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The Ayotzinapa case as an example of how corruption, impunity and core crimes intertwine

Francisco Muñoz Conde
Tania Ixchel Atilano

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Título: El caso Ayotzinapa como ejemplo de enlace entre la corrupción, la impunidad y delitos fundamentales

Sumario: I. IMPUNIDAD, CORRUPCIÓN Y CRÍMENES INTERNACIONALES. II. UNA CULTURA DE IMPUNIDAD. III. PARTICULARIDADES DEL CASO AYOTZINAPA. 1. La forma en cómo se desarrollaron los hechos. 2. El caso de Ayotzinapa como un crimen de lesa humanidad. 3. Cuestiones de admisibilidad. Iv. Ayotzinapa como un caso de remisión de un estado parte. V. Conclusiones.

Summary: I. IMPUNITY, CORRUPTION AND CORE CRIMES. II. A CULTURE OF IMPUNITY. III. THE PARTICULARITIES OF THE AYOTZINAPA CASE. 1. How the Events Unfolded. 2. The Ayotzinapa Case as a Crime Against Humanity. 3. Issues of Admissibility. IV. AYOTZINAPA AS A CASE FOR SELF-REFERRAL. V. CONCLUSIONS.

Resumen: Este artículo muestra como la impunidad a gran escala, así como la corrupción pueden ser incentivos y facilitadores en la comisión de crímenes internacionales. Un ejemplo de lo anterior es el caso de los 43 estudiantes desaparecidos en Ayotzinapa, Guerrero. El abordaje propuesto por Roht-Arriaza aplicado al caso Ayotzinapa nos permite encuadrarlo en el supuesto de delitos de lesa humanidad. Las implicaciones de este caso, sin duda constituyen un reto para la Corte Penal Internacional y una llamada para su actividad en la región Latinoamericana.

Palabras clave: Corrupción, Impunidad, Delitos de lesa Humanidad, Ayotzinapa, Referencia por un Estado Parte

Abstract: By presenting the case of Mexico, and in particular the case of the 43 students disappeared in Ayotzinapa Guerrero, this article argues that broad impunity combined with corruption can lead to the commission of core crimes. In order to understand the commission of core crimes in cases like Mexico we have applied the “corruption lens” approach suggested by Roht-Arriaza. As a result, the Ayotzinapa case is a perfect example of how impunity has led to high scale violence in the form of “crimes against humanity”. Finally, this article concludes that the implications of the case should be a “wake up call” for the ICC to be more active in the Latin American region.

Key words: Corruption, Impunity, Crimes against Humanity, Ayotzinapa, Self-referral

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I. IMPUNITY, CORRUPTION AND CORE CRIMES

Impunity is a vague term. It means the impossibility, de jure or de facto, of bringing the perpetrators of human rights violations or any other kind of crimes to account¹. Following the classification of *Viñuales*, there

are two major forms of impunity: structural and functional². The first category is met when there is a lack of institutional and legal measures needed to ensure accountability. The second category refers to the situation where institutions and legal structures are met but they are not used.

In the field of International Criminal Law (ICL), impunity can be as well understood as the absences or inadequacy of penalties and/or compensations for massive and grave violations of the human rights of individuals or groups of individuals³. These violations can be defined according to the Rome Statute as international crimes, namely, genocide, crimes against humanity and war crimes within the jurisdiction of the International Criminal Court (ICC)⁴. The ICC was created specifically by the Rome Statute to help end impunity for crimes of serious concern to the international community⁵. As a direct consequence of aiming to end impunity, this said statute does not recognize any immunity of heads of states (Article 27) nor the application of statutes of limitations to prosecute the crimes within the jurisdiction of the Court (Article 29).

Now, going back to the concept presented on impunity, in the following sections we will elaborate on the idea of impunity intertwining with corruption⁶. When people are able to commit crimes without facing consequences (such as arrest and prosecution), these crimes remain unpunished. If there is a pattern of impunity, state actors as well as non-state actors might take advantage of this situation, for their own gain. When people can act without fear of punishment, they frequently act in ways that are exceptionally brutal, and such acts oppress freedom within the state, while shocking and disturbing other countries. Impunity may be a part of legal protections in a government's laws, and may extend to those employed by the state like government officials, military personnel or others. Alternately, a state may not possess laws that would punish those

committing gross human rights violations. The use or abuse of state actors to excuse themselves on the basis of the state's structural flaws is usually thought to be one of the easiest ways to support a constant stream of vicious human rights violations. In short, the "unwillingness" or "inability" in terms of Art. 14 RS could be used as a tool or excuse to avoid punishment and keep enjoying privileges as state agents and⁷ shield their non-state accomplices⁸. In addition, state actors might also take advantage of institutions like "official immunity". At this point the concepts of impunity laid by *Viñuales*, intertwine with Article 14 of the RS, i.e. "inability" of a state equals structural impunity, whereas "unwillingness" of a state equals functional impunity⁹.

Aside from the crimes within the jurisdiction of the International Criminal Court, there are other kinds of serious crimes that are of concern to the international community, including corruption, financial crimes, (murder on women or "femicide"), kidnapping, rape, disappearance etc. At first sight, these crimes might not be of interest for international criminal law. However in developing countries, drug related crimes, corruption and financial crimes might also be entangled with core crimes¹⁰. This applies especially in cases where non-state actors, such as drug gangs collude with state actors and jointly commit such crimes¹¹, or where the state makes use of these groups to attack members of the political opposition¹². Scholarship has shown how the lines between ICL and transnational crime are blurred¹³. This intersection should be an incentive for the ICC to open preliminary examinations and further investigate cases of broad impunity like in particular, the case of Mexico. This is underlined by the fact that

1 United Nations - Economic and Social Council (1996), Report of the Special Rapporteur on the question of the impunity of perpetrators of violations of human rights (civil and political rights), E/CN.4/Sub.2/1996/18, p. 9.

2 *Viñuales, Impunity: Elements for an Empirical concept, in Law and Inequality*, (2007), pp. 125-127.

3 See *Ibid*; Ambos (1999); Silva Sánchez (2008); Fletcher (2020), pp. 61-62.

4 Article 5 Rome Statute of the International Criminal Court (hereinafter "ICC Statute").

5 See Preamble of the ICC Statute.

6 Transparency International defines corruption as: (...) an abuse of entrusted power for private gain, by either public or private actors. Also see foreword of the UN Convention against corruption (2003). <https://www.unodc.org/unodc/en/corruption/ratification-status.html>. Accessed 10 December 2020.

7 In terms of the benefits of "state crime", see Reese (2004), pp. 185-186.

8 Schatz has already proven how "impunity" has worked as a tool against political opposition in Mexico in the mid 1980s and mid 1990s. See Schatz S (2011), pp. 47-109

9 In this regard, a case is admissible before the International Criminal Court (ICC) if determined that it is domestically impossible to bring the perpetrators to justice —or that impunity in the situation is present—.

10 In this piece, the term of "core crimes" is used for the crimes within the jurisdiction of the ICC according to Art. 5 ICC Statute.

11 On the collusion of drug gangs and state actors in the commission of core crimes, see Olasolo/Galain (2018), pp. 148-164.

12 In this regard, the work of Schatz (2011) is paramount to understanding the dynamics of state and non-state actors with regards to political killings and how impunity has served as a facilitator for the commission of crimes.

13 In this regard, see especially the work of Roht-Arriaza, who suggests a "corruption lens" in countries where systemic corruption is present and where core crimes occur. See Roht-Arriaza/Martinez, *Venezuela, grand corruption, and the International Criminal Court* (2019). Regarding combatting transnational crime within the jurisdiction of the International Criminal Court, see Olásolo, *Is International Criminal Law an Appropriate Mechanism to Deal with Transnational Criminal Organizations?* (2018).

Mexican drug cartels operate in a wide range of countries such as Spain, the Netherlands, Italy, Nigeria, and even with Venezuelan high rank officials¹⁴. Thus we have a clear example of transnational organized crime, which indirectly or directly profits from impunity in Mexico and, one way or the other, contributes to insecurity on a global scale¹⁵. For these reasons, we would like to expose, in general, the case of Mexico and, in particular, the case of the 43 students who disappeared in Ayotzinapa Guerrero¹⁶, since this case appears to be a “microcosm” of what, arguably, has become a generalized pattern¹⁷.

II. A CULTURE OF IMPUNITY

Human rights violations such as torture and forced disappearance committed by state actors have been documented in Mexico since the end of the 1960s and the 1970s. The majority of these cases have, however, remained unpunished¹⁸. A later strain of impunity has followed since then, like election-related violence during the mid 1980s and the 1990s¹⁹. Another form of vio-

lence that follows a certain pattern in its commission is that related to the direct attack of civilians during social unrest or internal armed conflict²⁰. This is the case of the massacre of Acteal where forty-five civilians were murdered in the context of the Zapatista rebellion of 1994. However, non-international armed conflict has never been officially recognized by the Mexican state and, so far, the events have not been fully clarified by criminal investigation²¹.

The use of excessive and widespread violence as well as the absence of prosecutions and successful convictions has followed in the so-called war on drugs²². Since 2006, the number of murders amount to 300,000²³, while 63,000 have disappeared²⁴, with 4,000 clandestine graves and, around 340,000 people forcibly displaced²⁵. This dynamic has, in turn, provided incentives for other forms of criminality such as gender violence²⁶.

The fragility of the Mexican state (or weak rule of law) appears to be the result of the blurred line between state actors and criminal organizations²⁷. In this case, we are not speaking of a “victim” or a “villain” sta-

14 See Roht-Arriaza/Martinez *Venezuela, grand corruption, and the International Criminal Court* (2019), p. 25.

15 On the adequacy of implementing international criminal law frameworks against transnational crimes see: van der Wilt/Paulussen (eds), *Transnational and International Crimes. Towards an Integrative Approach* (2017).

16 The case of Ayotzinapa can also be used as framework to reflect on the dynamics and overall harm caused by the state policy known as: “war on drugs” and if the commission of crimes within the jurisdiction of the ICC is at place.

17 On the patterns of drug related violence and how collusion of state and non-state actors has led to an increase of violence see Trejo/Ley (2020); Zagato, *Increase of violence in Mexico - increased clusters of power. State and Warfare in Mexico* (2018). On the patterns of impunity see Centro de Derechos Humanos Miguel Agustín Pro (2019) *Patrones de impunidad. Deficiencias en la investigación de violaciones a derechos humanos y alternativas en el poder judicial*. <https://centroprodh.org.mx/wp-content/uploads/2019/07/Patrones.pdf>. Accessed 10 December 2020.

18 According to the UN-Human Rights Committee concluding observations on the sixth periodic report of Mexico, there has been only one conviction from the period known as the “dirty war”. See United Nations, Human Rights Committee (2019), CCPR/C/MEX/CO/6, para. 24. Also see IACtHR, *Radilla-Pacheco v. Mexico*, Judgment, 23 November 2009, paras. 132, 134, 166, 212.

19 Schatz has documented 600 murders of members of the left party Partido de la Revolución Democrática (PRD) between 1988 and 2005. See Schatz (2011), pp. 203-204.

20 It is important to highlight that the Charco massacre of 1998 followed the same modus operandi as the Acteal massacre, i.e. an unexpected attack on civilians of indigenous origin, perpetrated by so-called paramilitary groups. However, affiliations of the perpetrators have not been yet clarified. See Liga Mexicana de los Derechos Humanos (1999) *Informe sobre la masacre del Charco*. <http://www.derechos.org/limeddh/informes/charco.html>. Accessed 10 December 2020.

21 Most of all, the criminal investigation has not focused on the chain of command. On the Zapatista rebellion and the response of the Mexican state to the Acteal massacre, see Atilano (2021).

22 See OAS (2015) *Situación de los derechos humanos en México*, OEA/Ser.LV/II.Doc. 44/15, paras. 53-66.

23 FIDH/IDHEAS (2020) *Situación de impunidad en México*. <https://www.fidh.org/IMG/pdf/mexique750esp.pdf>. Accessed 15 December 2020, p. 5.

24 See the new official database of disappeared persons, Secretaría de Gobernación (2020) Comisión Nacional de Búsqueda. <https://versionpubliccampdno.segob.gob.mx/Dashboard/ContextoGeneral>. Accessed 15 December 2020,

25 See FIDH/IDHEAS (2020), p. 5.

26 See Comisión Mexicana de Defensa y Promoción de los Derechos Humanos (2012) *Femicide and Impunity in Mexico: A context of structural and generalized violence. Report presented before the Committee on the Elimination of all forms of Discrimination Against Women*, CEDAW. https://www2.ohchr.org/english/bodies/cedaw/docs/ngos/CDDandCMDPDH_forthesession_Mexico_CEDAW52.pdf. Accessed 12 December 2020.

27 See Olasolo/Galain (2018); Gallagher, *Enforced disappearances - when state and criminal perpetrators blur*. *Völkerrechtsblog*, (2020). <https://voelkerrechtsblog.org/articles/enforced-disappearances-when-state-and-criminal-perpetrators-blur/>. Accessed 10 December 2020. Also see Open Society Justice Initiative, *Corruption that kills why Mexico needs an international mechanism to combat impunity*. ht-

te, but rather a collusion of state actors with organized crime, who act jointly for mutual benefit. In this case, the mutual benefit translates to continuing business in their illegal activities²⁸. Related to this mutual benefit, *Roht-Arriaza* proposes that, in order to understand the commission of core crimes in places like Mexico (otherwise they could be understood as a series of loose events with no relation to the multiple actors involved), an approach is necessary that will allow us to identify requirements such as: the organizational policy or the “widespread” and “systematic” nature of the crimes²⁹. This approach is what *Roht-Arriaza* calls the “corruption lens”. It does not necessarily focus on the core crimes *per se*, but on the reasons why these core crimes were committed. In these cases, violations of protected human rights are not the end (or the target) in itself, but they are committed to shielding other illegal activities or, as in the case of journalists in Mexico, to silence the report of illegal activities³⁰.

The pattern of impunity and the resulting spiral of violence affects interests of the international community³¹. It results in thousands of people having their lives taken, displaced persons in large areas of the country³², and has proven to destabilise neighbouring countries in the Central American region, which in turn has led to mass displacement³³.

It should also be considered that, the inaccuracy and ambiguity of the legal system leads to confusion that could well pave the way for non-state and state actors to take advantage of it³⁴. Examples of this ambiguity also relate to international criminal law and the fact that, in order to ratify the Rome Statute, the Mexican state has adopted a constitutional clause that resembles a “disguised reservation”³⁵. Regarding military jurisdiction no univocal criteria have been issued by the Supreme Court concerning its limits³⁶.

III. THE PARTICULARITIES OF THE AYOTZINAPA CASE

1. How the Events Unfolded

During the late evening of September 26, 2014, a group of around 80-90 students from the teacher training college, Isidro Burgos, located in Ayotzinapa Guerrero³⁷, decided to commandeer some buses in order to travel to Mexico City and take part in the demonstrations commemorating the student massacre that happened on October 2, 1968³⁸.

The city of Iguala, where the events took place has a population of approximately 120,000 and is located in the state of Guerrero. The state of Guerrero has a large

<https://www.justiceinitiative.org/uploads/5071ab37-003f-46b1-9e1f-700bbdae34a3/corruption-that-kills-en-20180502.pdf> Accessed 10 December 2020.

28 In the sense that, corruption is what originates the commission of core crimes. The matter has been rightly pointed out in length in the case of Venezuela and very succinctly in the case of Mexico by *Roht-Arriaza*. See *Roht-Arriaza, The ICC in Latin America: an old friend with new challenges* (2019), pp. 607-617.

29 *Roht-Arriaza/Martinez, Venezuela, grand corruption, and the International Criminal Court* (2019) pp. 1, 10; *Roht-Arriaza, The ICC in Latin America: an old friend with new challenges*, (2019), p. 617.

30 See the communication to the ICC of Reporters Without Borders and Press Freedom concerning the systematic attack on journalists in Mexico, reporting 116 journalists murdered or disappeared between 2006 and 2018. Reporters Without Borders and Press Freedom (2019), Submission to the international criminal court pursuant to articles 15(1) and 53 of the Statute. https://rsf.org/sites/default/files/submission_to_the_international_criminal_court_pursuant_to_articles_15_1_and_53_of_the_statute_-_situation_in_mexico_-_en.pdf. Accessed 10 December 2020. As of the year 2020, the number of journalists killed was 9. See UNESCO-Observatory of killed journalists (2020). <https://en.unesco.org/themes/safety-journalists/observatory/country/223773>. Accessed 10 December 2020.

31 A similar example related to the political violence in Kenya is given by *Werle/Jeßberger* (2020), p. 459.

32 *Cruz Lera, Movilidad forzada por las dinámicas del narcotráfico: variables para el análisis del proceso de asilo de mexicanos por violencia en EE.UU* (2017).

33 *Mazzitelli, Influencia de los cárteles mexicanos en Centroamérica* (2012), pp. 15-24.

34 As an example, even though the Military is not constitutionally empowered to act in law enforcement activities, the Law of the National Guard grants them power to collect evidence or detain alleged perpetrators of civilian crimes. Notwithstanding the new powers they are granted, there is no provision in the law concerning criminal punishment derived from the abuse of power in the context of their new duties. See *Cámara de Diputados del H. Congreso de la Unión, Ley de la Guardia Nacional*, arts. 9 and 60. *Cfr. Cámara de Diputados del H. Congreso de la Unión, Constitución de los Estados Unidos Mexicanos*, Art. 13, 89 (VI) (VII).

35 See *Atilano* (2021).

36 As an example, the Supreme Court has interpreted that drug related crimes are subject to military jurisdiction. See *Suprema Corte de Justicia de la Nación* (2018) *Amparo en revisión 605/2014: restricción al fuero militar*. Further, see *Atilano* (2021).

37 The Isidro Burgos Teacher College is one of 17 Colleges founded in 1926 with the aim to train teachers to erase illiteracy and to diminish poverty among the rural and indigenous populations of the region. One of the most famous students of the college is *Lucio Cabañas* who was leader of a Guerrilla movement that aimed to abolish caciquismo and improve living conditions.

38 On October 2, 1968, students gathered at the Tlatelolco square in Mexico City, where some of them were killed as a result of gunfire. See *George, Díaz Ordaz and the Student Massacre at Tlatelolco* (1992), pp. 19-63.

indigenous and peasant population. The marginalization of these people, led to the formation of guerrilla groups and, was where most of the dirty war during the mid-60's and the 70's occurred³⁹. Apparently, violence in the state has been on-going since then, as hundreds of political sympathizers of the left party were executed during the 80's⁴⁰. Lastly, the fields of Guerrero have become a center for growing poppy seed and, as a result, interests collide with drug trafficking organizations⁴¹. This brief contextualization intend to depict that Guerrero is a state in which continuous violence has taken place and where, probably, the collusion between state and non-state actors to commit crimes has been customary.

The commandeering of buses is a common practice that rarely has extraordinary consequences. However, that night, according to the official account, 43 students were detained by municipal police and handed to a drug cartel. Since then, their whereabouts have been unknown and only the bone fragments of two of the students have been found and identified⁴². The official account made by the former Federal Prosecutor (PGR) is considered misleading, as important contextual considerations are blurred⁴³.

As a result of the inactivity of the government to give information on the whereabouts of the students, a special working interdisciplinary group (GIEI) was commissioned by the Inter-American Commission on Human Rights⁴⁴. The detailed account of the events delivered by the interdisciplinary group (GIEI) reveals, in two reports, that the number of victims is much higher than 43 and that the crimes committed are not only tho-

se of enforced disappearance. In addition to the multiple crimes committed, according to the GIEI report, the number of victims is approximately of 180⁴⁵. The victims—who neither had the duty to exercise public order or the legitimate means to exercise force—⁴⁶, were the main target of the attack. Furthermore, the length and extension of the crimes committed, led to the conclusion by the GIEI that multiple state security forces and non-state armed groups jointly coordinated the attacks⁴⁷ within a radius of 80 km⁴⁸.

The evidence weighed by the GIEI also shows that state forces and authorities could also be held accountable for not preventing the crimes, even though they had the possibility to prevent them⁴⁹. One of the interesting hypothesis of the GIEI reports is that a motive appears to be the fact that, one of the buses was carrying cargo (cocaine or money) connected with the operations of the drug cartel: “guerreros unidos”⁵⁰. This hypothesis matches the “corruption lens” approach laid by *Roht-Arriaza*, according to which, core crimes are not considered the end motive, but are committed either to cover up or continue with business⁵¹. In this regard, the Ayotzinapa case also contradicts the classic frame of core crimes in the sense that the motives are not for hegemonic domination but rather to continue with illegal activities like drug trafficking⁵².

After the disappearance of the 43 students was made public and the victims (parents and next of kin) commenced with their demands for justice and truth finding, a disinformation campaign took place by official authorities in what they later claimed was the “historical truth”. As a subsequent UN report has shown, in or-

39 See in general, Aviña (2014).

40 Schatz (2011).

41 Aviña, *Mexico's long dirty war* (2016), pp. 144-149.

42 Equipo Argentino de Antropología Forense, *Un hallazgo que derrumba la versión oficial de la masacre de Ayotzinapa* (2020). <https://eaaf.org/un-hallazgo-que-derrumba-la-version-oficial-de-la-masacre-de-ayotzinapa/>. Accessed November 5, 2020.

43 A good detailed journalistic account can be found in Gibler (2015) *The disappeared. The story of September 26, 2014, the day 43 Mexican students went missing - and how it might be a turning point for the country*. <https://stories.californiasunday.com/2015-01-04/mexico-the-disappeared-en>. Accessed 10 December 2020.

44 Inter-American Commission on Human Rights 2014, *Estudiantes de la Escuela Rural Isidro Burgos respecto del Estado de México*, Res no. 28/2014, Precautionary Measure no. 409-14. <http://www.oas.org/es/cidhi/decisiones/pdf/2014/MC409-14-ES.pdf>. Accessed 5 November 2020.

45 Interdisciplinary Group of Independent Experts—GIEI— (2015) *Ayotzinapa Report I*, pp. 311-312 (hereinafter “GIEI 2015”).

46 ICTR, Kayishema et al., Judgment and Sentence, May 21, 1999, ICTR 95-1-T, paras 127-129.

47 GIEI 2015, pp. 78, 319-321; Interdisciplinary Group of Independent Experts—GIEI— (2016) *Ayotzinapa Report II*, p. 17 (hereinafter “GIEI 2016”).

48 GIEI 2016, pp. 16-17.

49 As an example, in the GIEI report, it was evidenced that a military member was present in one of the crime scenes, but did nothing to prevent it. See GIEI 2015 pp. 325-326.

50 According to the GIEI the motive of the attacks to the students was the recovery of one of the buses, which allegedly was loaded with heroine or money. This hypothesis is also supported by the fact that a drug trafficking network operates from Iguala to Chicago, USA. See GIEI 2015, pp. 322-324; GIEI 2016, pp. 232-235.

51 See Roht-Arriaza/Martinez, *Venezuela, grand corruption, and the International Criminal Court* (2019), p. 6.

52 Like the motives of a political non-state group.

der to build this “historical truth”, several crimes were committed⁵³.

The findings of the UN report suggest that the commission of crimes developed in two phases: the first during the night of the 26th and early morning of the 27th of September 2014; the second developed in the aftermath to cover the initial events. In both phases, multiple crimes were committed such as murder, torture and inhumane treatment.

2. The Ayotzinapa Case as a Crime Against Humanity

Taking into consideration the reports by the GIEI and by the UN High commissioner on human rights, the relevant crime to be explored under the Rome Statute (Art. 7) is crimes against humanity. As we can see from the description above, the Ayotzinapa case is complex, multilayered and involves multiple actors and victims. The “widespread” requirement is met as the number of civilian victims on the night of the 26 is approximately 180 (not considering all the victims from shielding the perpetrators)⁵⁴.

The crimes perpetrated range from murder and torture to persecution and enforced disappearance, with enforced disappearance at the core of all the crimes committed (at least the most visible). Given the particularities of the teacher training college, “Isidro Burgos”⁵⁵, it is worth further exploring the crime of persecution.

Persecution is a crime of discrimination. In this sense, it could be interpreted that the unlawful detention

and further disappearance as well as the attacks to the physical integrity of the students was carried out due to their political and cultural background. The students mostly belong to indigenous groups such as Mixtecs, Nahuas and Tlapanecs⁵⁶. Additionally, their college is considered a radical left institution which in order to express discontent resorts to violence⁵⁷. The deliberate targeting of political opposition has also been present in the past in the state of Guerrero, especially against those affiliated with the left wing political party PRD⁵⁸. So here a pattern of political control through violation of fundamental rights can be identified. The students are also identified as being “un-civilized” and backward⁵⁹. Furthermore, the fundamental rights that were under attack during the persecution were: life, liberty, the right not to be held under arbitrary arrest and the right not to be subjected to torture or to inhumane treatment⁶⁰.

The overall consequences of such a persecution are numerous, most probably the communities where the students belong have suffered harm as in other cases where serious human rights violations have taken place, such as Eritrea and⁶¹, Guatemala⁶².

Additionally, indigenous groups face numerous challenges such as the loss of their lands, resources and livelihoods⁶³. In this regard, the harm caused to the indigenous groups: Mixtecos, Nahuas and Huave⁶⁴, should be considered when assessing the gravity of the crimes⁶⁵.

Regarding the *mens rea* element, the scope and gravity of the acts perpetrated evince the knowledge of the

53 UN-High Commissioner of Human Rights (2018), *Doble Injusticia. Informe sobre violaciones de derechos humanos en la investigación del caso Ayotzinapa*. http://hchr.org.mx/images/doc_pub/20180315_DobleInjusticia_InformeONUDHInvestigacionAyotzinapa.pdf. Accessed 10 December 2020. (hereinafter “UN-Report 2018”).

54 See ICC (2013), Elements of crimes, Article 7.

55 Johnson, *At college of missing Mexican students, history of revolutionary zeal*, (2014). <https://www.csmonitor.com/World/Americas/2014/1013/At-college-of-missing-Mexican-students-history-of-revolutionary-zeal>. Accessed December 10, 2020. Also see in overall Rodriguez, *La masacre de Ayotzinapa. Educación, lucha y resistencia en México* (2018).

56 Mora, *Ayotzinapa and the Criminalization of Racialized Poverty in La Montaña, Guerrero* (2017a), pp. 68, 72.

57 Mora (2017a), pp. 67-68.

58 See Schatz (2011), p. 209.

59 Even after the disappearance of the students discriminatory and degrading terms were used in the media such as: ayotzinarco, morenaco or ayotzinaco, all indicating that they were either “narcos” or “nacos” the latter, a term used in Mexico to refer to those of a lower class or of lower cultural background. For an in-depth study of the “racialization” in the Ayotzinapa region, see Mora (2017a), pp. 68, 79. Also see Mora, *Desaparición forzada, racismo institucional y pueblos indígenas en el caso Ayotzinapa* (2017b) pp. 29-30. The author even goes further to say that the students were taken away and some of them killed because they were simply “brown” colored.

60 *Blaskic*, ICTY, TC, Judgment, March 3, 2000, para. 220.

61 International Work Group for Indigenous Affairs, *Indigenous people in Eritrea* (2019). <https://www.iwgia.org/en/eritrea/3482-iw2019-eritrea.html>. Accessed November 2, 2020.

62 Moffet, *Guatemala's history of genocide hurts Mayan communities to this day* (2018). <https://theconversation.com/guatemalas-history-of-genocide-hurts-mayan-communities-to-this-day-97796>. Accessed November 2, 2020.

63 See United Nations, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions*, (2013) pp. 31-36. <https://www.ohchr.org/documents/issues/ipeoples/undripmanualfornhri.pdf>. Accessed 10 December 2020.

64 See Mora (2017b), pp. 29-31.

65 For the factors to be considered when assessing the gravity of crimes, see *Situation in the Republic of Kenya*, ICC (PTC II), Decision of 31 March 2010, para. 62. Also, the harm suffered by indigenous groups should be considered for reparations in terms of Art. 79 ICC Statute.

attack to the civilians, regardless if the individual perpetrators had overall knowledge of all the plan⁶⁶. The way in which the abduction of the students was executed reveals that the actors involved knew about the widespread nature of the attack⁶⁷.

Clearly, the most difficult element of the definition of crimes against humanity within Art. 7 RS would be the policy element. Was the attack perpetrated within a guiding idea, demand or goal of the organization? If we follow the hypothesis of the drug-trafficking motive, added to the “corruption lens”, this could fulfill the policy element⁶⁸. However, the motivations behind the crime could be more complex. The students, as we have mentioned, mainly belong to indigenous groups who have actively rejected mineral exploitation as they consider their livelihoods and land could be endangered⁶⁹. Additionally, they have also actively refused the closure of the training colleges in the country. Even as early as 2011, two students were shot by federal police during a rally against the reform of teacher training colleges⁷⁰.

3. Issues of Admissibility

According to Art. 53 RS, the Prosecutor would conduct a preliminary examination if the situation has the merits to be investigated in-depth⁷¹. In order to initiate an investigation, there has to be a reasonable justification that a crime under Art. 5 RS has been committed⁷². The situation must pass the admissibility test of Art. 17 RS and it should serve the interests of justice. Regarding Art. 17 RS, in order for a case to be admissible

before the Court, the state must be unwilling or unable to carry out the investigation or prosecution of the crimes. In this sense, the Ayotzinapa case is even more interesting as it appears that the numerous violations of human rights during the investigation of the case would fulfill the “unwillingness” required⁷³.

The UN report on the Ayotzinapa criminal investigation, analyzed the procedures of 63 persons accused⁷⁴. They gathered sufficient evidence to claim that from the cases analyzed, 34 of the accused suffered torture between September 2014 and January 2016⁷⁵. The methods of torture were similar to those reported in other cases of human rights violations⁷⁶. Within these investigations, the UN-high commissioner identified a pattern consisting of arbitrary detention and unjustified delay in the proceedings, with the Marines⁷⁷, the Federal Police and the Federal Public Prosecutor Office responsible for these violations⁷⁸. The report concludes that the torture suffered by the accused led to “auto inculpatory statements”⁷⁹. Further, evidence was not preserved and the crime scene had been tampered with⁸⁰. Presumably, evidence was orchestrated to prove one of the state official’s version of the events. In sum, the Mexican state appears to be unwilling as defined by Art. 17, para. 2 (a) (b) and (c).

The findings of the UN report reveal how the criminal justice system has served as an agent to perpetuate impunity⁸¹. The resources and institutions of the criminal justice system have been instrumentalized to shield the perpetrators and the motives of the crimes. One way of achieving the shielding is by delivering a false account of the events, as well as claiming that

66 Schabas (2010), p. 156.

67 See, in in general, GIEI report I (2015).

68 See Werle/Burghardt (2012), pp. 1151-1170

69 Cruz, *La Guerra oculta en Guerrero: mineras y Ayotzinapa* (2017). <http://revistadesocupado.com/noticias/entrevista?n=b3d8ad-10f347161bde4383af57a2b2d1>. Accessed 12 December 2020. Also, Ceja, 43 + n. *Impunidad, derechos humanos y violencia estructural en México*, (2017) pp. 29-30

70 Center for Justice and International Law, *México: ocho años de impunidad por asesinato de Jorge Alexis y Gabriel, normalistas de Ayotzinapa* (2019). <https://www.cejil.org/es/mexico-ocho-anos-impunidad-asesinato-jorge-alexis-y-gabriel-normalistas-ayotzinapa>. Accessed 10 December 2020.

71 See Bergsmo/Kruger/Bekou, Article 53. Initiation of an investigation in Triffterer/Ambos (eds.), *The Rome Statute of the International Criminal Court*, 3rd edn. (2016), pp. 1368-1369.

72 For example, regarding the situation of Iraq, in 2006 the Office of the Prosecutor determined that the information available did not support a “reasonable basis” to believe that a crime was committed under the jurisdiction of the court. See ICC, Office of the Prosecutor, *OTP response to communications received concerning Iraq*, 9 February 2006, pp. 7, 8.

73 See UN Report (2018), pp. 81-84.

74 UN Report, para. 19.

75 UN Report, para. 226.

76 UN Report, para. 227.

77 UN Report, pp. 44-46.

78 UN Report, p. 82.

79 UN Report, pp. 28-30, 40-41.

80 UN Report, paras. 185-190.

81 Regarding how a “culture of impunity” is an engine to the commission of core crimes see Werle (1997), pp. 808, 821.

they did not have notice of the events in real time⁸². In this sense, crime preventing agencies have been used to obstruct criminal investigations⁸³. At this point, the spiral of violence becomes visible, since the authority in charge of the criminal investigation commits more crimes to shield those of the past. This is interesting, because the failure to punish the crimes is not only characterized by omitting adequate investigation and prosecution, but also and most strikingly, the victims, next of kin and third parties have been harmed⁸⁴ not only in their right to know the truth but because they have additionally also been victims of crimes such as murder⁸⁵, torture and⁸⁶, deprivation of freedom⁸⁷.

Finally, it could also be interpreted as though the second objective element of the enforced disappearance namely, neglecting to give information about the whereabouts of the person were continuously committed over and over again, each time the authorities give false information. The giving of false information by competent authorities has been extended in time. This was first done by municipal authorities, who took time giving any information to next of kin and then by the federal prosecutor office, who knowingly misinformed the victims and public by giving a false account of the facts⁸⁸. In this sense, it could also be regarded as if the gap between common crimes and human rights violations diminishes, since, presumably, private actors kid-

napped the students and authorities neglected to provide information on the whereabouts.

IV. AYOTZINAPA AS A CASE FOR SELF-REFERRAL

According to Art. 13 (a) and 14 RS, the ICC can exercise its jurisdiction if a “situation” in which apparently core crimes have been committed is referred by a state party⁸⁹.

A self-referral entails the rights of sovereign states to renounce its prerogative to prosecute and judge crimes within their competency⁹⁰. This mechanism is based on the common objective at both the international and national level to combat impunity for the most serious crimes. In this regard, the referral could lead to a cooperative approach between the ICC and the Mexican state⁹¹.

A self-referral has to be submitted to the prosecutor by the head of state or party who has powers⁹². It is a unilateral declaration which has a binding effect. However, the Prosecutor is not obliged to open an investigation. By means of the referral, the Prosecutor can look at a situation in which crimes within the jurisdiction of the Court appear to have been committed. By doing so, the Mexican head of state would not be giving up its jurisdictional duties but it would be requesting the Court’s intervention, given that corruption make it im-

82 That competent authorities knew in real time of the attacks and that they were even coordinated at different levels has been proven by the group “forensic architecture”. Using high end technological methods they have been able to evidence the disparities of the official version. See Forensics Architecture, *The enforced disappearance of the Ayotzinapa students*, (2017). <https://forensic-architecture.org/investigation/the-enforced-disappearance-of-the-ayotzinapa-students>. Accessed 10 December 2020.

83 According to the study by Schatz, this pattern of impunity is also evidenced in the political killings of members of the opposition party the PRD.

84 An example of how third parties have also suffered harm in the aftermath, is the case of Carrizalillo, a town near Ayotzinapa, whose population suffered a series of direct attacks after the 26th September. The population was besieged during October 2014, when the Federal Police searched for alleged narco gang members who had allegedly been involved in the disappearance of the 43 students. Organized crime has also had activities in this town as the inhabitants have been victims of extortion as a result of mining extraction. See Radio Canada International (2015) *Canadian mining giant’s ‘conflict-free’ gold sparks cartel wars in Mexico*. <https://www.rcinet.ca/en/2015/12/08/canadian-mining-giants-conflict-free-gold-sparks-cartel-wars-in-mexico/>. Accessed 10 December 2020. Also see Valladarez de la Cruz, *The siege of indigenous autonomies due to the extractive mining model in Mexico* (2018).

85 See the case of Emmanuel Alejandro Blas Patiño, who died as a consequence of the torture suffered. See UN Report (2018), paras. 116-123.

86 See UN Report, paras. 61-88.

87 As a result of the arbitrary detentions. See UN Report paras. 35-36, 41, 47.

88 GIEI 2015, p. 172.

89 A situation is not yet a “case” in the sense that it is not yet determined who the perpetrators are and to what extent have they committed core crimes. It is just a potential case. See Bergsmo/Kruger/Bekou, in Triffterer/Ambos (eds.) *Article 53. Initiation of an investigation*, marginals no. 20-21.

90 See Werle/Jeßberger (2020), pp. 173-174.

91 As it was in the Katanga case. See *Katanga*, ICC, (AC), Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case’, ICC-01/04-01/07 OA8 (25 September 2009), at para. 79. On the Mexican case see Atilano T (2021).

92 The ICC should request the state verification of the power to make a referral on behalf of the state. See Marchesi/Chaitidou, Article 14. Referral of a situation by a State Party in Triffterer/Ambos (eds.) *The Rome Statute of the International Criminal Court*, 3rd edn. (2016), marginal no. 11.

possible *de facto* to prosecute crimes, especially those which appear to have been committed as a result of the joint commission between state and criminal organizations. In this regard it might be relevant that *López Obrador* a former leader of the opposition and current president, is partnering with the ICC to combat core crimes committed by previous governments⁹³.

Most importantly, a self-referral could present a win-win situation. On the one hand, the ICC could help the Mexican state break the pattern of impunity by unveiling the corruption and impunity networks that led to the commission of core crimes in Ayotzinapa, while on the other, the ICC could gain legitimacy by finally being active in the Latin American region⁹⁴. Additionally, the ICC has had until now ten self-referrals⁹⁵. Five have been made by African states and, in four of them, the ICC has started an investigation, characterized by targeting rebel groups⁹⁶. The self-referrals have mostly dealt with non-international armed conflicts⁹⁷. However, no such case has been put forward against state actors due to their collusion with organized crime⁹⁸. The crimes and aftermath of the Ayotzinapa case have proven that the networks of non-state actors like drug trafficking organizations and state actors have worked efficiently to shield the perpetrators and motives and have resulted in extensive harm to communities. The new government in office must deal with the issue of state actors at all levels providing for the crimes to go

unpunished and has good grounds to resort to Article 14 ICC Statute. In this sense, it would be a *terra incognita*, since it would be a head of state asking the ICC to act against former or current state actors⁹⁹. Additionally, president *López Obrador* could argue that there might still be state actors interested in shielding the crimes¹⁰⁰.

Another consideration in favor of a self-referral in the Ayotzinapa case is the fact that it expedites the process of opening an investigation as judicial review is not required by the RS¹⁰¹. In addition, self-referrals have proved helpful or relevant when states are not capable of combatting atrocities committed by non-state actors¹⁰².

In a state such as Mexico with allegations of corruption¹⁰³, the ICC as an impartial and international court could help rebuild the trust in the rule of law and could help dismantle networks of corruption within state agencies and between the state agencies and criminal groups. In this regard, according to Art. 15 (2) RS the Prosecutor can seek additional information in the self-referral state. Such an action would help to break the pattern of impunity or shake the “safe havens” the criminal actors presume. This could also be a good opportunity for the ICC to tackle the human rights crisis that Mexico faces. In this manner, cooperation between the ICC and the state could pave the way to fight impunity, with Ayotzinapa being just the tip of the iceberg or the beginning of a transitional justice process¹⁰⁴.

93 Akhavan, *Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims of Atrocities?* (2010) p. 120.

94 Roht-Arriaza, *The ICC in Latin America: an old friend with new challenges* (2019).

95 For the latest update on self-referrals, see ICC (2020), Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on the referral by Venezuela regarding the situation in its own territory. <https://www.icc-cpi.int/Pages/item.aspx?name=200217-otp-statement-venezuela>. Accessed 16 December 2020.

96 See Mukwana (2017).

97 In this regard, the Venezuelan self-referrals are extraordinary. The first one was made by five state parties, namely the Argentine Republic, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru. The second one has been submitted by the Venezuelan government against the US and the effects of the economic sanctions, framing them as crimes against humanity. See “Referral pursuant to Article 14 of the Rome Statute to the Prosecutor of the International Criminal Court by the Bolivian Republic of Venezuela with respect to unilateral coercive measures”, February 13, 2020. https://www.icc-cpi.int/RelatedRecords/CR2020_00802.PDF. Accessed November 28, 2020.

98 This is also the approach suggested by Roth-Arriaza on the first submitted situation concerning Venezuela.

99 The Mexican journalist Anabel Hernández has kept track of former as well as current high ranking officials involved in the Ayotzinapa events. See Hernández (2016). Also see her briefings of the Ayotzinapa case in: Deutsche Welle, Anabel Hernández Contracorriente! <https://www.dw.com/es/actualidad/anabel-hern%C3%A1ndez-contracorriente/s-6729>. Accessed 16 December 2020.

100 For example, Tomás Zerón, former director of the Federal Criminal Investigation Agency, who was in charge of gathering evidence at the Cocula river, —where, allegedly, the remains of students were deposited—, and fled to Israel after an arrest warrant was issued against him. See Revista Proceso (2020) *Tomás Zerón fue ubicado en Israel y se solicitará su detención*. <https://www.proceso.com.mx/nacional/2020/9/14/tomas-zeron-fue-ubicado-en-israel-se-solicitará-su-detencion-amlo-249309.html>. Accessed 16 December 2020.

101 See Art. 15 (4) ICC Statute.

102 See Van der Wilt, *Self-Referrals as an indication of the inability of states to cope with non-State actors* (2014).

103 See, for example, the Odebrecht case, in which the Brazilian company, Odebrecht, made corrupt payments between 2010 and 2014 to high government officials in Mexico in order to secure public works contracts. See United States District Court-Eastern District of New York vs Odebrecht S.A. Plea agreement, (2016), paras. 59-60. <https://www.justice.gov/opa/press-release/file/919916/download>. Accessed 10 December 2020.

104 The effects of self-referrals have also been considered in transitional justice processes in Africa. See Hobbs (2020), pp. 345-376.

V. CONCLUSIONS

The Ayotzinapa events can be best described as belonging to the category of “macro criminality” due to the collective nature of the attacks (the number of victims)¹⁰⁵, actors and the level of atrocity¹⁰⁶. It is also a crime of the powerful, in general, and state-crime, in particular¹⁰⁷, as the agencies in charge of preventing the violence did nothing to guarantee the safety of the victims¹⁰⁸. This is even more the case if proven that it was a coordinated attack by authorities at all levels, in collusion with drug gangs¹⁰⁹. In this sense the crime could also be labeled as “state organized crime”¹¹⁰. The state agents that perpetrated the crime did not only serve themselves to the institutions and resources available to them, but also to the legitimacy upon which their acts rest. This legitimacy is not only given formally but also by the simple assumption that, as public servants, they act with “conformity” to the norms¹¹¹.

Finally, we claim that the Mexican case, in its overall complexity, is an interesting example of how lack of prosecution and punishment leads to the commission of core crimes¹¹². This situation, in our opinion, can no longer be tolerated by the ICC as it was created precisely to prevent and punish such crimes. Additionally, the Mexican case is a good example of the growing complexity of the contexts and novel situations in which core crimes take place¹¹³, as a plea to farewell the “classical” and paramount example personified by the crimes punished at the Nuremberg Trials¹¹⁴. Finally, and this is of course object of further in-depth research, ignoring the commission of core crimes in complex cases like that in Mexico also puts a blind eye to the global effects of such impunity. This results from some of the actors involved (e.g. Mexican drug cartels), while not committing core crimes, operating in transnational crimes in distant places such as Nigeria, Australia, the

Netherlands, Italy and Spain. Thus by tackling impunity in Mexico, the fight against transnational crime could marginally benefit and most of all punishing core crimes would contribute to global security and world peace.

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105 It is also interesting how the “collective nature” is another feature that intertwines with transnational organized crime as argued by Van der Wilt. See van der Wilt, *Expanding Criminal Responsibility in Transnational and International Organised Crime* (2016), p. 2.

106 They could also be labeled as: “atrocities crimes”, in the terminology proposed by David Scheffer. See Scheffer, *Genocide and Atrocity Crimes*, (2006) p. 238.

107 For a differentiation in these two typologies see Reese (2004), pp. 100-101, 185-186.

108 See GIEI 2015, pp. 325-326. As an example, the public servant in charge of collecting evidence in one of the crime scenes has been charged of manipulating the crime scene. See supra note 98.

109 See GIEI 2015, pp. 317-325.

110 Following art. 2(a) and (c) of the UN Convention against organized crime, it could also be interpreted as if the structured group of three or more persons is made up by the state actors and non-state actors. See also Werle/Burghardt, (2012) on the definition of organization and organizational policy.

111 See Reese (2004), p. 121-123.

112 Confirming the framework laid down by Werle in Werle (1997).

113 A good example of how the ICC has managed with the fact that non-state actor possess the organizational capacity to commit core crimes is the Kenya case. See *Situation in the Republic of Kenya*, Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010.

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