indeed, the Preamble recognizes that atrocity crimes "threaten the peace, security, and well-being of the world."²¹⁹ Thus, prosecuting conduct that qualifies as a Crime Against Humanity simply as an ordinary crime promotes impunity for Crimes Against Humanity because the crime is not being recognized and punished as the international atrocity it is.²²⁰ Given the worldwide interest implicated by atrocities, domestic prosecutions for ordinary crimes warrant international jurisdiction when the conduct meets the elements of an

212. *Id.*

213. Kleffner, *supra* note 22, at 90–94.

214. *Id.* at 92.

215. *Id.* at 92–93.

216. Rome Statute, *supra* note 9, pmb. para. 6 (emphasis added).

217. *Id.* pmb. paras. 4–5.

218. Kleffner, *supra* note 22, at 93.

219. Rome Statute, *supra* note 9, pmb. para. 3.

220. See Prosecutor v. Tadic, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 58–59 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) ("Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, . . . there would be a perennial danger of international crimes being characterised as 'ordinary crimes.'").

international crime and implicates worldwide humanitarian interests and concerns.²²¹

2. The Admissibility of Lazcano's Case

Assuming Mexico would in fact attempt to prosecute Lazcano for the Tamaulipas Massacre, the issue would be whether Mexico, due to its lack of a domestic codification of Crimes Against Humanity, is otherwise unable to carry out its proceedings, thus rendering its judicial system unavailable under Article 17(3).²²² Mexico would have to charge Lazcano with the ordinary crime of domestic murder, as it is quite literally unable to charge Lazcano with an international crime for the conduct in question.²²³ But simply because the relevant international charge is not available to Mexico does not mean that Mexico's judicial system is unavailable to the point that Mexico is unable to carry out proceedings against Lazcano.²²⁴ Despite its inability to charge an ICC crime, Mexico can still charge Lazcano with multiple counts of a very serious crime: murder.²²⁵ Consequently, in prosecuting for an ordinary crime, the Mexican judicial system could carry out proceedings, and thus the judicial system is quite *available*.²²⁶ Assuming a conviction, the sentence for up to seventy-two counts of murder stemming from the Tamaulipas Massacre would certainly incarcerate Lazcano for the remainder of his natural life.²²⁷ Thus, the threat of impunity that drives the engine of ICC admissibility does not exist in this particular case, nor would it

221. *Id.*; see also Rome Statute, *supra* note 9, art. 5 ("The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.").

222. Terracino, *supra* note 18, at 435–37 (discussing whether a domestic ordinary crimes prosecution allows the ICC to find the state unable to prosecute under the definition of inability in Article 17(3)).

223. See Falconi, *supra* note 23 (recognizing that while the Rome Statute has been ratified, the criminal offenses have yet to be included in Mexican criminal legislation).

224. Terracino, *supra* note 18, at 436.

225. Press Release, U.S. Immigration & Customs Enforcement, ICE Deports Illegal Alien to Face Murder Charges in Mexico (May 13, 2010), *available at* <http://www.ice.gov/news/releases/1005/100513washington.htm>.

226. See Kleffner, *supra* note 22, at 96 (arguing that a state clearly carries out its proceedings when it prosecutes for ordinary crimes); Terracino, *supra* note 18, at 436 (same).

227. *Mexico Alters Extradition Rules*, BBC NEWS (Nov. 30, 2005), <http://news.bbc.co.uk/2/hi/4483746.stm> (reporting on a Mexican Supreme Court decision striking down a constitutional provision banning life without parole, which also overturned Mexico's ban on extraditing nationals facing a life sentence in that receiving country).

exist in most instances of drug-related killings.²²⁸ Murder, as a crime entailing the most severe domestic sentence,²²⁹ sufficiently captures the atrociousness of the conduct, and would do so in nearly every circumstance.²³⁰ In short, Lazcano would not get a break with domestic charges,²³¹ and his conduct would not go unpunished or inadequately punished.²³² While he cannot be convicted of an international crime if tried domestically,²³³ his sentence would be as harsh as possible under accepted international standards.²³⁴

Article 20(3) strongly supports the argument that Mexico is able to prosecute under Article 17(1)(c).²³⁵ As mentioned previously, Article 20(3) explains that the ICC cannot exercise jurisdiction over conduct within the ICC's substantive jurisdiction if the person was previously tried for that same conduct by another court (i.e., a domestic court).²³⁶ The ICC Statute thus bars ICC jurisdiction in a situation where a previously charged domestic crime differs from the ICC's charged crime.²³⁷ When examining Article 20(3) in light of the ICTY and ICTR provisions against double jeopardy, this argument becomes even stronger. The ICTY and ICTR *ne bis in idem*²³⁸ provisions specifically reference domestic prosecutions for ordinary crimes and permit the respective tribunals to exercise jurisdiction in

228. Kleffner, *supra* note 22, at 97 (arguing that a conviction and sentence on domestic murder charges is likely to adequately reflect the gravity of the perpetrator's conduct).

229. Código Penal Federal [CPF] [Federal Criminal Code], *as amended*, art. 320, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.) (stating that murder is punishable by a sentence of between thirty and sixty years).

230. Kleffner, *supra* note 22, at 97.

231. Código Penal Federal [CPF] [Federal Criminal Code], *as amended*, art. 320, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.).

232. See Julia Preston, *Raul Salinas's Sentence in Mexico Murder Is Cut to 27 ½ Years*, N.Y. TIMES, July 17, 1999, at A2. The article describes the sentence of Mr. Salinas for one count of murder back when Mexico had a maximum sentence of fifty years without parole. *Id.* Lazcano faces potentially seventy-two counts of murder stemming from the Tamaulipas Massacre, as opposed to one count. See Ellingwood, *supra* note 10 (reporting that seventy-two people were executed by the Zetas in late August of 2010).

233. Falconi, *supra* note 23.

234. The death penalty is generally not an acceptable sentence in international law. See AMNESTY INT'L, INTERNATIONAL STANDARDS ON THE DEATH PENALTY 3–7 (2006), available at <http://www.amnesty.org/en/library/info/ACT50/001/2006> (giving an excellent overview of international authority condemning the death penalty). The Rome Statute imposed a maximum sentence of thirty years, with an exception of life imprisonment “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.” Rome Statute, *supra* note 9, art. 77(1).

235. Benzing, *supra* note 11, at 616.

236. Rome Statute, *supra* note 9, art. 20(3).

237. *Id.*

238. *Ne Bis in Idem* is Latin for “Not Twice for the Same.” It is a fancy way of saying “no double jeopardy.” Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. 778–79 (2009).

spite of a domestic “ordinary crimes” prosecution.²³⁹ Thus, the ad hoc tribunals based the concept of double jeopardy on whether an international crime was previously charged by another court.²⁴⁰ In contrast, Article 20(3) of the ICC Statute precludes ICC admissibility when the *conduct* was previously subject to prosecution by another court.²⁴¹ Thus, ICC double jeopardy has nothing to do with whether the “proper crime” was previously charged, but instead has to do with whether the specific *conduct* was previously charged.²⁴² By departing from the language of the ad hoc tribunals, Article 20(3) shows that the drafters of the ICC Statute sought to preclude ICC admissibility over conduct substantively within ICC jurisdiction that was already prosecuted domestically as an ordinary crime.²⁴³

Article 20(3) governs situations of prior domestic prosecution, while Article 17(1)(a) determines admissibility for cases currently under domestic investigation or prosecution. The provisions are very clearly related, which allows the language of Article 20(3) to inform the interpretation of inability under Article 17(1)(a).²⁴⁴ As explained above, Article 20(3) prohibits ICC admissibility when conduct was already prosecuted by another court, subject to the provision’s exceptions.²⁴⁵ Similarly, conduct currently under investigation or prosecution by another court makes the case inadmissible under Article 17(1)(a), subject to the provision’s exceptions.²⁴⁶ The exceptions to the general rule of inadmissibility in Article 20(3) provide that when the prior proceedings were designed to shield the accused from justice, or were conducted in a manner inconsistent with an intent to bring the person to justice, the ICC may hold the case admissible despite the prior prosecution.²⁴⁷ The exceptions to inadmissibility in Article 17(1)(a) are, of course, a state’s unwillingness or inability to prosecute.²⁴⁸

239. ICTR Statute, *supra* note 206, art. 9(2)(a); ICTY Statute, *supra* note 206, art. 10(2)(a).

240. See ICTR Statute, *supra* note 206, art. 9(2)(a) (limiting proceedings in the tribunal to persons not previously tried in national courts, unless that proceeding comprised only “ordinary crimes”); ICTY Statute, *supra* note 206, art. 10(2)(a) (same); see also Pichon, *supra* note 168, at 197 (explaining the difference between the Rome Statute Article 20 and the ad hoc tribunals’ double jeopardy provisions).

241. Rome Statute, *supra* note 9, art. 20(3); Benzing, *supra* note 11, at 616.

242. Kleffner, *supra* note 22, at 96.

243. *Id.*

244. Benzing, *supra* note 11, at 616–17; Pichon, *supra* note 168, at 197.

245. Rome Statute, *supra* note 9, art. 20(3).

246. See Benzing, *supra* note 11, at 617 (noting that crimes currently under investigation or under prosecution fall within the scope of Article 17); Pichon, *supra* note 168, at 197 (noting that the Rome Statute does not allow the ICC to prosecute a person that has already been convicted by a national court for an “ordinary crime”).

247. Rome Statute, *supra* note 9, art. 20(3).

248. *Id.* art. 17(1)(a).

The exceptions to Article 20(3) are clearly not implicated by domestic murder charges.²⁴⁹ Prosecution for domestic murder would not be an attempt to shield Lazcano from justice, nor would such charges be inconsistent with an intent to bring him to justice.²⁵⁰ Murder charges would reflect a clear intent to hold Lazcano accountable for the Tamaulipas Massacre, as the nature and punishment for these charges would reflect the act's severity.²⁵¹ Thus, the case would clearly be inadmissible before the ICC if the domestic ordinary crimes prosecution was already complete when the ICC stepped in.²⁵² However, if the ICC were to hold that domestic murder charges brought concurrent to ICC action create an inability to prosecute, then an exception to inadmissibility under Article 17(1)(a) would be implicated.²⁵³ Suddenly, the exact same case would be admissible simply because the domestic prosecution is not final before the Pre-Trial Chamber issues an arrest warrant.²⁵⁴ In effect, such a decision would reduce the admissibility determination of a given case, in terms of domestic prosecutions, to a question of timing by the ICC Prosecutor. This is cold comfort for states parties.

IV. THE IMPLICATIONS OF ORDINARY CRIMES PROSECUTIONS

To oversimplify the issue, Mexico initiated its crackdown on the drug cartels,²⁵⁵ and should reap the political rewards of that crackdown when the opportunity to prosecute cartel leadership manifests itself. Of course, as this Note demonstrates, this reward is subject to Mexico's potential inability to prosecute the case.²⁵⁶ While Mexico lacks a domestic codification of the Crimes Against Humanity,²⁵⁷ this alone is not dispositive of Mexico's inability to prosecute Heriberto Lazcano. The conduct underlying the particular crime in question involved multiple premeditated murders.²⁵⁸ Mexico can prosecute domestically for an ordinary crime that carries with it a

249. *Id.* art. 20(3).

250. *Id.*

251. Código Penal Federal [CPF] [Federal Criminal Code], *as amended*, art. 320, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.).

252. Rome Statute, *supra* note 9, art. 20(3).

253. *Id.* art. 17(1)(a) (stating that an inability to prosecute is grounds for admissibility).

254. *See* Benzing, *supra* note 11, at 617 (pointing out the possible contradiction of holding a case inadmissible under Article 20(3) and holding a case admissible under Article 17(3)).

255. Ioan Grillo, *Mexico's New President to Take on Drug Gangs*, DAILY BREEZE (Torrance, Cal.), Dec. 12, 2006, at A12.

256. *See supra* Part III (discussing the inability to prosecute inquiry under Article 17(1)(a) and Article 17(3)).

257. Falconi, *supra* note 23, at 458.

258. Ellingwood, *supra* note 10.

nature and sentence comporting with international sentencing guidelines.²⁵⁹ The sentence reflects the seriousness, and thus the atrociousness of the crime.²⁶⁰ The threat of impunity or concerns of a disproportionately lenient response failing to reflect the atrocious nature of the act are, at best, symbolic fears. Resting arguments of impunity and disproportional leniency on merely the title of the charged crime is a symbolic concern that in no way justifies the intrusion into state sovereignty that would necessarily follow.

This is not to make light of the international community's interests in ending impunity and recognizing atrocity crimes in such a manner that reflects their egregious nature. After all, the ICC Statute recognizes that atrocity crimes implicate the interests of the international community as a whole.²⁶¹ It follows that these crimes should be recognized as such, but only in appropriate circumstances. Admittedly, it may be difficult to find a comparatively sufficient ordinary crime that reflects the seriousness and atrociousness of the international War Crime of "[d]estroying or seizing the property of an adversary."²⁶² Assuming the domestic state lacks domestic implementation of the relevant War Crimes provision,²⁶³ the domestic prosecutor might have to settle for simply charging domestic theft. While the admissibility or inadmissibility of this hypothetical scenario is beyond the scope of this Note, there is clearly a stronger argument favoring the state's inability to prosecute this hypothetical destruction of property than in the case of Heriberto Lazcano, where the domestic prosecutor could charge multiple counts of premeditated murder that would carry an appropriately harsh sentence.²⁶⁴

However, the ICC could attempt to justify Mexico's inability to prosecute based on Mexico's precarious security situation.²⁶⁵ While this Note posits that the security concerns in Mexico are not significant enough to give rise to inability, if the concerns became significant in Lazcano's case, Mexico could extradite him to the United States.²⁶⁶ In doing so, Mexico would still be using domestic

259. Compare Rome Statute, *supra* note 9, art. 77(1) (providing for a sentence of thirty years, except in cases of extreme gravity, in which a life sentence is authorized), with Código Penal Federal [CPF] [Federal Criminal Code], *as amended*, art. 320, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.) (providing a sentence of thirty to sixty years for the crime of murder).

260. Kleffner, *supra* note 22, at 97.

261. Rome Statute, *supra* note 9, pmbl. para. 3 ("Recognizing that such grave crimes threaten the peace, security and well-being of the world . . .").

262. *Id.* art. 8(2)(e)(12).

263. Article 8 of the Rome Statute covers War Crimes. *Id.* art. 8.

264. See Kleffner, *supra* note 22, at 97 (arguing that some ICC crimes may not have an appropriate ordinary crime affiliate).

265. See *supra* Part III (discussing how Mexico's security situation relates to inadmissibility).

266. Ellingwood, *supra* note 178.

means—an extradition treaty—to facilitate a domestic prosecution.²⁶⁷ This could prevent a finding of ICC admissibility under Article 17, irrespective of the fact that the United States has no obligation to turn over its prisoners to the ICC.²⁶⁸

Due to the comparative penal strength of the ordinary crime and Mexico's ability to work around its security concerns, Lazcano's case is not one of the "appropriate circumstances" justifying strict reflection of an international crime as the atrocity it is.²⁶⁹ The ICC should adopt a circumstantial, case-by-case approach to ordinary crimes prosecutions that is concerned with whether the nature of the ordinary crime and its corresponding sentence adequately reflects the atrocious nature of the conduct and imposes a comparatively similar or harsher punishment in relation to international sentencing standards.²⁷⁰

But why should the ICC care about ordinary crimes? The ICC determines the admissibility of a given case, not the state bringing the admissibility challenge.²⁷¹ Why should the ICC determine that a case is admissible despite a concurrent ordinary crimes prosecution in only "appropriate circumstances," as suggested above? First, if the ICC adopts a rule that active ordinary crimes prosecutions are per se evidence of a state's inability to prosecute, it not only contradicts the express language of Article 20(3),²⁷² but also creates an obligation on states parties to precisely implement all ICC crimes in order to avoid potential ICC usurpation of an ongoing domestic prosecution.²⁷³ Staunch ICC proponents argue that the preambular language of the ICC Statute clearly reflects the obligation of the states to prosecute international crimes, and thus such an obligation is unproblematic.²⁷⁴ The states parties ratified the Rome Statute voluntarily, and in doing so willingly gave away a portion of their sovereignty in the interests of international accountability for atrocity crimes. As a result, the states parties should be required to implement substantive domestic legislation to preserve their own sovereign right to prosecute.

267. See generally Extradition Treaty, *supra* note 181 (describing the extradition obligations between the United States and Mexico).

268. *States Parties: Western European and Other States*, *supra* note 185 (showing absence of United States as a party to the Rome Statute).

269. See Kleffner, *supra* note 22, at 97 (describing the importance of considering relative penalties for the crime in the domestic and the international court).

270. See Pichon, *supra* note 168, at 197 (arguing that the ICC could require states impose adequate sentencing in ordinary crimes prosecutions).

271. See Rome Statute, *supra* note 9, art. 19(1) ("The Court shall satisfy itself that it has jurisdiction in any case brought before it.").

272. Article 20(3) states that conduct previously tried by another court is not admissible before the ICC. *Id.* art. 20(3).

273. Terracino, *supra* note 18, at 438–39.

274. Rome Statute, *supra* note 9, pmb. paras. 4, 6.

But this argument overlooks the most critical point. While the states parties did voluntarily ratify the ICC Statute, the Statute contains no express obligation to domestically implement ICC crimes.²⁷⁵ The Preamble recognizes a national duty to prosecute international crimes, but does not impose a duty to prosecute such crimes in accordance with substantive ICC law.²⁷⁶ The states parties voluntarily signed a document that lacks, presumably intentionally,²⁷⁷ any domestic implementing obligation. Indeed, the plain text of the statute at Article 20(3) recognizes prior ordinary crimes prosecutions as legitimate domestic prosecutions that preclude admissibility.²⁷⁸ By failing to recognize concurrent ordinary crimes investigations or prosecutions as legitimate domestic proceedings, the ICC would create an obligation to implement, thus infringing on the sovereignty of states parties, when in fact the states parties signed a document containing no such obligation in its text. The states parties are certainly wise to implement ICC crimes to curb potential ICC intrusions into state sovereignty, but the states parties are not, and should not be required to implement substantive domestic legislation to preserve their sovereign rights.²⁷⁹

Some scholars argue that the ICC should be read to implicitly contain a domestic implementing obligation.²⁸⁰ This promotes facilitation of effective domestic prosecutions for international crimes that appropriately reflect the international humanitarian interests at stake in such atrocities.²⁸¹ However, the question of whether the ICC Statute should contain, or should be read to contain, an implementing obligation is an entirely different question from whether an obligation actually exists in the text. The fact that there is debate about whether the ICC Statute contains any implementing obligation²⁸² necessarily implies that there is indeed no express obligation; otherwise there would be no need for debate. This lack of an express implementing obligation should preclude the ICC from imposing one on the states parties.

275. Kleffner, *supra* note 22, at 91.

276. Rome Statute, *supra* note 9, pmb1.

277. Terracino, *supra* note 18, at 438 (discussing the intentional removal of an ordinary crimes exception to inadmissibility during the 1998 meetings of the Preparatory Committee).

278. Rome Statute, *supra* note 9, art. 20(3).

279. See Newton, *supra* note 25, at 17 (arguing that complementarity is "severely weakened" if the ICC Prosecutor can essentially dictate acceptable domestic charges).

280. Kleffner, *supra* note 22, at 92–93.

281. See Terracino, *supra* note 18, at 439 ("Regular national prosecutions for ordinary crimes are not desirable and would undermine the fundamental idea on which the international criminal justice system is founded.").

282. Kleffner, *supra* note 22, at 90–91.

Secondly, if the ICC were to create an implied implementing obligation, it would risk alienating the cooperation of the states parties, on whom it is wholly dependent for investigative purposes. The situation in Mexico provides an ideal illustration. Mexico is a willing state that has invested a tremendous amount of resources into combating its drug-trafficking problem domestically.²⁸³ Robbing Mexico of the opportunity to prosecute the spoils of its costly efforts would not endear the ICC to Mexico or the rest of its member states. More importantly, all crimes within ICC jurisdiction still occur in the sovereign territory of a state. Thus, the ICC is largely, if not fully, dependent on the cooperation of states parties to apprehend perpetrators, obtain witnesses, and otherwise conduct effective investigations.²⁸⁴ While the states parties have an express obligation to cooperate with the ICC,²⁸⁵ this does not mean that a state is unable to make life particularly difficult for the ICC and its investigators. Additionally, a state party may always withdraw from the Rome Statute if it feels that the impediment on its sovereign interests is too great. If the ICC finds a way, through ordinary crimes, to exercise jurisdiction in spite of state prosecutorial action, it might convince some member states that the treaty is no longer in its best interests.

Finally, by holding cases admissible despite an ordinary crimes prosecution, the ICC would add fuel to the fire for skeptical states that refuse to ratify the Statute, namely the United States. Article 17 exists to ensure that ICC prosecutions are *complementary* to domestic prosecutions, in that they exist only to fill in gaps where domestic prosecutions fall short and permit pockets of impunity.²⁸⁶ Thus, at its core, complementarity is a restrictive principle, designed to limit ICC authority.²⁸⁷ This principle was fashioned in Article 17 out of respect for national institutions and deference to the sovereign right of states to prosecute offenders for crimes committed within their nationality or territorial jurisdictions.²⁸⁸ The states parties ratified the ICC

283. Merle D. Kellerhals, Jr., *Merida Initiative Will Help Battle Drug Trafficking*, NEWS BLAZE (July 1, 2008), <http://newsblaze.com/story/20080701063119tsop.nb/topstory.html> (reporting that as of July 2008, the Mexican government had spent an estimated \$7 billion in an eighteen-month period fighting drug trafficking organizations).

284. Giulio M. Gallarotti & Arik Y. Preis, *Politics, International Justice, and the United States: Toward a Permanent International Criminal Court*, 4 UCLA J. INT'L L. & FOREIGN AFF. 1, 28 (1999).

285. See Rome Statute, *supra* note 9, art. 86 ("States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.").

286. Newton, *supra* note 22, at 47-48.

287. Newton, *supra* note 25, at 11.

288. Benzing, *supra* note 11, at 595.

Statute largely because they believe Article 17 sufficiently protects state sovereignty.²⁸⁹

Meanwhile, the United States remains opposed to the ICC in part because it believes that Article 17 provides inadequate protection for domestic prosecutions.²⁹⁰ If the Pre-Trial Chamber were to hold a case admissible under Article 17 despite a concurrent domestic prosecution, the fears of the United States would largely be confirmed. By failing to respect concurrent ordinary crimes prosecutions, the ICC would essentially create a loophole in Article 17's complementarity regime through which the ICC could exercise jurisdiction despite simultaneous state action. This would undermine the very purpose for which complementarity was created. Article 17 would become a hollow protection for national prosecutions, and by extension, hollow protection for national sovereignty. If the international community were to ultimately see the ICC as intruders upon grounds reserved for its member states, the ICC would severely undermine its institutional legitimacy and purpose.

V. CONCLUSION

The ICC would be wise to adopt a circumstantial, case-by-case inquiry regarding the admissibility of a case in which there is also a concurrent ordinary crimes prosecution. The inquiry should center on whether the nature of the ordinary crime and its associated penalty adequately reflect the international scope and atrociousness of the conduct.²⁹¹ Of course, the ICC may adopt other factors it deems relevant, but this Note argues that the critical factor is the nature and sentence associated with the domestic crime. A comparatively severe domestic charge and sentence satisfies the international community's concerns regarding impunity or potential leniency for atrocity perpetrators who are subject to domestic proceedings.²⁹² In contrast, a comparatively weak domestic charge and sentence for the domestic crime would likely not capture the gravity of the perpetrator's conduct.²⁹³ In the case of homicides or sexual offenses, a correspondingly weak domestic charge and sentence is extremely unlikely.

Mexico presents a situation in which the proposed circumstantial ordinary crimes inquiry should lead to inadmissibility. Using the

289. See Rolf Einar Fife, *The International Criminal Court: Whence It Came, Where It Goes*, 69 *NORDIC J. INT'L L.* 63, 68 (2000) (noting that the lack of concurrent jurisdiction with national courts is important for the perceived legitimacy of the court).

290. Carla Levy Rodriguez, *Slaying the Monster: Why the United States Should Not Support the Rome Treaty*, 14 *AM. U. INT'L L. REV.* 805, 816–18 (1999).

291. Pichon, *supra* note 168, at 197.

292. Benzing, *supra* note 11, at 617.

293. Kleffner, *supra* note 22, at 97.

hypothetical prosecution of notorious Los Zetas leader Heriberto “The Executioner” Lazcano, this Note demonstrates that substantively speaking, the Pre-Trial Chamber could arrest Lazcano as an individual for a crime within the ICC’s jurisdiction. However, due to the comparatively strong ordinary crime that Mexico would charge in this situation, Mexico is not unable to prosecute Lazcano under Article 17(1)(a) and Article 17(3) of the Rome Statute,²⁹⁴ despite its failure to domestically implement Crimes Against Humanity.²⁹⁵ There are admittedly concerns about the security situation in Mexico, especially given the sophisticated paramilitary capabilities of Lazcano’s organization.²⁹⁶ However, these concerns are addressable domestically, and in a worst-case scenario Mexico could still facilitate a domestic prosecution by extraditing Lazcano to the United States.²⁹⁷

The facts of Lazcano’s prosecution are applicable to other potential ICC cases in Mexico. The ICC is unlikely to intervene in Mexico for crimes not involving murder, kidnapping, or human trafficking, as the ICC is constrained to crimes that are of “the most serious concern to the international community as a whole.”²⁹⁸ Simple crimes carried out by the cartels, such as various thefts or assault, are very unlikely to rise to this high level of international concern outside the context of an armed conflict,²⁹⁹ and the crime of drug trafficking is not within the ICC’s jurisdiction.³⁰⁰ The sentences associated with murder, kidnapping, and human trafficking are likely harsh enough to reflect the atrocious nature of the conduct.³⁰¹ Regarding security concerns for other cases, Mexico is capable of addressing the situation and implementing appropriate protective measures on a case-by-case basis, and extradition to the United States is always an option for perpetrators associated with trafficking narcotics into the United States.³⁰² Thus, under the concurrent

294. See *supra* note 19.

295. Falconi, *supra* note 23, at 458.

296. Ware, *supra* note 42.

297. Cf. Ellingwood, *supra* note 178 (noting the sharp increase in extraditions from Mexico to the United States under the Calderón Administration).

298. Rome Statute, *supra* note 9, pmb. para. 4.

299. See *supra* Part II (discussing the nonexistence of an armed conflict in Mexico).

300. See Rome Statute, *supra* note 9, arts. 5–8 (lacking any definition of drug trafficking or any form of narcotics activity as an offense within the jurisdiction of the Court).

301. See Código Penal Federal [CPF] [Federal Criminal Code], *as amended*, art. 320, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.) (providing a sentence of thirty to sixty years for the crime of murder); Elisabeth Malkin, *Mexico: Kidnap Sentence Upheld; France Warns of Consequences*, N.Y. TIMES, Feb. 11, 2011, at A8 (describing a French national sentenced to sixty years imprisonment in Mexico on kidnapping charges).

302. Extradition Treaty, *supra* note 181, at 190, 196.

ordinary crimes test proposed in this Note, these crimes would not be admissible before the ICC. Given this conclusion, Mexico is not a situation in which the ICC would be wise to intervene. If the ICC were to get involved in Mexico, it would simply undercut its own highly valued complementarity regime, and, as a result, significantly damage itself as a legitimate supranational judicial institution.

*Spencer Thomas**

* Spencer Thomas is a third-year law student at Vanderbilt Law School and a graduate of the University of Redlands. He would like to thank Samara Spence and Marissa Cwik for their hard work in guiding this Note from a simple idea to a product worthy of publication. He would also like to thank Professor Mike Newton for his idea and comments during this Note's creation, and Christian Orozco for assistance translating Mexico's Federal Penal Code. Finally, VJTL Editor in Chief Peter Muller and Executive Managing Editor Hedda Leikvang deserve the Author's utmost gratitude for the work put into the final version presented herein.