

ARTICLES

THE ICC IN LATIN AMERICA: AN OLD FRIEND WITH NEW CHALLENGES

*Naomi Robt-Arriaza**

TABLE OF CONTENTS

I. INTRODUCTION.....608

II. COLOMBIA: CAREFUL CALIBRATION OF OTP INTERVENTION610

III. VENEZUELA: NEED FOR A NEW APPROACH614

*Abramson Distinguished Professor of Law, University of California Hastings.

I. INTRODUCTION

Latin America was fundamental to the creation of the Court.¹ The original proposal of an international court came from Trinidad and Tobago, and people involved in Latin American struggles against dictatorship ended up being some of the primary actors supporting the Court in 1998.² Almost all the states in Latin America are States Parties to the Court.³ Most of those states have incorporated the crimes under the Rome Statute into their own criminal statutes, and some have initiated their own national prosecutions for the crimes in the Rome Statute.⁴ Thus, Latin America is a region that has been both influenced by the Court and has influenced the shape and the development of the Court.

There are no cases from Latin America presently before the Court. All of the action is in the preliminary examination stage of ICC procedure. According to the Office of the Prosecutor's (OTP) Policy Paper on Preliminary Examinations, there are a number of issues that the Prosecutor must consider in deciding whether or not to open an investigation.⁵ Article 53(1)(a)-(c) of the Statute establishes the legal framework that ICC prosecutors must consider.⁶ It provides that the Prosecutor shall consider: jurisdiction (temporal, material, and either territorial or personal jurisdiction); admissibility (complementarity and gravity); and the interests of justice.⁷ In considering material jurisdiction, the Prosecutor must consider whether crimes within the jurisdiction of the Court have been committed.⁸ The standard of proof for proceeding with an investigation into a situation under the Statute is a "reasonable basis."⁹

¹ Press Release, Int'l Criminal Court, Int'l Criminal Court and Inter-American Court of Human Rights sign Memorandum of Understanding on Cooperation (Feb. 16, 2016), <https://www.icc-cpi.int/Pages/item.aspx?name=pr1191&ln=en>.

² See *Overview: Rome Statute of the International Criminal Court*, <http://legal.un.org/icc/general/overview.htm> (last visited Sept. 7, 2019).

³ Jamaica, Haiti, Cuba and Nicaragua are among the few non-party states. See *The States Parties to the Rome Statute, Latin America and Caribbean States*, INT'L CRIMINAL COURT, https://asp.icc-cpi.int/en_menus/asp/states%20parties/latin%20american%20and%20caribbean%20states/Pages/latin%20american%20and%20caribbean%20states.aspx (last visited May 28, 2019).

⁴ See Mikel Delagrangé, *Latin America: The Next Frontier for the ICC?*, 5 FIU L. Rev. 293 (2009).

⁵ Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, INT'L CRIMINAL COURT (Nov. 2013), https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf.

⁶ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

There have been four recent preliminary examinations of Latin American allegations: two are now closed, two are still open, and there are several requests for additional preliminary examinations. The two closed examinations involved Honduras and Venezuela. The Honduran examination followed the 2009 coup in Honduras.¹⁰ After the coup, there were a number of people killed in demonstrations and many arbitrary detentions.¹¹ Civil society groups provided additional information to the prosecutor focused on killings of peasant activists in the Bajo Aguán region.¹² That case was closed in 2015 on grounds that the information submitted was insufficient to find a reasonable basis of crimes within the Court's remit.¹³

The Venezuelan preliminary examination is discussed in Section III below. However, a case regarding the attacks on government opponents after the 2002 attempted coup against then-President Hugo Chavez was closed in 2006 on grounds that the statutory requirements were not satisfied.¹⁴ The allegations within the temporal jurisdiction of the Court¹⁵ were found not to constitute a "widespread or systematic attack," as required by Article 7 of the Rome Statute.¹⁶ The allegations included "45 victims of murder, 39 to 44 [cases of] imprisonment, 42 of torture and larger numbers of victims of persecution."¹⁷ All allegations were against political opponents. The OTP found that "[e]ven on a generous evaluation of the information provided, the available information did not provide a reasonable basis to believe that the requirement of a widespread or systematic attack against any civilian population had been satisfied."¹⁸

¹⁰ Office of the Prosecutor, *Preliminary Examination: Honduras*, INT'L CRIMINAL COURT, <https://www.icc-cpi.int/honduras> (last visited May 28, 2019).

¹¹ See, e.g., PETER J. MEYER, CONG. RESEARCH SERV., RL41064, HONDURAN POLITICAL CRISIS, JUNE 2009-JANUARY 2010 (2010).

¹² Office of the Prosecutor, *supra* note 10. See also Statement, Fatou Bensouda, Prosecutor, Int'l Criminal Court, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, On the Conclusion of the Preliminary Examination into the Situation in Honduras (Oct. 28, 2015), <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-28-10-2015>.

¹³ *Id.*

¹⁴ Office of the Prosecutor, *Response Regarding Preliminary Examination*, INT'L CRIMINAL COURT (Feb. 9, 2006), https://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf.

¹⁵ *Id.* Those allegations that concerned events prior to July 1, 2002 were outside the temporal jurisdiction of the Court.

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 3.

¹⁸ *Id.* at 4.

II. COLOMBIA: CAREFUL CALIBRATION OF OTP INTERVENTION

Colombia is the subject of one of the two pending preliminary examinations before the OTP. The Colombian preliminary examination has been a marathon and illustrates both the utility and the limits of this mechanism. The OTP opened a preliminary examination in 2004 into the armed conflict “between and among government forces, paramilitary armed groups and rebel armed groups”¹⁹ In 2012, the OTP found there was a reasonable basis to conclude that crimes within the jurisdiction of the court, including war crimes and crimes against humanity, had indeed been committed.²⁰ The OTP found that at the time the Revolutionary Armed Forces of Columbia (FARC) and National Liberation Army (ELN) guerrilla groups and the paramilitaries (and perhaps their successor organizations) were responsible for crimes against humanity and war crimes, and that the military—at least at the level of certain brigades—had developed a policy of “false positives” by which poor young men were killed and then made to appear as though they were dead FARC fighters, in order for the military to increase their bonus pay.²¹ The preliminary examination remains in the phase of considering whether complementarity has been met.²²

The OTP has been trying to calibrate how to influence domestic processes in Colombia towards greater accountability without having to actually open an investigation. They have worked through multiple channels to do that, issuing continuing reports, conducting multiple visits of OTP staff to Colombia, organizing visits of Colombians to the Hague, and sending correspond-

¹⁹ The preliminary examination is of war crimes committed since November 1, 2009, and crimes against humanity committed since November 1, 2002. The difference in timing is due to a declaration filed by Colombia pursuant to Article 124 excluding war crimes from the jurisdiction of the ICC for a seven-year period. See *Preliminary Examination; Colombia*, INT'L CRIMINAL COURT, <https://www.icc-cpi.int/colombia> (last visited June 17, 2019).

²⁰ See Office of the Prosecutor, *Situation in Colombia, Interim Report*, INT'L CRIMINAL COURT (Nov. 2012), <https://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf>.

²¹ *Id.* at ¶ 8. See also *Colombia: New Army Commanders Linked to Killings*, HUMAN RIGHTS WATCH (Feb. 27, 2019), <https://www.hrw.org/news/2019/02/27/colombia-new-army-commanders-linked-killings>.

²² Office of the Prosecutor, *Report on Preliminary Examination Activities*, INT'L CRIMINAL COURT 1, 44 (Dec. 5, 2018), <https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf> [hereinafter *2018 Report*]. The 2018 Report focused on progress in the false positives, forced displacement, sexual violence and paramilitary cases, and on recent holdings by the Constitutional Court. The preliminary investigation remains in Phase 3, consideration of complementarity and gravity.

ence (public and private) at key moments, especially as the peace process developed, first with the paramilitaries, and most recently with the FARC.²³ For example, the Prosecutor, in two letters addressed to the country's constitutional court, argued that the Rome Statute requires actual incarceration as punishment for international crimes.²⁴ On July 26, 2013, Prosecutor Bensouda wrote that "The decision to suspend a prison sentence would suggest that the proposed judicial process has the purpose of removing the accused from his criminal responsibility," thus potentially triggering the ICC's jurisdiction.²⁵

The most important influence has been, perhaps, indirect. The peace processes in Colombia have bargained in the shadow of the law.²⁶ So, as noted, decisions of the Constitutional Court of Colombia have taken into account the provisions of the Rome Statute when assessing what is legal under Colombian law, especially with respect to the creation of the Special Jurisdiction for Peace.²⁷ The Rome Statute and the correspondence that has become public from the court has also been instrumental in the way all of the political actors of Colombia have used it. There is, however, a complicating factor in trying to understand the influence of the OTP: Colombia is also a party to the American Convention on Human Rights, and is therefore subject to the jurisdiction of the Inter-American Commission and Court on Human Rights.²⁸ In some ways, especially with respect to the rights of victims, the Inter-American system is more demanding than the Rome Statute. In others, it might provide more flexibility. For example, with respect to the need for proportional punishment, the Inter-American Court may take a harder line.²⁹

²³ See *Situation in Columbia, Interim Report*, *supra* note 20; and *2018 Report*, *supra* note 22, for descriptions of OTP activities.

²⁴ The letters were cited in a Constitutional Court case upholding the Framework for Peace. Corte Constitucional [C.C.] [Constitutional Court], Aug. 23, 2013, Sentencia C-579/13 (Colom), <http://www.corteconstitucional.gov.co/relatoria/2013/C-579-13.htm>. The OTP also sent an *amicus curiae* brief to the C.C. to be used in its consideration of the legality of the amnesty law and law implementing the Special Jurisdiction for Peace. In addition to the question of incarceration, the OTP expressed concerns about the definition of command responsibility and restrictions on war crimes prosecutions. *2018 Report*, *supra* note 22, at 41-42.

²⁵ *Id.*

²⁶ The idea is that the parties bargain taking into account the projected legal outcomes should they not come to agreement and end up in trial. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979).

²⁷ See, e.g., Brian Harper & Holly K. Sonneland, *Explainer: Colombia's Special Jurisdiction for Peace*, COUNCIL AMS. (Aug. 3, 2018), <https://www.as-coa.org/articles/explainer-colombias-special-jurisdiction-peace-jep>.

²⁸ Dep't of Int'l Law, *Multilateral Treaties, American Convention on Human Right "Pact of San Jose, Costa Rica"*, ORG. OF AM. STATES, https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Aug. 21, 2019).

²⁹ For an example of Inter-American Court jurisprudence on proportionality of punishment, see *La Rochela Massacre v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No.

The way different Colombian actors have used the Rome Statute has varied over time. At the beginning of the peace process, it was mostly victims' groups that raised the idea that if there is not adequate attention paid to justice for the victims, the Rome Statute will apply and the ICC will step in.³⁰ There was a widely shared understanding that ICC involvement was something to be avoided, especially since Colombia's legal system is quite complex and well-respected.³¹ That meant that a blanket amnesty was off the table. Now however, after the parties reached a peace accord in 2016, the local actors have flipped positions. The victims' groups and their allies are now on the side arguing to give this flexible agreement a chance, while the right-wing government of Iván Duque has argued that no amnesty should apply.³² Duque (and his main backer, former president Alvaro Uribe), the former Inspector General Alejandro Ordoñez, along with the current Prosecutor, have led the opposition to the agreement, especially the provisions involving the Special Jurisdiction for Peace.³³ They argue the peace agreement's provisions on punishment of the FARC leadership are too lenient and that the Rome Statute requires prison time.

In fact, the discussion between Colombia and the ICC on the question of punishment has been key. One of the interesting aspects of the Colombian peace agreement is that it separates investigation and trial from punishment.³⁴

163 (May 11, 2007). For a discussion in the Inter-American Court on post-conflict punishment in the context of peace processes that suggests greater flexibility, *see* Judge García-Sayan's separate opinion in *Massacres of El Mozote and Neighboring Locations v. El Salvador*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 252, ¶¶ 30-31 (Oct. 25, 2012).

³⁰ *See, e.g.*, the interventions of the Colombian Commission of Jurists before the Constitutional Court and elsewhere. Letter from Colombian Commission of Jurists to Constitutional Court (July 25, 2013) (available at <http://iccnw.org/documents/ColJuristasintervencion.pdf>).

³¹ *See, e.g.*, Santiago Vargas Niño, *La JEP: ¿cómo evitar que la Corte Penal Internacional intervenga en Colombia?*, RAZÓN PÚBLICA (Nov. 27, 2017), <https://www.razonpublica.com/index.php/conflicto-drogas-y-paz-temas-30/10724-la-jep-c%C3%B3mo-evitar-que-la-corte-penal-internacional-intervenga-en-colombia.html>.

³² Daniela Blandón Ramírez, *Colombia: a pesar de sus objeciones, presidente Duque firmó la ley Estatutaria de la Jurisdicción Especial para la Paz*, FRANCE 24 (June 7, 2019), <https://www.france24.com/es/20190607-colombia-duque-ley-acuerdo-paz-jep>.

³³ *Risky Business: The Duque Government's Approach to Peace in Colombia*, INT'L CRISIS GROUP (June 21, 2018), <https://www.crisisgroup.org/latin-america-caribbean/andes/colombia/67-risky-business-duque-governments-approach-peace-colombia>; *Debut de Alejandro Ordoñez y Alvaro Uribe contra el acuerdo de paz*, EL TIEMPO (Sept. 26, 2016), <https://www.eltiempo.com/politica/proceso-de-paz/oposicion-de-alejandro-ordonez-y-alvaro-uribe-a-firma-del-acuerdo-final-35307>.

³⁴ As summarized by Harper & Sonneland, *supra* note 27.

If the accused admits to his or her crimes up front, he or she will serve between five to eight years of an alternative sentence that deprives them of various personal liberties if the crime is serious, and between two to five years if the crime is not. Alternative sentences can include house

At first, the OTP was firmly opposed to the lack of prison sentences for those who cooperate, give information and provide reparation to victims, in the name of proportional punishment.³⁵ As was pointed out by supporters of the Special Jurisdiction, the Rome Statute does not say anything about punishment, which is generally left to national law under international treaties.³⁶ The Rome Statute instead prescribes what kinds of punishments the court itself should impose but does not say anything about what national courts are required to do.³⁷ And, through a process of dialogue and several rounds of correspondence, the ICC's position became less rigid, and it had, until recently, taken a wait-and-see attitude on the issue.³⁸

arrest and/or community service, to be meted out in agreement with the victim(s), to whom they might also owe reparations. Reparations included the removal of mines and explosives from territories in which FARC had operated, finding, identifying, and returning the remains of people who went missing during the conflict, new judicial mechanisms to break apart criminal organizations, and the restitution of land titles.

That said, the defendant could spend their sentence in a regular prison if he or she doesn't fess up to crimes initially but only does so after a criminal investigation. Finally, if the accused refuses to take responsibility for any crime and is later found guilty by the court, he or she faces a sentence of 15 to 20 years in a regular prison.

Id.

³⁵ *Una 'carta bomba'*, SEMANA (Aug. 17, 2013), <https://www.semana.com/nacion/articulo/una-carta-bomba/354430-3>.

³⁶ Rome Statute of the International Criminal Court arts. 77-80, July 17, 1998, 2187 U.N.T.S. 90. Articles 77-80 of the Rome Statute deal with penalties.

³⁷ Rome Statute of the International Criminal Court art. 80, July 17, 1998, 2187 U.N.T.S. 90 (specifically stating that "Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.").

³⁸ In a speech in May 2018, the Deputy Prosecutor declared:

The OTP has already expressed its position that the suspension of sentences would be manifestly inadequate, as this would, in effect, allow individuals who bear the greatest responsibility for the commission of the most serious crimes to avoid any real punishment. Reduced sentences are conceivable, however, as long as the convicted person must fulfil certain conditions that would justify an attenuated sentence. The OTP has noted that such conditions could include acknowledgement of criminal responsibility, demobilization and disarmament, guarantees of non-repetition, full participation in the process of establishing the truth about serious crimes, a possible temporary ban from taking part in public affairs, among other measures. Such conditions might justify reducing a sentence that would otherwise be proportionate to the gravity of the crime and the degree of responsibility of the perpetrator. Alternative or non-custodial sentences, involving restrictions upon liberty, supervision and obligations, must also be consistent with a genuine intent to bring the convicted persons to justice. In assessing such sentences, the OTP will consider a range of factors that would include the usual national practice

However, the ICC's deferential approach may change in light of President Duque's blatant hostility towards the whole peace process, and especially the Special Jurisdiction. As Deputy Prosecutor James Stewart said in 2018: the OTP must "satisfy[] [it]self that the array of transitional justice measures applied in the situation in Colombia meet, in a genuine way, the Rome Statute goals."³⁹ The Colombian government's insistence on changes to the Special Jurisdiction's procedural law, and the delays in implementation, has raised alarms and voices calling for ICC intervention.⁴⁰ While the Special Jurisdiction statute has now become law,⁴¹ a rocky road no doubt lies ahead.

III. VENEZUELA: NEED FOR A NEW APPROACH

Venezuela is back on the OTP's radar, as a new preliminary examination commenced in 2018.⁴² There are two factors present in the Venezuelan preliminary examination that are missing from the Colombian examination. One is that Venezuela has withdrawn from the American Convention on Human Rights and from the Organization of American States (OAS), which means the regional human rights system has little purchase.⁴³ Second, unlike Colombia, there is a state referral in Venezuela.⁴⁴ The prosecutor began considering Venezuela in February 2018.⁴⁵ Later that year, five Latin American countries and Canada filed a joint referral to the ICC about the situation in Venezuela.⁴⁶ A state referral allows a case to be submitted directly to a pre-trial chamber, which was done here on September 28, 2018.⁴⁷

in sentencing for Rome Statute crimes, the proportionality of the sentence in relation to the gravity of the crime and the degree of responsibility of the offender, the type and degree of restrictions on liberty, any mitigating circumstances, the reasons the sentencing judge gave for passing the particular sentence, and so on.

James Stewart, *The Role of the ICC in the Transitional Justice Process in Colombia*, INT'L CRIMINAL COURT (May 30, 2018), <https://www.icc-cpi.int/iccdocs/otp/201805SpeechDP.pdf>.

³⁹ *Id.*

⁴⁰ Kai Ambos & Susann Aboueldahab, *Colombia: Time for the ICC Prosecutor to Act?*, EJIL: TALK! (Apr. 2, 2019), <https://www.ejiltalk.org/colombia-time-for-the-icc-prosecutor-to-act/>.

⁴¹ Ramírez, *supra* note 32.

⁴² *2018 Report*, *supra* note 22, at 29-33.

⁴³ *Venezuela to Withdraw from OAS, Denounces Campaign by Washington*, REUTERS (Apr. 26, 2017), <https://www.reuters.com/article/us-venezuela-oas/venezuela-to-withdraw-from-oas-denounces-campaign-by-washington-idUSKBN17S330>.

⁴⁴ *2018 Report*, *supra* note 22, at 29.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

Most of the information the Court is working with is based on prior investigations, including those of the Inter-American Commission,⁴⁸ the UN High Commissioner for Human Rights,⁴⁹ and an OAS expert panel. In 2018, the OAS Secretary General appointed a panel of independent international experts to investigate whether international crimes had been committed in Venezuela. In May 2018, the panel found that reasonable grounds existed to believe that crimes against humanity have been committed in Venezuela dating back to at least February 12, 2014.⁵⁰

Submissions to the Court have focused on crimes against humanity committed by police, military and paramilitary forces in the service of the regime.⁵¹ These crimes have occurred largely in the context of demonstrations and political activities, especially since 2017. The operating assumption has been that these are attacks on a civilian population, carried out against opponents of the regime. While numbers are hard to come by, the OAS Expert Group estimated that 131 people had been killed in the context of several years of anti-regime demonstrations, and another 8,292 had been executed in a broader context of government repression and political persecution.⁵² The widespread or systematic nature of the alleged crimes has derived from the fact that attacks have occurred in multiple cities and on numerous occasions. Under the Rome Statute, prosecutorial action requires a state or organizational

⁴⁸ *Democratic Institutions, the Rule of Law and Human Rights in Venezuela*, INTER-AM. COMM’N HUMAN RIGHTS (2017), <http://www.oas.org/en/iachr/reports/pdfs/Venezuela2018-en.pdf>.

⁴⁹ Office High Comm’r Human Rights, *Human Rights Violations in the Bolivarian Republic of Venezuela: A Downward Spiral with No End in Sight*, U.N. HUMAN RIGHTS (June 2018), https://www.ohchr.org/Documents/Countries/VE/VenezuelaReport2018_EN.pdf.

⁵⁰ The panel of experts—Santiago Cantón (Argentina), Irwin Cotler (Canada), and Manuel Ventura Robles (Costa Rica)—did not investigate on their own, but rather used the evidence collected in five public OAS hearings. The panel found that reasonable grounds exist to find that, “[t]he opposition, or those identified as such, were branded as the ‘internal enemy’ of the State, turning large segments of the civilian population into targets for the military, paramilitary and regular security forces who operate in a coordinated manner to ‘defend the Bolivarian Revolution.’” The panel recommended that the Secretary General of the OAS should submit the report and the evidence to the International Criminal Court (ICC). The Secretary General did so, and also invited States Parties to the Rome Statute to refer the situation of Venezuela to the OTP. *Executive Summary*, ORG. AM. STATES, <http://www.oas.org/documents/eng/press/Venezuela-Executive-Summary.pdf> (last visited June 17, 2019) (hereinafter *OAS Report*).

⁵¹ *2018 Report*, *supra* note 22, at 31.

⁵² *OAS Report*, *supra* note 50, at 389. In addition, submissions to the Office of the Prosecutor recount arbitrary detentions, torture, forced disappearances and persecution. These include detention of political opponents, attacks on demonstrators, torture in detention, and the like.

policy.⁵³ Here, the policy is deemed to be the illegal means or excessive force aimed at countering political opposition.

However, there is a complementary narrative that has received far less attention from those seeking to hold the Venezuelan leadership accountable. Venezuela is an opportunity for the Court to consider the underlying conditions of state capture and grand corruption that drive the need of that government to stay in power. Extensive, systemic, and controlling corruption today provides much of the real *raison d'être* of the Maduro government and its military allies. Over the last years, a shadowy alliance of ruling party politicians, high-ranking military officers, organized crime (including but not limited to drug traffickers) and some members of the private sector have looted the Venezuelan economy for their own benefit, all made possible by corrupt use of the levers of state power.⁵⁴ This alliance has erased the independence of the judiciary and of prosecutors; commandeered the oil industry, gold mining, food distribution networks, and even foreign exchange markets; ensured complete impunity for their actions; and used the natural resources and finances of the state to enrich themselves and their cronies. Moreover, targets have included not only demonstrators but indigenous people, artisanal miners, soldiers and military officers, and others who might create obstacles to the looting of the state with impunity.⁵⁵

In other words, the government is not staying in power because they want the socialist revolution to survive. Not at this point. The reason why the regime and its supporters absolutely need control of the justice system, why they have weakened the country's institutions, why they have gone after not just civilians, but people within the government itself and the military, is because kleptocracy, or grand corruption, is driving the need to stay in power.

A corruption lens, as has been applied here, will help strengthen and focus the Court's work in cases like Venezuela, where systemic corruption plays a key explanatory role. Viewing similar cases through such a lens allows for a broader scope when denouncing and judging human rights violations and atrocities, pulling the evidentiary string to the point of fully understanding the causes and rethinking ways to address them. Such a lens has narrative power and exposes ideological discourses of both the left and right as simple rhetoric, thus changing the national and international context in which the Court will have to seek support and potentially creating new alliances. Additionally, a corruption-based view connects the Court's work to the issues of corruption

⁵³ Rome Statute of the International Criminal Court, art. 7(2)(a), July 17, 1998, 2187 U.N.T.S. 90.

⁵⁴ See, e.g., *Venezuela: A Mafia State?*, INSIGHT CRIME (May 2018), <https://www.insightcrime.org/wp-content/uploads/2018/05/Venezuela-a-Mafia-State-InSight-Crime-2018.pdf>.

⁵⁵ See Naomi Roht-Arriaza & Santiago Martinez, *Venezuela, Grand Corruption, and the International Criminal Court* (May 2, 2019), <https://www.ssrn.com/abstract=3381986>.

and natural resource extraction that are at the heart of popular protests and reform movements in the region.⁵⁶

Finally, using this lens in Venezuela might make it easier for the Court to consider the situation of Mexico, where over 200,000 people have died and 32,000 have disappeared since 2006, killed by both state and non-state actors in the context of the “war on drugs.”⁵⁷ There have now been at least three major submissions to the OTP to open a preliminary examination, but to date, none have been accepted.⁵⁸ Part of the problem has been developing a coherent theory on what, in this context, is a “state or organizational policy,” as required by the Rome Statute for crimes against humanity. A corruption-focused lens may help supply answers to that question.⁵⁹

⁵⁶ *Id.*

⁵⁷ Gerardo Lissardy, *México: ¿por qué no hay más indignación internacional ante los miles de muertos y desaparecidos?*, BBC (June 22, 2018), <https://www.bbc.com/mundo/noticias-america-latina-44434406>.

⁵⁸ Press Release, International Federation for Human Rights, Mexico: The President-Elect Must Defer Quickly the Crimes Committed to the Prosecutor of the ICC (Nov. 29, 2018), <https://www.fidh.org/en/region/americas/mexico/the-president-elect-must-keep-his-promise-and-defer-quickly-the>; *La Corte Penal Internacional como Tribunal de Justicia Internacional*, CENTRO DE ESTUDIOS INTERNACIONALES GILBERTO BOSQUES 6-8 (Oct. 4, 2018), https://centrogilbertobosques.senado.gob.mx/docs/AI_CortePenal-I_041018.pdf.

⁵⁹ Open Society Justice Initiative, *Corruption that Kills: Why Mexico Needs an International Mechanism to Combat Impunity*, OPEN SOCIETY FOUND. (2018), <https://www.opensocietyfoundations.org/sites/default/files/corruption-that-kills-en-20180502.pdf>.

