Square Pegs and Round Holes: Mexico, Drugs, and International Law

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Abstract

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The drug-related violence in Mexico has become so ubiquitous that President Calderon is using the Mexican Army to fight the drug cartels. This paper argues that this situation rises to the level of a non-international armed conflict and discusses the international legal obligations and rights that arise from that designation under international humanitarian law. It then proposes several means of ensuring compliance with these rights and obligations.

Under international humanitarian law, to qualify as a non-international armed conflict, there must be protracted armed violence involving at least one sufficiently organized non-state party. This requirement does give any guidance on how to answer the threshold question of how much or what kind of organization is sufficient. The paper proposes a brightline test for determining the existence of a non-international armed conflict based on the text of the Geneva Conventions. Every armed conflict, if between two or more states, is either an international armed conflict, or a non-international armed conflict. The existence of a non-international armed conflict places specific obligations on both parties, such as humane treatment of those not actively involved in hostilities.

This paper addresses the non-international armed conflict taking place between Mexico and the drug cartels, and then proposes options that Mexico and the international community can undertake to curb the violence and ensure compliance with its international humanitarian law obligations. These options include referral of these

violations to the International Criminal Court, the United States conditioning funding for Mexican anti-narcotics efforts on compliance with international humanitarian law, and ICRC engagement with Mexico and the cartels to promote compliance and protect civilians.

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Part I- Introduction

> It is twenty minutes after midnight on Sunday, January 20, when Julian Chairez Hernandez is found dead by gunshot. He is a lieutenant in the municipal police and thirty-seven years old. Seven hours and ten minutes later, Mirna Yesenia Munoz Ledo Marin is found inside her own home. She is naked and has been stabbed several times. She is ten years old. On Monday, January 21, at 7:50 A.M., Francisco Ledesma Salazar is killed in his SUV. He is thirty-five years old and the coordinator of operations for the municipal police. The gunshots come from men in a minivan. At 9:30 A.M., the body of Erika Sonora Trejo is found by police in the bathroom of her home. She is thirty-eight and eight months pregnant, and officers think her father-in-law has had at her with an axe. Later, that Monday, at 5 P.M., a year-old skeleton turns up in the desert. That evening around 8:40 P.M., Fernando Lozano Sandoval is cut down in his SUV by a barrage of fifty-one rounds. He is fifty-one and the commander of the Chihuahua Bureau of Investigations. Two vehicles, a red SUV and a gray car, figure in the attack. Later, Lozano is transported to an El Paso Hospital since Juárez has had recent incidents of killers visiting the wounded in hospitals in order to finish their work. A list appears on a Juárez monument to fallen police officers. Under the heading THOSE WHO DID NOT BELIEVE are the names of five recently murdered cops. And under the heading FOR THOSE WHO CONTINUE NOT BELIEVING are seventeen names.[1]

These morbid descriptions of life in Juárez, Mexico, just across the border from El Paso, Texas, provide a view into the ongoing struggle being waged between the Mexican government and a handful of Mexican drug trafficking organizations[2] (DTOs) throughout Mexico. These DTOs, in addition to fighting the Mexican Government, are

[1] CHARLES BOWDEN, MURDER CITY: CIUDAD JUÁREZ AND THE GLOBAL ECONOMY'S NEW KILLING FIELDS 1-2 (Nation Books 2010) [hereinafter Murder City].

[2] The common accepted term for these groups in political and journalistic discourse is "cartel", however these organizations are not responsible for controlling the price of the drugs the way that OPEC, a cartel, is. CRS Report, *infra* note 3, at n.1 Therefore, throughout this paper, these terms will be used interchangeably.

also locked in a power struggle between each other[3] for supremacy over the supply and distribution routes of illegal drugs. Caught in the crossfire are innocent civilians, soldiers, Mexican law enforcement, and even United States citizens[4] in and around the Mexican border towns of Juárez, Tijuana, Laredo, and Tamaulipas.[5] It is almost impossible to know for sure how many lives have been lost as a result of this violence, but estimates place the numbers at around 2,700 murders in 2007, and over 5,000 murders in 2008, with reason to believe that the numbers are increasing.[6] From January to May 2010, Juárez alone experienced over 870 drug-related murders, after having seen 2,700 deaths in 2009.[7]

Since taking power in 2006, Mexican President Felipe Calderón's response to the increasing violence has been to dispatch the Mexican Army to fight the DTOs and restore law and order to the country.[8] This policy has forced the drug cartels to become decentralized and change their methods for moving the drugs[9]- using submarines[10] and

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[3] COLLEEN W. COOK, CONG. RESEARCH SERV., RL 34215, MEXICO'S DRUG CARTELS 2 (2007), *available at* http://www.fas.org/sgp/crs/row/RL34215.pdf [hereinafter CRS Report].

[4] Marc Lacey & Ginger Thompson, *Two Drug Slayings in Mexico Rock U.S. Consulate*, N.Y. TIMES, Mar. 14, 2010, *available at* http://www.nytimes.com/2010/03/15/world/americas/15juarez.html.

[5] STRATEGIC FORECASTING, MEXICAN DRUG CARTELS: GOVERNMENT PROGRESS AND GROWING VIOLENCE 2-3, Dec. 11, 2008, *available at* http://www.stratfor.com/memberships/128691/analysis/20081209_mexican_drug_cartels_government_progress_and_growing_violence [hereinafter Stratfor, Drug Cartels].

[6] *Id.* at 15.

[7] STRATEGIC FORECASTING, MEXICAN DRUG CARTELS: AN UPDATE, 4-4, *at* Juárez, May 17, 2010; GEORGE GRAYSON, MEXICO: NARCO-VIOLENCE AND A FAILED STATE? 97, Transaction Publishers- New Brunswick, NJ, 2010 [hereinafter Grayson, Narco-Violence].

[8] Stratfor, Drug Cartels, *supra* note 5 at 2.

[9] *See id.* at 2.

helicopters in addition to traditional transportation such as cars, trucks, and even bicycles.[11] But while the Mexican government has been able to diminish slightly the power of the cartels, the violence against soldiers, women and children, and innocent bystanders continues to escalate.[12]

This paper argues that the violence in Mexico rises to the level of an "armed conflict" within the meaning of international law. Because the violence is concentrated between the Mexican Government and the drug trafficking organizations, the armed conflict cannot be classified as an "international armed conflict; rather it is a non-international armed conflict within the meaning of common Article 3 of the 1949 Geneva Conventions. Although the conflict occurs in Mexico and therefore internal U.S. law is not of direct relevance, support for the proposition that a non-international armed conflict exists in Mexico may be found in the United States Supreme Court's rationale in *Hamdan v. Rumsfeld*, which held that the United States is engaged in a non-international armed conflict with Al Qaeda.

Since the conflict in Mexico constitutes a non-international armed conflict, international law (particularly common Article 3) imposes important obligations on and grants certain privileges to each party to the conflict, meaning not just the Mexican Government but the drug cartels as well. Under the law of armed conflict, enemy soldiers are granted what is known as 'combatant's privilege,' meaning that one soldier is

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[10] *Columbia Seizes Smugglers' 'Narcosub'*, MSNBC, Feb. 15, 2011, *available at* http://www.msnbc.msn.com/id/41594536/ns/world_news-americas/.

[11] *Under the Volcano*, THE ECONOMIST 29-31, Oct. 14, 2010, *available at* http://www.economist.com/node/17249102?story_id=17249102.

[12] *Id*.

allowed to shoot and kill an enemy soldier at any time, so long as they are actively taking part in the hostilities.[13] On the other hand, those obligations outlined in common Article 3 include the prohibition on committing violence, killing, mutilating, torturing, and treating cruelly any person not actively involved in the conflict.[14] While it is easy to say that certain rights and obligations exist, there remain practical problems in the implementation of these obligations: getting the parties to acknowledge the existence of a non-international armed conflict, ensuring that the parties comply with the mandates of common Article 3, and punishing those who commit violations of the Geneva Conventions.[15]

Part II of this paper recounts the background to the conflict, including how it started, the major cartels involved, and some of the methods used to secure control over the drug routes. Part III addresses the history and application of international humanitarian law under the Geneva Conventions, with a specific emphasis on conflicts "not of an international character."[16] In particular, Part III highlights the problems

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[13] Major Joseph P. Bialke, *United Nations Peace Operations: Applicable Norms and the Application of the Law of Armed Conflict*, 50 A.F. L. REV. 1, 38 (2001).

[14] FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 69-70 (Int'l. Comm. Red Cross 2001) (citing Geneva Conventions, *infra* note 16, at art. 3) [hereinafter Constraints on the Waging of War].

[15] *Id*. at 69.

[16] The Geneva Conventions' common Article 3 delineates between armed conflicts of an international character and those of a non-international one. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, Geneva Convention No. I, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 (1949) [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, Geneva Convention No. II, 6 U.S.T. 3217, T.I.A.S No. 3363, 75 U.N.T.S 85 (1949) [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, Geneva Convention No. III, 6 U.S.T. 3316, T.I.A.S No. 3364, 75 U.N.T.S 135 (1949) [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War

inherent in the dichotomy between international and non-international armed conflicts, and proposes a new methodology for applying the rules of international humanitarian law to the violence in Mexico. Finally, Part IV addresses the obligations and privileges for both the Mexican Government and the drug cartels, in addition to how international actors can help to quell the violence.

Part II- The Situation in Mexico

This section will outline the rise of the DTOs, and their use of military grade weapons and indiscriminate violence to eliminate all obstacles preventing them from selling drugs. This understanding of how the DTOs function, the power they wield, and Mexico's military response provides background for why this conflict constitutes a non-international armed conflict. Traditionally, domestic violations of law, such as isolated incidents of murder, rape, arson, and kidnapping have been within the exclusive purview of the national legal system, including using national police to investigate and the national criminal justice system to prosecute and punish. The current violence in Mexico has become so omnipresent and the DTOs have been, to a significant extent, able to infiltrate the ranks of law enforcement through coercion and bribery, that the only effective response Mexico has is to utilize its armed forces to combat this violence. The Army, however, is operating outside the bounds of the law in going after not only members of the cartels, but also its own citizens using internationally proscribed tactics such as torture and indiscriminate killing.

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of August 12, 1949, Geneva Convention No. IV, 6 U.S.T. 3516, T.I.A.S No. 3365, 75 U.N.T.S 287 (1949) [hereinafter Geneva IV] [collectively hereinafter Geneva Conventions].

A. The Historical Underpinnings of Drug Trafficking.

The DTOs have been operating for just under a century, first by smuggling rum into the United States during prohibition,[17] and now smuggling drugs, people[18], and weapons.[19] In that time, the DTOs have learned to adapt to threats to their existence. The DTOs have been able to avoid defeat by the state precisely because they are able to subdivide the organization into smaller groups and reunite when the threat has subsided and are able to form and break alliances with other DTOs on the fly when strategically necessary.

For each DTO, there exists great incentive to survive, as the global illegal drug trade generates earnings of $500 billion annually.[20] While about four-tenths of one percent of Mexico's population[21] is addicted to drugs, the true consumers are located just north, as the United States is responsible for consuming almost $56 billion of the total amount,[22] or just over eleven percent. The United States Office of National Drug Control Policy (ONDCP) found that 22 million Americans used some sort of illegal drug in

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[17] *See generally infra* note 25.

[18] Josh Meyer, *Drug Cartels Raise The Stakes On Human Smuggling*, L.A. TIMES, March 23, 2009, *available at* http://www.latimes.com/news/nationworld/nation/la-na-human-smuggling23-2009mar23,0,5345333,full.story.

[19] Manuel Roig-Franzia, *U.S. Guns Behind Cartel Killings in Mexico*, WASH. POST, Oct. 29, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/10/28/AR2007102801654.html.

[20] DEPARTMENT OF STATE WASHINGTON FILE, MCCAFFREY URGES GLOBAL COOPERATION AGAINST DRUG TRAFFICKING, Feb. 8, 2000, *available* at http://usinfo.org/wf-archive/2000/000208/epf209.htm.

[21] In 2008, there were estimated to be 485,000 addicts out of the 100 million citizens of Mexico, which is about .4%. Jorge G. Castañeda, *What's Spanish For Quagmire? Reassessing Mexico's War on Drugs,* FOREIGN POLICY, Jan/Feb 2010, *available at* http://www.foreignpolicy.com/articles/2010/01/04/whats_spanish_for_quagmire?page=full.

[22] *Id*.

2009.[23]. With that kind of market for illicit substances,[24] it is not surprising that one of the largest drug operations in the history of the world is taking place just south of the United States border.

The key to understanding the power of the DTOs in Mexico is to understand how they arose. The market for these drugs started during the American Civil War.[25] In 1853, doctors for the Union and Confederacy began to give syringes filled with morphine to soldiers who were injured in battle, and soon after used it to cure such ailments as dysentery and diarrhea.[26] Due to this widespread use, soldiers quickly became addicted to the morphine, calling that addiction 'the army disease.'[27] In the late 1890s, Bayer Pharmaceuticals made available to American a "nonaddictive cough syrup for children" known as heroin,[28] which just happened to be eight times more powerful than morphine and was widely used.

At the same time, the U.S. Government sought to regulate the consumption of drugs. In 1912, the United States Government and twelve other nations entered into the

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[23] OFFICE OF NATIONAL DRUG CONTROL POLICY, 2009 NATIONAL SURVEY ON DRUG USE AND HEALTH 1, Sept. 2010, *available at* http://www.whitehousedrugpolicy.gov/publications/pdf/nsduh.pdf.

[24] The ONDCP defines "illicit" drugs as prescription drugs for non-medical use, marijuana, MDMA ("ecstasy"), cocaine, heroin, inhalants, and LSD. *See id.*

[25] GEORGE W. GRAYSON, MEXICO'S STRUGGLE WITH DRUGS AND THUGS 9-10, 31 (Foreign Policy Association 2009) [hereinafter Drugs and Thugs].

[26] *Id*.

[27] *Id.* at 9-10

[28] *Id.* at 10.

International Opium Convention,[29] in which those nations agreed to "limit the manufacture, trade and use of these products to medical use, cooperate in order to restrict use and to enforce restriction efficiently, close opium dens, penalize possession; and prohibit selling to unauthorized persons[30]." This created a new black market for opium products that was previously nonexistent. The United States also began to regulate alcohol consumption.[31] An amendment establishing prohibition on the sale of alcohol was ratified by the states on January 16, 1919, and went into effect one year later.[32] The period of prohibition directly led to the rise and strengthening of the organized crime groups in Mexico.[33] The groups perfected their smuggling routes, moving barrels of rum to American border cities during this time, and the experience and knowledge gave them the infrastructure later necessary for moving narcotics into the United States.[34]

The drug smugglers did not have to wait very long for the demand for opium to rise again. During World War II, Mexico became a provider of morphine to the legal market and heroin to the illegal one.[35] After the war, some American service members

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[29] *See* Teachers College- Colombia University, *International Opium Convention Signed at The Hague, January 23, 1912*, *available at* http://www.tc.edu/centers/cifas/drugsandsociety/background/OpiumConvention.html, accessed Nov. 6, 2010. The twelve other nations who ratified the treaty were China, France, Germany, India, Iran, Italy, Japan, Portugal, Russia, Thailand, the Netherlands, and the United Kingdom. *Id.*

[30] *The Beginnings of International Drug Control*, CBS INTERACTIVE BUSINESS NETWORK, Summer, 1998, *available at* http://findarticles.com/p/articles/mi_m1309/is_2_35/ai_54157834/.

[31] U.S. Const. amend. XVIII, repealed by U.S. Const. amend. XXI

[32] Meredith B. Morgan, *Arkansas's Response to Granholm v. Heald: The Small Farm Winery Law Provides an Appropriate Remedy for Commerce Clause Violations*, 61 ARK. L. REV. 487, 491 (2008).

[33] Drugs and Thugs, *supra* note 25, at 13.

[34] *Id*.

[35] *Id.* at 15.

returned home, complete with a drug addiction, and the demand for other drugs such as marijuana, methamphetamines, and cocaine began to take off as well. Since then, the cartels have been optimizing their operations to avoid losing power to the Mexican Government, the United States Government, and each other.[36]

The post-North American Free Trade Agreement (NAFTA) climate has been a disaster for governments attempting to combat the drug trade, as it has made the movement of cheap goods (and drugs) from Mexico into the United States and Canada much easier.[37] As a direct result of NAFTA, there are more trucks heading north and there are not enough customs agents to search every truck.[38] It is estimated that each year, more than 200 tons of cocaine, 1,500 tons of marijuana, 15 tons of heroin, and 20 tons of methamphetamines are exported into the United States from Mexico alone.[39] At the same time, the average wage in Mexico, especially in Juárez, has dropped from $4.50 per day to $3.70 from a poor economy,[40] either forcing campesinos[41] to move north or to participate in drug cultivation and smuggling.

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[36] *See generally* Drugs and Thugs, *supra* note 25.

[37] Murder City, *supra* note 1, at 98.

[38] *Cf. id.*

[39] Marcelo Bergman, *Creating New Soldiers in Mexico's Drug War*, FOREIGN POLICY, May 17, 2010, *available at* http://www.foreignpolicy.com/articles/2010/05/17/creating_new_soldiers_in_mexico_s_drug_war.

[40] *Id*.

[41] Campesino is Spanish for a land worker or farmer.

Finally, the decline of the FARC[42] and the major cartels in Colombia has shifted market share north to the Mexican Cartels.[43] There is significant evidence suggesting that former affiliates of the FARC are now lending their expertise to trafficking operations in Mexico and Central America to facilitate cocaine shipments through the region.[44] Both the Mexican Government[45] and news agencies agree with this assessment.[46]

B. More Than Organized Crime

The Mexican Government's response to the threat posed by the DTOs has been to utilize the Army. This is significant because the use of armed forces potentially implicates international humanitarian law, and as will be argued, elevates this conflict from domestic violence to the level of an armed conflict.

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[42] The Fuerzas Armadas Revolucionarias de Colombia, or Revolutionary Armed Forces of Colombia, was established in 1964 as the military component of the Colombian Communist Party. The FARC is known for many things, but perhaps it is most well known for its narcotics activities- specifically cultivation and distribution. COUNCIL ON FOREIGN RELATIONS, FARC, ELN: COLOMBIA'S LEFT-WING GUERILLAS, Aug. 19, 2009, *available at* http://www.cfr.org/publication/9272/farc_eln.html; CRS Report, at 7 ("Mexico's cartels have existed for some time, but have become increasingly powerful in recent years with the demise of the Medellín and Cali cartels in Colombia").

[43] *See* Statement of Anthony P. Placidio, Assistant Administrator for Intelligence, Before the Subcommittee on National Security and Foreign Affairs, *Transnational Drug Enterprises (Part II): Threats to Global Stability and U.S. Policy Responses*, Mar. 3, 2010, *available at* www.justice.gov/dea/pubs/cngrtest/ct030310.pdf.

[44] *Id*.

[45] *Id*.

[46] *See e.g.*, *FARC's Cocaine Sales to Mexico Cartels Prove Too Rich to Subdue*, BLOOMBERG NEWS, Jan. 10, 2010, *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aQfKk3ykBBes; Kirsten Begg, *FARC is Colombia's Biggest Cartel*, Colombia Reports, Sept. 13, 2010, *available at* http://colombiareports.com/colombia-news/news/11815-farc-biggest-drug-cartel.html ("If one looks at the capos [Cartel leaders] that have fallen in the last four years in Colombia, all of them have had links to Mexico and with different cartels in that country. There are Mexican drug bosses that have come here… [P]ressure on drug trafficking networks in Colombia has resulted in intensified collaboration between Mexican and Colombia traffickers").

Former United States Secretary of Homeland Security Michael Chertoff was specifically referencing the drug cartels in Northern Mexico when he said, "Not surprisingly, when you strike at organized criminal groups, they strike back."[47] The tactics that have been adopted in "many of the cartels in Northern Mexico are directly derived from what they have seen on television or over the Internet in Iraq and Afghanistan.[48]" These tactics include beheadings, kidnappings, bombings, and torture. "All the things that Al-Qaeda and the Taliban have done are now being used by these organized crime cartels"[49]

While it would be easy to gloss over the intricacies and power dynamics in Mexico by referring to this problem simply as one of "organized crime", giving DTOs that label is too restrictive and overlooks the scope of the violence and lawlessness that is an omnipresent component of daily life in Mexico. Even the Mexican Government is unwilling to resort to this classification; President Calderón has referred to the violence as a threat to the Mexican state.[50] Consequently, it would be incorrect to label these drug trafficking organizations as mere organized crime.

The Federal Bureau of Investigation defines organized crime as "as any group having some manner of a formalized structure and whose primary objective is to obtain money through illegal activities. Such groups maintain their position through the use of

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[47] Secretary Michael Chertoff, *The Nexus Between Drug Trafficking, Terrorism, and Organized Crime*, 13 CHAP. L. REV. 681, 865 (2010) [hereinafter Chertoff, Nexus].

[48] *Id*.

[49] *Id*.

[50] CRS Report, *supra* note 3, at 16.

actual or threatened violence, corrupt public officials, graft, or extortion, and generally have a significant impact on the people in their locales, region, or the country as a whole"[51] The United Nations Convention Against Transnational Organized Crime defines an organized criminal group as a "structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offenses established… in order to obtain, directly or indirectly, a financial or other material benefit."[52] While several of the activities carried out by the cartels meet these definitions, the cartels qualify as parties to a non-international armed conflict, within the meaning of the laws and customs of war, which is more consistent with their actions. As explained below, the classification of these non-state groups has traditionally been paramount in determining whether special international norms are applicable to them.

C. Who Are The Drug Cartels?

A cursory examination of the nature of these DTOs is necessary at this point to understand how the cartels deal with threats to their existence. The difficulty under international humanitarian law lies in determining that non-state group is sufficiently organized, as that is one of the requirements to find the existence of a non-international

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[51] Federal Bureau of Investigation, *Organized Crime- Glossary of Terms*, *available at* http://www.fbi.gov/about-us/investigate/organizedcrime/glossary.

[52] *See* United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, T.I.A.S. No. 13,127, 2225 U.N.T.S. 209 (2000) at art. 2.

The Treaty defines the crimes and offenses established as money laundering, corruption, and participation in an organized criminal group. *Id.* at art. 5-10.

Mexico, and more than 155 other countries have ratified this treaty. *United Nations Treaty Collection*, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en,.

armed conflict. Because at any given time, it is almost impossible to know which cartels are split up or being reunited and which are working in concert, applying a set of nebulous factors to determine whether the cartels are sufficiently organized is an extremely difficult task.

According to the Mexican Government, there are at least seven major drug cartels operating in Mexico,[53] but there are really a few key DTOs that are responsible for the vast majority of the violence, and drugs in Mexico. These critical DTOs are the Gulf, Sinaloa, Juárez, and Tijuana Cartels.[54] It is almost impossible to determine which of these DTOs are working in concert and which are fighting each other on any given day, because the alliances are so fluid. The major cartels are fighting each other in addition to the Mexican Government for supremacy in trafficking routes and control over the drugs themselves.[55]

Being able to form and break alliances is vital to the DTOs' survival. The cartels will choose fragmentation when other groups are fighting for control of an area, they will choose to break up the cartel and make everyone fend for themselves when there is instability within the group, and they will choose to consolidate when attempting to co-opt the police or amass private security forces.[56] In this respect, the ability to fragment

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[53] CRS Report, *supra* note 3, at 1.

[54] For a map of contested and controlled areas of Mexico, see Appendix A of this paper.

[55] JUAN CARLOS GARZÓN, MAFIA & CO.: THE CRIMINAL NETWORKS IN MEXICO, BRAZIL, AND COLOMBIA 102 (Kathy Ogle, trans., Woodrow Wilson Int'l Center for Scholars 2008), *available at* http://www.seguridadcondemocracia.org/administrador_de_carpetas/OCO-IM/pdf/criminal%20networks_mexico_brazil_colombia.pdf [hereinafter Mafia & Co.].

[56] *Id*.

and reunite is key to the cartel's success. Breaking the organization up into smaller components makes it a much harder target for Governments, which will go after the bigger DTOs instead of the fragments.[57] Even the leadership roles are nebulous,[58] because moving from a vertically-integrated to horizontally-integrated power model allows the DTO to continue on after the death or arrest of one of its leaders. The decentralization and diffusion of control makes it significantly more difficult for the authorities to bring down the entire organization.

A specific strategy the DTOs employ against one another is accusing the Army of favoritism toward a rival cartel to motivate the Army to go after that rival. During the Vicente Fox administration, the Government focused most of its resources on going after the Gulf and Tijuana Cartels, leaving the Juárez and Sinaloa cartels to thrive. Fox's strategy became such a problem for the Gulf Cartel that they sent President Fox a letter demanding that he stop protecting the Sinaloa DTO.[59] To illustrate this dynamic of fluidity, the following briefly discusses four of the major DTOs in Mexico, and how they are able to survive despite constant threats from the Mexican Army, the United States Drug Enforcement Agency, and each other.

1. The Gulf Cartel and Los Zetas

[57] *Id*. at 103.

[58] *Id*.

[59] Mafia & Co. at 97 (citing ANA ARANA, EL AMOR EN LOS TIEMPOS DE LA COCA, 87 Gatopardo 38, February, 2008, *available at* http://knight.icfj.org/Portals/0/gatopardo.pdf ("The Gulf Cartel sent a letter to President Fox in which they demanded he stop protecting the Sinaloa Organization") (translation by thesis author)).

The Gulf Cartel started out as an organization whose main source of income and power was in importing contraband goods, including alcohol, from Mexico into the United States in the 1940s.[60] Back then, the organization was known as the Matamoros Cartel,[61] and its power was derived from its ability to co-opt political leaders and leaders in the upper echelons of the petroleum and transportation sectors.[62] Having powerful people help move illicit goods was a successful business model that lasted until the late 1980s, when the cartel began to break ties with the President of Mexico.[63] Matamoros was able to regain power briefly, and then in 1994, President Zedillo specifically began to target the organization and take out its leaders, leaving a power vacuum and instability among the remaining members.[64] Around 1996, the cartel merged with another DTO in Laredo and expanded the drug market. The cartel became so big, however, that the then-leader, Osiel Cardenas, divided up the territory and control of the cartel to subunits.[65] Each leader promised allegiance to Cardenas, and in return, Cardenas promised protection of the leaders by state, federal, and municipal authorities.[66] As time went on, state and local officers continued to work for the cartel, but federal officials, working in conjunction with the United States Drug Enforcement Agency, began to actively pursue

[60] Mafia & Co. at 83.

[61] *Id*.

[62] *Id*.

[63] *Id*.

[64] *Id*. at 84.

[65] *Id*. at 84-5

[66] *Id*.; Cardenas was so adept at co-opting law enforcement, that in the late 1990s, he had an entire regiment of cavalry working under his orders, allowing him to run drugs across the Rio Grande with no interference. *Id.* at 85-6.

the group.[67] Attempting to ensure its safety and stability, Cardenas did something that was unprecedented; he created his own paramilitary group whose job it was to protect the cartel and fight back against anyone who challenged the cartel.[68]

This new paramilitary group is known as Los Zetas. These fighters, who were directly recruited from Mexico's Airborne Special Forces Group,[69] gave Los Zetas access to more sophisticated arms and the ability to carry out more complex operations, such as staging a prison break or responding to a military incursion.[70] It is unknown how many members make up Los Zetas, but the group now counts members of federal, state, and local enforcement among their ranks; estimates include from 31 to over 200.[71] In 2003, despite having his own private military force, Cardenas was captured at his home, arrested, and later extradited to the United States.[72] Since that time, Los Zetas have become increasingly independent and its current role may not be tied to the Gulf Cartel any longer.[73]

The Gulf Cartel's area of control is generally believed to be all of the Texas border, except for Juárez, and the eastern coast of Mexico[74]. Los Zetas continue to

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[67] *Id*. at 87.

[68] CRS Report, *supra* note 3, at 7; Mafia & Co. at 87.

[69] *Id*.; CRS Report at 7.

[70] Mafia & Co. at 88; CRS Report at 8 ("The Zetas act as assassins for the Gulf Cartel. They also traffic arms, kidnap, and collect payments for the cartel on its drug routes").

[71] Mafia & Co. at 88; Tim Padgett, *The Killers Next Door*, TIME, Apr. 18, 2005; CRS Report at 7.

[72] Mafia & Co. at 88-9; CRS Report at 8.

[73] Mafia & Co. at 93.

[74] *Cf*. CRS Report at 3.

maintain control over the Northern Mexican cities of Nuevo Laredo and Matamoros,[75] and are thought to be in charge of the lucrative trafficking routes along the eastern part of the border with the United States.[76] Recent reports indicate that Los Zetas has gained control over most of the Gulf Coast down to the Yucatan Peninsula and is fighting for control over Guatemala and the suburbs of Mexico City.[77] Los Zetas is not just making money from protection and drug running, but is also increasingly engaging in other illegal and lucrative activities, such as extortion, prostitution, human kidnapping,[78] and selling other types of contraband to the local population.[79]

2. The Sinaloa Cartel

The Sinaloa Cartel maintains control over most of the Pacific coast of Mexico, including most of Baja California.[80] The rise of the Sinaloa Cartel is not unlike that of the Gulf Cartel; both arose as the Matamoros Cartel began to decline in the late 1980s. As the DEA was beginning to gain momentum taking out Matamoros, their leader, Miguel

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[75] *Id*. at 8;

[76] Ed Vulliamy, *The Zetas: Gangster Kings of Their Own Brutal Narco-State*, THE OBSERVER, Nov. 15, 2009, *available at* http://www.guardian.co.uk/world/2009/nov/15/zetas-drugs-mexico-us-gangs/print. ("…not only had the Zetas sealed off the bridges around Reynosa, but international bridges into the United States as well").

[77] *Id*.

[78] The smuggling is based out of the area around the Yucatan, "where mostly Cuban and Central American Immigrants enter Mexico on their way to the United States" and Los Zetas make counterfeit documents for immigration for them. Stratfor, Drug Cartels at 5. This human smuggling results in a profit for the cartels to the tune of $10,000 per person. *Id*.

[79] Mafia & Co. at 96; Stratfor, Drug Cartels, *supra* note 5, at 4-5.

[80] JUNE S. BEITTEL, CONG. RESEARCH SERV., R 40582, MEXICO'S DRUG RELATED VIOLENCE 7 at fig. 1 (2009) [hereinafter Beittel, Drug Related Violence].

Angel Felix Gallardo, was arrested and the territory he controlled was divided quasi-geographically; one of those territories became the Sinaloa DTO. [81]

Before the 1990s, the main DTOs in charge of running drugs into the United States and Europe were the Colombian cartels, who avoided Mexico altogether by moving the drugs through the Caribbean.[82] Realizing that it was disadvantageous and cost inefficient do that, the Colombian cartels began to pay the Mexican DTOs to move the drugs across Mexico and into the United States.[83] The Sinaloa leaders, realizing that they controlled the 'Golden Triangle,' a highly arable section of Mexico in the states of Sinaloa, Chihuahua, and Durango, began to cultivate their own poppy and marijuana plants.[84] This area is particularly beneficial to poppy farmers because in many parts, it is mountainous and rural, making it more difficult for law enforcement to access the plants and eradicate them before they can be cultivated.[85]

The Sinaloa Cartel is widely considered the most active and successful smuggler of cocaine,[86] being able to establish operations in places like Argentina, Paraguay, and Peru[87]. This is especially astounding considering that the Sinaloa DTO has been the

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[81] Mafia & Co. at 97-8.

[82] *Id*. at 98

[83] *Id*.

[84] *Id*. at 98. Soldiers deployed to the Golden Triangle "found more than 160 tons of drugs in so-called *secaderos*, or drying sheds". *Id*. at 104.

[85] *Cf*. Mafia & Co. at 104.

[86] Beittel, Drug Related Violence, *supra* note 80, at 4; Stratfor, Drug Cartels, *supra* note 5, at 6-7; Mafia & Co. at 98-99.

[87] Stratfor, Drug Cartels at 7.

largest target of President Calderon's military counter-cartel efforts.[88] As a result of this pressure from the Mexican Army, Sinaloa has been forced to scale back on its money laundering operations, despite being able to continue drug trafficking.[89]

3. The Juárez Cartel

Just like the other cartels, the Juárez Cartel, also known as the Vicente Carrillo Fuentes Organization, was created when the Matamoros Cartel was spun off into smaller cartels.[90] Fuentes was the first to transport cocaine from Colombia to Mexico using a fleet of planes, rather than using ground transportation, which had been the preferred method up to that point. This became a highly lucrative venture, earning the DTO up to $200 million per week.[91]

Several sources have reported that the Sinaloa and Juárez cartels came together, along with the smaller Guadalajara Cartel to form one big cartel known as "The Federation."[92] Reinforcing the nebulous and fluid nature of the cartels, since 2008, the Juárez Cartel has partnered with Los Zetas to help it ward off the Sinaloa Cartel for control of Juárez. Juárez is strategically important to all of the cartels because it is the Mexican city closest to El Paso, Texas, providing transport routes directly into the United

[88] "The Sinaloa Cartel has come under attack from nearly every other cartel in Mexico… [and] under increasing attack… from the Mexican Government, which has deployed several thousand troops to Sinaloa." *Id*.

[89] *Id*.

[90] Mafia & Co. at 98.

[91] *Id*. at 99.

[92] *See e.g.* Mafia & Co. at 99, CRS Report, *supra* note 3, at 1 ("The Cartels work together, but remain independent organizations").

States. This strategic advantage is underscored by the extreme rates of violence taking place in Juárez.

4. The Tijuana Cartel

Also known as the Arellano Felix Organization, the Tijuana Cartel was created the Matamoros Cartel ended, with Felix Gallardo giving control over the land south of California to his nephews, Benjamin, Ramon, and Javier Arellano Felix.[93] Tijuana's proximity to the United States and the ocean make it an important area of influence for the DTOs. Control over Tijuana itself was in limbo until about 2008. In 2004, the Sinaloa Cartel, knowing that the leaders of the Gulf and Tijuana Cartels were in prison, made a play for control of Tijuana.[94] This united the former enemies for less than a year, until the Gulf and Tijuana leaders quarreled for control over the area between themselves, leading to a three-way conflict for control over Tijuana.[95]

In the past few years, the efficacy of the Tijuana Cartel has been severely weakened by internal infighting, and, more importantly, efforts by the Mexican and American Governments to capture top leaders.[96] The United States used the coast guard to stop shipments into West Coast ports, but also to capture Tijuana Cartel leaders on

[93] *Id*. at 98.

[94] Mafia & Co at 99-100; Fred Burton, *Mexico: The Price of Peace in the Cartel Wars*, STRATEGIC FORECASTING, May 2, 2007, *available at* http://www.stratfor.com/mexico_price_peace_cartel_wars [hereinafter Burton, Price of Peace].

[95] *Id*

[96] Stratfor, Mexican Cartels, *supra* note 5, at 8-9.

their boats,[97] while Mexico sent Army troops to Baja California in January 2007, to stop the violence and combat the corruption. As a result of United States and Mexican action, plus instability within the cartel, the Tijuana Cartel now has the ability and power to operate only in the city of Tijuana, while the Gulf and Sinaloa Cartels continue to fight for the rest of Western Mexico.[98]

D. Mexican President Felipe Calderón's Response To The Violence

Felipe Calderón was elected President in Mexico in 2006 in a controversial election reminiscent of the 2000 United States presidential election, with the Mexican Courts declaring him the winner.[99] Calderón, a member of the center-right National Action Party (PAN), made a campaign pledge to create jobs, fight poverty, and fight crime.[100] Almost immediately after being sworn in, he turned his focus and resources to going after the Mexican DTOs.[101] This shift in priority was likely prompted by the rapidly increasing violence between the time Calderón was declared President-elect in September and when he was sworn in December, 2006, as there were more than 1,000 drug-related deaths.[102] President Calderón's anti-drug policy was to utilize the Mexican

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[97] Burton, Price of Peace, *supra* note 94.

[98] *Id*.

[99] For a more in-depth explanation, *see Calderón Declared Mexico's President-Elect*, ASSOCIATED PRESS, Sept. 5, 2006, *available at* http://www.msnbc.msn.com/id/14672039/ns/world_news-americas/. The Court rejected the challenger, Andres Manuel Lopez Obrador's claims of election fraud and held the election to be decided, despite Calderón winning by .56% of the total vote, or almost 234,000 votes. *Id*. *See also* Manuel Roig-Franzia, Calderón's Offensive Against Drug Cartels, WASH. POST, July 7, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/07/07/AR2007070701280.html.

[100] George W. Grayson, *Mexico and the Drug Cartels*, FOREIGN POLICY RESEARCH INSTITUTE, Aug. 2007, *available at* http://www.fpri.org/enotes/200708.grayson.mexicodrugcartels.html

[101] *Id*.

[102] *Id*.

Army and federal law enforcement to engage in direct conflict with the DTOs by arresting traffickers, burning growing fields, and intercepting shipments of drugs.[103] Due to reports of rampant corruption among federal and local police officers,[104] President Calderón chose to utilize primarily the Army to fight the DTOs rather than law enforcement.[105]

Utilizing the Army was initially greeted with approval by the general populace, and various reports indicate that some of the violence has decreased as a result.[106] Lieutenant Colonel Julian Leyzaola Perez, a soldier who took over the job of Police Chief of Tijuana, has said that before the Army showed up, a plethora of "Escalades and Suburbans full of armed men were rolling around these central streets, killing with complete impunity…they are no longer big groups in SUVs using AK-47s,"[107] but now the violence is committed with "a couple of guys in old cars [and] pistols."[108]

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[103] Beittel, Drug Related Violence, *supra* note 80, at 3.

[104] CRS Report at 9-10; Tim Padgett, *Mexico's Calderón Needs to Listen, Not Just Lecture U.S.,* TIME, May 19, 2010, *available at* http://www.time.com/time/world/article/0,8599,1990176,00.html ("And in Mexico… most cops moonlight for the cartels"); Ken Ellingwood, *Corruption Hurting Mexico's Fight Against Crime, Calderon Says*, L.A. TIMES, Dec. 10, 2008, *available at* http://www.latimes.com/news/nationworld/world/latinamerica/la-fg-mexico10-2008dec10,0,2304138.story ("Many police officers, especially at the state and municipal levels, are paid by smuggling groups to provide protection and tip them off to pending police actions. That infiltration has reached into the top ranks of the Calderon government. In recent months, more than a dozen ranking or former officials have been arrested on charges of passing tips to drug gangs.")

[105] Beittel, Drug Related Violence, *supra* note 80, at 9.

[106] William Finnegan, *Letter from Tijuana: In The Name of the Law*, THE NEW YORKER, Oct. 18, 2010, *available at* http://www.newyorker.com/reporting/2010/10/18/101018fa_fact_finnegan?currentPage=all [hereinafter Letter From Tijuana].

[107] *Id*.

[108] Letter From Tijuana, *supra* note 106.

Despite this result, there are still lingering concerns about the use of the military.[109] In Tijuana, in order to purge perceived traitors from their ranks, the Army, lead by Lt. Col. Leyzaola has resorted to excessive displays of power, according to some of those who were taken into custody by his men. For example, Ricardo Castellanos, a six-year veteran of the Tijuana police force, claims that he was kidnapped by Leyzaola's men and taken to an Army base outside of town, where he was subjected to acts that, if true, can only be described as torture:

> Only one person asks the questions. I didn't have any answers. He wanted the names of other officers and civilians involved in organized crime. They taped my hands behind my back and made me sit on the floor. They put more tape around my knees, around my feet. They put a blanket around me. Then I felt the weight of three people—one on my feet, one on my legs, and one who started kicking me in the chest. I couldn't defend myself. At that moment, I feel the fear. Because I don't know what's going to happen. I kept asking, 'Why? Why are you passing me this?' But only one person spoke. He kept asking me questions. I kept saying, 'I don't know.' He got angry. They put some plastic on my face. I couldn't breathe. It felt like years passed. Too long.[110]

According to Castellanos, the abuse continued for two days, and on the second day, the soldiers began to make threats to harm his wife and daughters, until Castellanos finally gave in and signed their denunciation form.[111] This form contained a list of names of people who were then picked up by the Army and allegedly tortured just as he was.[112] "Investigations" of those listed on the form involved more than just rendering the subject immobile and committing physical violence; there have been multiple reports of other

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[109] *Id*.

[110] Letter From Tijuana.

[111] *Id*.

[112] *Id*.

forms of torture, such as being suffocated with plastic bags, waterboarded,[113] assaulted with rebar and assault rifles, and shocked by electrodes placed on the subject's genitals.[114] As for the man behind the alleged abuse, the Colonel maintains that people have been physically hit, but not tortured. His job, according to him, is to execute arrest orders and hand the suspects over to the Army.[115]

In addition to the Castellanos allegations, there have been over 4,000 complaints filed against soldiers for acts including torture, rape, and kidnapping since President Calderón instituted his military strategy,[116] and these abuses continue to happen because the military is allowed to act as both judge and jury. In response, President Calderón has proposed trying some of these crimes in civilian courts instead of military

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[113] Waterboarding has been described by ABC News as "The prisoner is bound to an inclined board, feet raised and head slightly below the feet. Cellophane is wrapped over the prisoner's face and water is poured over him. Unavoidably, the gag reflex kicks in and a terrifying fear of drowning leads to almost instant pleas to bring the treatment to a halt." Brian Ross & Richard Esposito, *CIA's Harsh Interrogation Techniques Described*, ABC NEWS, Nov. 18, 2005, *available at* http://abcnews.go.com/Blotter/Investigation/story?id=1322866.

There has been much dispute as to whether or not waterboarding constitutes torture, but for this paper, the author will refer to this practice and group it with the other egregious acts that have been allegedly committed in the Human Rights analysis below.

[114] Despite fearing for their lives, family members of victims have testified about their treatment before the Inter-American Commission for Human Rights, and as a result have received death threats, harassment, and can not return to their homes. Letter From Tijuana, *supra* note 106.

[115] *See id*.

[116] Randal C. Archibold, *A Proposal to Address Rights Abuse in Mexico*, N.Y. TIMES, Oct. 19, 2010, available at http://www.nytimes.com/2010/10/20/world/americas/20mexico.html; HUMAN RIGHTS WATCH, UNIFORM IMPUNITY: MEXICO'S MISUSE OF MILITARY JUSTICE TO PROSECUTE ABUSES IN COUNTERNARCOTICS AND PUBLIC SECURITY OPERATIONS 45, Apr. 28, 2009, *available at* http://www.hrw.org/en/reports/2009/04/28/uniform-impunity [hereinafter Uniform Impunity].

commissions,[117] but under his plan, the most egregious violations, like murder, would still be investigated and prosecuted by the military.[118]

In response, the United States has started threatening to withhold foreign funding from the Mexican Government in order to spur a change toward military accountability and away from impunity.[119] In addition, various non-governmental organizations have started to voice their disapproval. For example, Human Rights Watch has requested a list of prosecutions carried out by the Mexican Military from the Ministry of Defense (MOD). The MOD has asserted that there have been many convictions and imprisonment, but a copy of the decisions or list of cases has yet to be disclosed.[120] The MOD limits access to any kind of information on the status of Army cases that are currently pending, making it extremely hard to ascertain to what extent soldiers are being held accountable for their actions.[121]

Given the drug-related violence being employed in Mexico by the Mexican Government and the DTOs, international law places limits on their use of force and against the deliberate mistreatment of civilians. As discussed in Part III, the drug-related violence in Mexico is a "non-international armed conflict" within the meaning of

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[117] *Id*.

[118] *Id*.

[119] *Id. See also* Elisabeth Malkin and Randal C. Archibold, *U.S. Withholds Millions in Mexico Antidrug Aid*, N.Y. TIMES, Sept. 3, 2010, *available at* http://www.nytimes.com/2010/09/04/world/americas/04mexico.html. ("15 percent of the money for Mexico is allotted on the condition that the country improve the accountability of the federal and local police; ensure civilian investigations and, if warranted, prosecutions of allegations of abuse by the police and the military; and ban testimony obtained through torture or other mistreatment.")

[120] Uniform Impunity, *supra* note 116, at 3.

[121] *Id*.

international humanitarian law, and as such both the cartels and the Mexican Army are obligated to comply with certain legal obligations arising under that law.

Part III- The International Legal Framework Applicable to the Situation in Mexico

A. The Situation in Mexico is an Armed Conflict

Mexico signed the four 1949 Geneva Conventions, without reservations,[122] on August 8, 1949, and ratified the Conventions on October 29, 1952,[123] but has yet to ratify Protocol Additional II to the Geneva Conventions.[124] Under the Geneva Conventions, if a situation of violence can at some point be regarded as rising to a level of "armed conflict," it is the trigger for a set of rules that apply to the parties engaged in the armed conflict. These rules are derived from customary international humanitarian law and

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[122] Antonio Lopez de le Rosa, *The Protocols Additional to the 1949 Geneva Conventions in Relation to Mexico*, 27 INT'L REV. RED CROSS 297, 302 (1987) [hereinafter de la Rosa, Relation to Mexico].

[123] United Nations Office of Legal Affairs, Permanent Mission of Mexico, June 2, 2010, *available at* http://www.un.org/en/ga/sixth/65/StatProtGeneva_StatesComments/Mexico_E.pdf; International Committee of the Red Cross, International Humanitarian Law – State Parties/Signatories, *available at* http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P#ratif.; The United Nations Office at Geneva, Mexico Signature: 10.04.1981 Ratification, Acceptance, Approval, Accession, Succession, *available at* http://www.unog.ch/80256EDD006B8954/(httpAssets)/D6FE93CA231E0CE6C125727D00592A9E/$file/MEXICO.pdf.

For a list of all IHL treaties that Mexico has ratified/acceded to, *see* International Committee of the Red Cross, International Humanitarian Law- Treaties & Documents: Mexico, *available at* http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=MX; Geneva Academy of International Humanitarian Law and Human Rights, Mexico | International Treaties Adherence, Jan. 13, 2010, *available at* http://www.adh-geneva.ch/RULAC/international_treaties.php?id_state=145 (listing all of the IHL and International Human Rights Treaties that Mexico has ratified).

[124] *Id.*; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 (hereinafter Protocol II).

codified in the Geneva Conventions of 1949.[125] These rules both inhibit and empower the parties in certain important ways, including by restraining the parties from committing acts of "wanton cruelty and ruthlessness,"[126] and providing protection to those who are affected the most by the conflict,[127] namely those not engaged in active hostilities. Consequently, an important initial matter is to determine whether the drug-related violence in Mexico constitutes an armed conflict.

The phrase "armed conflict" is used only twice in each of the four 1949 Geneva Conventions, once in common Article 2 and once in common Article 3,[128] however it identifies the type of situation that must exist to trigger application of this body of international law. As discussed in the official commentaries to the Geneva Conventions regarding common Article 2, the rationale for using the phrase "armed conflict" is that it

> fills the gap left in the earlier conventions, and deprives the belligerents of the pretexts they might in theory invoke for evasion of their obligations. There is no longer any need for a formal declaration of war, or for recognition of the state of war, as preliminaries to the application of the convention. The convention becomes applicable as from the actual opening of hostilities… the existence of armed conflict brings [the Geneva Conventions] automatically into operation [129]

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[125] Geneva Conventions, *supra* note 16.

[126] Constraints on the Waging of War, *supra* note 14, at 12.

[127] *Id*.

[128] Geneva Conventions, *supra* note 16, at art. 2 ("In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them"); Geneva Conventions at art. 3 ("In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions…").

[129] *Id*. at 32.

At the time the Geneva Conventions were codified, there was no legal definition of "armed conflict."[130] The commentary to the First Geneva Convention explains that "armed conflict" instead of "war" was deliberately used.[131] Fearing that states would redefine their hostile acts as something other than war,[132] the phrase "armed conflict" was designed to avoid linguistic gymnastics and grammatical wordplay.[133]

At an early stage of its work, the International Criminal Tribunal for the Former Yugoslavia (ICTY), in *Prosecutor v. Tadic*, articulated in 1995 a definition of "armed conflict."[134] Dusko Tadic was the President of the Local Board of the Serb Democratic Party (SDS). On May 24, 1992, the SDS began a military campaign against the town of Kozarac that lasted two days and left over 800 people dead.[135] After the SDS had captured the town, Tadic became instrumental in collecting and moving the Croatian and Muslim population out of town. Many were shot as they were being led out of town, and those that survived were placed in internment camps, where they were subject to beatings, sexual assault, execution, and torture, in addition to degrading psychological

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[130] ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 27 (Cambridge University Press 2010) [hereinafter Cullen].

[131] JEAN PICTET, COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE 32 (Int'l. Comm. Red Cross 1952), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf. [hereinafter Pictet, Commentary I].

[132] Examples of alternative names for armed conflict include "engaging in a police action" and "acting in legitimate self-defense". *Id.*

[133] *Cf. id*.

[134] Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) [hereinafter Tadic Jurisdiction Decision].

[135] COMMUNICATIONS SERVICE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, CASE INFORMATION SHEET: DUSKO TADIC 4-5, accessed Jan. 21, 2011, *available at* http://www.icty.org/x/cases/tadic/cis/en/cis_tadic_en.pdf [hereinafter ICTY Tadic Case Sheet].

treatment at the hands of the soldiers.[136] Tadic was indicted under a theory of individual criminal liability for grave breaches, crimes against humanity, and violations of the laws and customs of war.[137] The ICTY Trial Chamber found him guilty of crimes against humanity and violations of the laws and customs of war, and sentenced him to 20 years imprisonment.[138]

On appeal, Tadic argued, in addition to other theories,[139] that the ICTY had no subject matter jurisdiction, based on the fact that none of these crimes had taken place during an armed conflict.[140] In noting that crimes against humanity, grave breaches, and violations of the laws and customs of war are only crimes when committed during armed conflict,[141] an ICTY appeals chamber held that the *sine qua non* for application of the Geneva Conventions is an armed conflict. The Chamber then went on to define the term, stating that "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[142] This groundbreaking definition

[136] *Id*; Prosecutor v. Tadic, Case No. IT-94-1-I, Indictment (Amended) ¶ 4- 4.5 (Dec. 14, 1995).

[137] *Id*.

[138] *Id*. at 1, 5.

[139] These other theories were that the ICTY was unlawfully established, and that the Tribunal does not have primacy over the domestic courts of Bosnia and Herzegovina. *See generally* Tadic Jurisdiction Decision, *supra* note 134. The discussion of these two ground are beyond the scope of this article, but it is enough to note that the court failed to find either of these arguments fatal to Tadic's conviction. *Id*.

[140] Tadic Jurisdiction Decision, *supra* note 134, at ¶ 65.

[141] *Id*. at ¶ 67.

[142] Id. at ¶ 70.

has been widely used since 1995 as a test for the characterization of armed conflict[143] in the ICTY as well as in reports of independent experts, manuals on international humanitarian law, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the International Criminal Court, and the International Court of Justice.[144] The application of this definition into the jurisprudence of the ICC, as well as its use in relation to conflicts in East Timor,[145] Lebanon,[146] Somalia,[147] and the Sudan[148] supports the notion that this definition is now to be regarded as reflecting customary international law.[149] For the purposes of this article, the "protracted armed violence" standard will be the basis for considering whether the struggle in Mexico between the government and the DTOs in armed conflict within the meaning of international law.

Under *Tadic*, it becomes clear that an armed conflict is one that is greater than sporadic violence or internal instability,[150] and each conflict must be categorized on a

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[143] Cullen at 120-21.

[144] *Id*. at n. 18-25.

[145] East Timor Action Network, *Report of the Commission for Reception, Truth, and Reconciliation in East Timor* ¶ 141, Oct. 31, 2005, *available at* http://www.etan.org/news/2006/cavr.htm.

[146] Human Rights Council, *Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1*, ¶ 50-51, U.N. Doc. A/HRC/3/2 (Nov. 23, 2006).

[147] Commission on Human Rights, *Report on the Situation of Human Rights in Somalia*, ¶ 54, U.N. Doc. E/CN.4/1997/88 (Mar. 3, 1997).

[148] Commission on Human Rights, *Report of the Special Rapporteur on the Human Rights Situation in Sudan*, ¶ 8, U.N. Doc. E/CN.4/2006/111 (Jan. 11, 2006).

[149] *Id*. at 121-22.

[150] Tadic Jurisdiction Decision, *supra* note 134; Arturo Carrillo-Suarez, *Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict*, 15 AM. U. INT'L L REV. 1, 69 (1999) [hereinafter Hors de Logique].

individualized basis.[151] Since the *Tadic* case, various authorities have indicated key factors to be considered in making such a categorization. For example, in refusing to grant a motion for an acquittal, a Trial Chamber of the ICTY, presiding over the trial of Slobodan Milosevic, articulated some factors for measuring the intensity of the conflict.[152] This analysis focused on the protracted nature of the conflict and seriousness of the armed clashes,[153] the spread of clashes over the territory,[154] the increase in the number of governmental forces deployed,[155] and the weapons used by both parties.[156]

The situation in Mexico considerably exceeds the Trial Chamber's description of the protracted nature of the conflict in the *Milosevic* case, finding an armed conflict where the Kosovo Liberation Army (KLA) "conducted many operations against the police, including killing people who had been employees of the police and who had cooperated with the police, amounting to about 20 persons in 1997."[157] For this reason, the first prong of the *Milosevic* test, protracted nature of the conflict and seriousness and increases in armed clashes, is met.

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[151] Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence ¶ 93 (Dec. 6, 1999) ("[W]hether or not a situation can be described as an 'armed conflict', meeting the criteria of Common Article 3, is to be decided upon on a case-by-case basis"); *See also* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment ¶ 620 (Dec. 2, 1998) [hereinafter Akayesu].

[152] Prosecutor v. Milosevic, Case No. IT-02-54-T Decision on the Motion for Judgment of Acquittal ¶ 28-31 (June 16, 2008) [hereinafter Milosevic Case].

[153] *Id*. at ¶ 28.

[154] *Id*. at ¶ 29.

[155] *Id*. at ¶ 30.

[156] *Id* at ¶ 31.

[157] Milosevic Case at ¶ 28.

Finally, General McCaffrey's description of the weapons used by the cartels is enough to meet another prong of the *Milosevic* "armed conflict" test: "weapons being used by both parties"[158] to the conflict. The Trial Chamber in *Prosecutor v. Milosevic* found that the Kosovo Liberation Army were equipped with "rifles, guns, and mortars."[159] Certainly if the extensive use of rifles and mortars are sufficient for establishing an "armed conflict," then the widespread use of landmines, anti-tank guns, rocket propelled grenades, heavy machine guns, and fifty caliber rifles[160] are enough to meet this prong of the test.

The next aspect of the *Milosevic* test is the spread of clashes over the territory. More than a prong, this spread of clashes reinforces the idea that the conflict is applicable in the entire territory of the state. When faced with the question of whether the "temporal and geographic scope" of an armed conflict extends beyond the "exact time and place of hostilities,"[161] the Chamber held that the Geneva Conventions apply to the entire area of the nation state involved in the armed conflict. The Appellate Chamber in *Tadic* explicitly held that "international humanitarian law continues to apply… in the case of internal armed conflicts [to] the whole territory under the control of a party whether or not actual combat takes place there."[162] Therefore, international humanitarian law applies

[158] *Id*. at 31.

[159] *Id*.

[160] McCaffrey, Narco-Violence, *infra* note 182.

[161] Tadic Jurisdiction Decision, *supra* note 134, at ¶ 67.

[162] *Id*. at ¶ 70.

to territories under the DTO's control, whether or not combat is taking place there and applies to the entirety of the territory.[163]

In Mexico, there is both a "spread of clashes throughout the territory,"[164] as stated above, and an increase in governmental forces being utilized in Mexico.[165] While certain areas are bigger flashpoints than others, there is prevalent violence in much of Mexico. President Calderon has chosen several "hotspots" to concentrate the efforts of the military, and has sent over 35,000 soldiers to a number of places.[166] In early 2009, he sent over 5,000 troops to Juárez,[167] just south of El Paso, Texas, an area hotly contested by the Juárez Cartel. Juárez is strategically important to both the DTOs and the Mexican Government because of its proximity to the United States, making it a highly important and lucrative border crossing for drugs and guns. To emphasize the struggle taking place, Calderon was forced to send 3,000 more troops to Juárez a month after sending the original 5,000, totaling over 8,000 military troops by mid 2009.[168]

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[163] Bahia Tazhib-Lie & Olivia Swaak-Goldman, *Determining the Threshold for the Application of International Humanitarian Law*, *in* MAKING THE VOICE OF HUMANITY HEARD 246 (Liesbeth Lijnzaad et al, ed., Martinus Nijhoff Publishers 2004) (citing Tadic Jurisdiction Decision, *supra* note 134).

[164] *See* Part II.C, *supra*; Grayson, Mexico & The Drug Cartels, *infra* note 310.

[165] This is the third prong of the analysis and is fairly self-explanatory. Milosevic Case, *supra* note 152, at ¶ 30.

[166] Scott Stewart & Alex Posey, Mexico: The War With the Cartels in 2009, Strategic Forecasting, Sept. 12, 2009) [hereinafter Stewart & Posey, War].

[167] Beittel, Drug Related Violence, *supra* note 80, at 13.

[168] *Id*.

Labeling it the "Northern Border Initiative," Mexico sent 800 federal protective police officers to the border town of Nuevo Laredo,[169] despite the fact that the cartels are gaining influence over "all law enforcement present in the city."[170] The inability to prevent corruption from those the Federal Police are paid to fight is a strong sign that Mexico is losing control over its own territory. The same is true in Tijuana, just south of San Diego, California, where there is strong concern that the police take their orders from the DTOs rather than the state.[171] In the states of Michoacán and Guerrero, the Mexican federal police and military are frequently under fire, usually in the form of ambushes by DTO gunmen.[172] The violence in Mexico has consistently been in a few specific areas, but those areas are located in different parts of the country. The five most violent states, measured by death rate, are Chihuahua (where Juárez is located), Sinaloa, Guerrero, Michoacán, and Baja California[173] (containing Tijuana).

Applying the Mexican situation to the *Milosevic* standard demonstrates the existence of an armed conflict within the meaning of international law. There is another metric for determining the existence of an armed conflict, which confirms this conclusion about Mexico. In looking at the protracted nature of the Gaza conflict, John Dugard, the Special Rapporteur to the Human Rights Commission on Human Rights in the Israeli Territories, characterized the conflict in the West Bank and Gaza as an armed conflict on

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[169] CRS Report, *supra* note 3, at 11.

[170] *Id*. at 10.

[171] *Id*.

[172] *See* Stewart & Posey, War, *supra* note 166.

[173] *Id*.

an "irregular and sporadic basis" due to "frequent exchanges of gunfire between the Israeli Defense Forces and Palestinian gunmen."[174] Mr. Dugard's analysis suggests that the minimum requirement for an armed conflict is a situation involving more than sporadic exchanges of gunfire.

Under Mr. Dugard's metric, the conflict between the Mexican government and the DTOs is an armed conflict within the meaning of international law. Over 45,000 troops and 5,000 federal agents[175] have been dispatched to strategic locations in Mexico to fight the DTOs, and the fighting in the streets has to led to over 10,000 deaths in under three years.[176] The Army "increasingly appears to have been drawn into a deepening morass of cartel rivalries, local political disputes, and blood feuds."[177] In a southern Mexican state, the Army increased its presence by killing reputed drug traffickers and making scores of arrests.[178] In retaliation, nine soldiers were abducted and decapitated, four policemen were set on fire in a grenade attack, and an ex-mayor was shot twenty-four times in front of a crowd of 1,000 people.[179] The Mexican military is issuing "automatic rifles, high-caliber ammunition, grenade launchers, and fragmentation

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[174] Human Rights Council, *Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967*, ¶ 13, U.N. Doc. A/56/440 (Oct. 4, 2001); Commission on Human Rights, *Question of the Violation of Human Rights in the Occupied Arab Territories*, ¶ 18, U.N. Doc. E/CN.4/2002/32 (Mar. 6, 2002).

[175] Beittel, Drug Related Violence, *supra* note 80, at 3.

[176] Calderon's Military Call-Up, Washington Post, Apr. 2, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/graphic/2009/04/01/GR2009040103531.html. *See* chart at Appendix A, *infra*.

[177] Steve Fainaru & William Booth, *As Mexico Battles Cartels, The Army Becomes the Law*, WASH. POST, Apr. 9, 2009.

[178] *Id*.

[179] *Id*.

grenades to" state and local officers who pass a security clearance,[180] in order to combat the rocket-propelled grenades, bazookas, and automatic weapons in the hands of the DTOs.[181] General Barry McCaffrey, the former United States director of the Office of National Drug Control Policy describes the situation in Mexico:

> Mexican law enforcement authorities face armed criminal attacks from platoon-sized [DTO] units employing night vision goggles, electronic intercept collection, encrypted communications, fairly sophisticated information operations, sea-going submersibles, helicopters and modern transport aviation, automatic weapons, RPG's, anti-tank 66 mm rockets, mines and booby traps, heavy machine guns, 50 cal [sic] sniper rifles, massive use of military hand grenades, and the most modern models of 40mm grenade machine guns.[182]

Therefore, using John Dugard's conceptualization of armed conflict, the situation in Mexico simply is not one of standard, low-level violence between law enforcement authorities and criminal elements, but rather a true armed conflict under international law.

Applying the *Tadic* and *Milosevic* decisions, in addition to John Dugard's analysis, as expressing the requirements under international law for the existence of an armed conflict, demonstrates that the conflict between the Mexican government and the DTOs is to be regarded as an armed conflict. Specifically, the Mexican conflict has satisfied the *Tadic* requirement for armed conflict: intensity of hostilities. To determine

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[180] *Id*.

[181] *Infra* note 182; David Luhnow & Jose de Cordoba, *The Perilous State of Mexico*, WALL ST. J., Feb. 21, 2009.

[182] General Barry R. McCaffrey, *Narco-Violence in Mexico: A Growing Threat to U.S. Security*, Nov. 28, 2008, *available at* http://www.unc.edu/depts/diplomat/item/2009/0103/comm/mccaffery_mexico.html [hereinafter McCaffrey, Narco-Violence].

the intensity of the hostilities, this section demonstrated that the requirements identified in the *Milosevic* case and applied the four prongs to Mexico. The protracted nature of the conflict and seriousness of the armed clashes is attributable to use of the Mexican Army and the sheer numbers of deaths that have arisen as a direct result of the conflict. The spread of clashes over the territory is attributable to the battlefields found in the big cities of Juárez, Tijuana, and Nuevo Laredo, all in different parts of the country. The third prong, an increase in the number of governmental forces is illustrated not only by the original deployment of over 35,000 troops but also by the recent increase in military presence since 2009. Finally, the weapons, such as rocket propelled grenades, machine guns, and anti-tank munitions, used by both parties are more consistent with those that an armed party to a conflict than a group merely causing a short-term disturbance. Because an armed conflict has been identified in Mexico, the next step is to determine whether it can properly be classified as a non-international armed conflict to determine whether common Article 3 is applicable here.

Before discussion of the typology of the armed conflict, it is important to briefly discuss the Martens clause to the Hague Convention of 1907.[183] Before common Article 3 was promulgated, there was no codified provision of international humanitarian law that applied to non-international types of armed conflicts, but there was a fallback provision meant to bind states to the laws of war in all circumstances.[184] The so-called Martens clause states that

[183] Convention [No. IV] Respecting the Laws and Customs of War on Land, with annex of regulations, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

[184] Cullen at 25.

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.[185]

This landmark clause arose from the knowledge of the delegates to the Hague Convention that they had not finished codifying international humanitarian law, in addition to the fact that most of the rules agreed on covered mostly prohibited means and methods during war.[186] As discussed below, the principle of humanity is paramount to international humanitarian law, and the goal of the Martens clause was to ensure the conduct of all parties to the conflict is compatible with this paramount principle, even if a specific act itself was not expressly forbidden.[187] The signatories to the Geneva Conventions understood that the Martens Clause covered all aspects of international humanitarian law.[188]

In addition to its breadth, the clause is treated as a recitation of specific positive law obligations on those high contracting parties to an armed conflict.[189] During the Nuremburg war crimes trial, the majority concluded that "it is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of

[185] *Supra* note 183.

[186] ROBERT KOLB & RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 62 (Hart Publishing 2008) [hereinafter Kolb & Hyde].

[187] *Id*. at 62-3.

[188] Theodore Meron, *The Hague Peace Conferences: The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT'L L. 78, 79 (2000) [hereinafter Meron, Hague].

[189] Kolb & Hyde, *supra* note 186, at 63.

public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare."[190] For this reason, Mexico should comply with the guarantees of common Article 3, as a minimum level, in its dealings with the DTOs and its own citizens, even if it maintains that its current struggle does not rise to the level of a non-international armed conflict.

B. The Situation in Mexico Is a Non-International Armed Conflict

In addition to determining whether the violence in Mexico constitutes an "armed conflict" within the meaning of international law, it is also important to determine whether the armed conflict is "international" or "non-international" in nature. This further classification is important under international law because, for an "international" armed conflict, the entire corpus of international humanitarian law is applicable to the parties, while in a "non-international armed conflict," there exist fewer obligations placed on the parties to the conflict. For example, the law relating to an international armed conflict requires the granting of combatant immunity to enemy soldiers (immunity from prosecution for killing other soldiers so long as he complies with the precepts of international humanitarian law), and prisoner of war status (the detention of the captured soldier as a merely preventative measure against his return to hostilities).[191] Neither of these protections are mandatory in a non-international armed conflict. Instead, common

[190] Meron, Hague at 80 (citing In Re Krupp et al, 15 Ann. Dig. 620, 622 (U.S. Mil. Trib. 1948)).

[191] EMILY CRAWFORD, THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT 78 (Oxford Univ. Press 2010) [hereinafter Crawford, Treatment of Combatants].

Article 3, where many of the rules for non-international armed conflicts are derived, simply requires that those persons who are not actively taking part in the hostilities be treated humanely.[192] As discussed below, the Mexican conflict is one of a non-international character. This means that, consistent with common Article 3, the DTOs and the Mexican Army are prohibited from inflicting "violence to life and person, … murder of all kinds, mutilation, cruel treatment and torture" in addition to "outrages upon personal dignity, in particular humiliating and degrading treatment."[193]

Since the *Tadic* decision, international and domestic tribunals have struggled with determining when a "non-international" armed conflict exists. Some tribunals have proposed non-determinative factors and some have looked at the observations of those on the ground in deeming the armed conflict non-international. As will be discussed here, the International Criminal Tribunals for Yugoslavia and Rwanda have addressed this issue and ruled conflicts to be non-international for completely different reasons. Due to these differences, there is no articulable and consistent way that a court can determine when an armed conflict qualifies as a non-international armed conflict. After outlining the approaches of international tribunals, the approach taken by the United Kingdom Asylum and Immigration Tribunal will illustrate this confusion over the use of these factors.

Despite the confusion that exists from these tribunals, it may be possible for the conflict in Mexico to be deemed a non-international armed conflict under this international legal jurisprudence, but there exists a superior way to make that

[192] *Id*. at 78-79.

[193] Geneva Conventions, *supra* note 16, at art. 3.

determination while avoiding the need to apply nebulous factors or rely on observations made by those on the ground. This superior method is a brightline test, articulated by the United States Supreme Court, for determining the existence of a non-international armed conflict. The brightline determines that there is an armed conflict "not of an international character"[194] anytime there is an armed conflict not involving two or more states. In assessing the relevant legal framework applicable to drug trafficking in Mexico, the most potentially applicable situation is that of a non-international armed conflict, since all of the relevant actions by the cartels and the Mexican Government arise within Mexican territory and between only Mexico and the DTOs.

The States who drafted the Geneva Conventions could not agree on when a situation rose to this level, so the term "not of an international character" was left undefined.[195] The parties acknowledged that being too specific would infringe on state sovereignty, but also cited a fear of legitimizing violent domestic groups by giving them protections in conflict with the host government.[196] The most common type of contemporary armed conflicts are those that are non-international in character,[197] and it is for this reason that most of the jurisprudence regarding this species has arisen from the ad-hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda and, to some extent, the International Criminal Court. While many consider the *Tadic* framework

[194] Geneva Conventions, *supra* note 16, at art. 3.

[195] Cullen at 44-61 (discussing several positions held by the delegates regarding how to define armed conflict not of an international character).

[196] Crawford, Treatment of Combatants, *supra* note 191, at 69-74.

[197] INTERNATIONAL COMMITTEE OF THE RED CROSS, INCREASING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW IN NON-INTERNATIONAL ARMED CONFLICTS 5, February 2008, *available at* http://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf [hereinafter ICRC, Increasing Respect].

for determining the existence of a non-international armed conflict to be customary international law,[198] this section will argue for the United States Supreme Court's conceptualization of a non-international armed conflict as an alternate and simpler way to view armed conflicts. As a black-or-white, international or non-international paradigm, the Supreme Court's approach removes the perpetually gray area surrounding the classification of the armed conflict.

1. *Tadic* and its Progeny

To illustrate the problems inherent in the *Tadic* analysis in determining what exactly constitutes organization for the purpose of finding a non-international armed conflict, this section will discuss various cases in the ICTY and ICTR that have confronted this question. Specifically, the problem for these bodies is answering the threshold question of how much and what type of organization is enough to determine satisfaction of the second prong of the *Tadic* test. As will be explained, each body has its own idea of how the organization analysis should be adjudicated, giving little, and at times, contradictory guidance making that determination.

The *Tadic* Trial Chamber indicated that the two prong test, "the intensity of the conflict and the organization of the parties to the conflict"[199] should be used for the purposes of applying "the rules contained in Common Article 3."[200] Therefore, to qualify as a non-international armed conflict within the meaning of *Tadic*, the conflict must meet

[198] Ian G. Corey, *The Fine Line Between Policy and Custom: Prosecutor v. Tadic and the Customary International Law of Internal Armed Conflict*, 166 MIL L. REV. 145, 152-53 (2000).

[199] Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (May 7, 1997).

[200] *Id*.

both prongs of the test, or else international humanitarian law does not apply to the conflict in question. *Tadic* itself did not outline the qualifications for sufficient organization and the later cases that confronted this issue articulated factors which are more confusing than helpful, and many of which beg the threshold question: how organized does the group have to be? For example, are 500 soldiers required? Must there be a president or a general or can the power be split horizontally between more than one person? More than two people? Does there have to be a certain number of echelons within the group? It is because of these unresolved issues that it is nearly impossible to come up with a consistent answer or even one that draws a meaningful line between a group that is organized enough and one that is not.

The ICTY Trial Chamber confronted the issue of whether the Kosovo Liberation Army (KLA) was an organized armed group within the confines of the Tadic test in *Prosecutor v. Limaj*.[201] Choosing to focus on the governing body of the KLA, the Trial Chamber looked at a plethora of factors not articulated in *Tadic*. The court first looked at the KLA's 'General Staff,' meaning those who made the decisions for the entire KLA. The Chamber noted that the General Staff's members included at least seven people.[202] Additionally, the Chamber focused on the duties carried out by the Staff. For example, the General Staff was responsible for appointing the commander in each of the seven areas controlled by the KLA,[203] controlling where their weapons were procured and

[201] Prosecutor v. Limaj, Case No. IT-03-66-T, Trial Chamber Judgment (Nov. 30, 2005).

[202] *Id*. at ¶ 94.

[203] *Id*. at ¶ 95-6.

distributed,[204] issuing communiqués and political statements,[205] and authorizing military action by the KLA.[206] However, in holding that there was sufficient organization to deem the KLA a party to the conflict, the Chamber was quick to point out that the level of organization in each zone controlled by the KLA was "fluid and developing and not all zones had the same level of" organization and development.[207] After finding those factors to be determinative, at least for the purposes of the armed conflict in Kosovo, it then relied on the assertion that the KLA had gained acceptance "as a necessary and valid participant in negotiations with international governments and bodies" in outlining the rules of the conflict.[208] It would be easy to accept that the KLA is organized, after all, they were gaining legitimacy among international governments, were willing to comply with the rules of war, and operated with a somewhat top-down command structure. The problem is that *Limaj* does not add anything new to the *Tadic* equation, save for its specific pronouncements regarding the KLA. It is entirely conceivable that the court was more willing to afford the KLA the status of a sufficiently organized party under the Geneva Conventions because they were recognized by other countries and wanted to encourage all parties to the conflict to follow international humanitarian law. Either way, the ICTY's factors can be thought of as round holes and the unique circumstances of each armed conflict as square pegs, as it takes some maneuvering to make them fit the unique characteristics of each potential non-international armed conflict.

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[204] *Id*. at ¶ 100.

[205] Id. at ¶ 101.

[206] *Id*. at ¶ 46.

[207] *Id*. at ¶ 95.

[208] Id. at ¶ 171.

In *Prosecutor v. Haradinaj*, the ICTY Trial Chamber was confronted again with determining the correct type and level of organization. In making this determination, the Chamber looked to the jurisprudence of more than seven other ICTY judgments relating to this issue of organization, including *Limaj*.[209] The *Haradinaj* Chamber finally concluded that the true requirement for an armed conflict is sufficient organization such that each side can militarily confront each other.[210] The chamber then gives a laundry list of factors that have been relied upon:

> [T]he existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords[211].

The Chamber goes on to state that none of these factors are essential to establish whether the party is sufficiently organized for the purposes of an armed conflict.[212] This analysis leaves a gap between theory and practice. As indicated by ICTY practice, if a future Chamber is interested in finding sufficient organization, it has many nebulous and non-specific factors on which to base its conclusion, making the goal of determining organization an almost arbitrary exercise.

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[209] Prosecutor v. Haradinaj, Case No. IT-04-84-T, ¶ 50-60, Trial Chamber Judgment (Apr. 3, 2008).

[210] *Id*. at ¶ 60.

[211] *Id*.

[212] *Id*.

Further confusing the issue, the International Criminal Tribunal for Rwanda approached this question of organization in a completely different way. The ICTR was tasked with determining whether the conflict in Rwanda constituted a non-international armed conflict in *Prosecutor v. Akayesu*.[213] In finding that an internal armed conflict existed in Rwanda, the Chamber held that both parties had forces that were considered to be separate, well-organized armies.[214] But instead of applying the same factors as the *Milosevic*, *Tadic*, *Haradinaj*, or *Limaj* Chambers did, the *Akayesu* Chamber relied on reports of observers such as UN Special Rapporteurs to make the determination that an internal armed conflict existed.[215]

In two different international criminal tribunals, each respective Trial Chamber used completely different criteria and types of information for making the determination that the situation on the ground was an internal armed conflict. The ICTY in *Milosevic* looked for a chain of command, ability to procure arms, and various other military-type metrics, whereas the ICTR looked at firsthand reports from observers concluding that the Rwandan government was locked in an internal armed conflict. It is this kind of inconsistency between tribunals that makes it exceptionally difficult to articulate when the parties are organized enough to meet the *Tadic* formula, even if the decision is to be made on a case-by-case basis.

Finally, the Asylum and Immigration Tribunal of the United Kingdom addressed the problem of whether the conflict in Somalia was international or internal for the

[213] Prosecutor v. Akayesu, *supra* note 151.

[214] *Id*. at ¶ 620-21.

[215] *Id*.

purposes in the context of asylum proceedings of individuals from Mogadishu.[216] In holding that individuals outside of Mogadishu may not bring a claim for asylum, the tribunal found that an internal armed conflict existed in Somalia, but omitted any coherent rationale or explanation for its holding.[217] The Tribunal correctly articulated the pitfalls associated with the *Tadic* line of factors and cautioned against their use in making broad factual findings. The *Tadic* factors, the Tribunal argues, are "not sharp instruments" of law, but are merely one way of delineating between a minor revolt and an internal armed conflict.[218] Utilizing these factors beyond that purpose or accepting them as gospel threatens to create an "*ad hoc* set of indicators not firmly rooted in international law."[219] Recognizing, as the UK Asylum and Immigration Tribunal did,[220] that the finding of an armed conflict, and more specifically the character of that armed conflict, is always going to be a factual question, the rules articulated in *Tadic* and its progeny are unnecessarily elusive and nebulous.

It would, of course, be possible to select one or more of the *Tadic*, *Limaj*, or *Haradinaj* factors and apply them to almost any conflict happening in the world, but deeming the conflict to be non-international is still one to be made on a case-by-case basis and serves no precedential advantage for future conflicts. To illustrate this point, this author will apply only the factors outlined in the above cases to Mexico that tend to

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[216] *HH & Others (Mogadishu: Armed Conflict: Risk) Somalia v. Secretary of State for the Home Department*, CG [2008] UKAIT 00022, *available at* http://unhcr.org/refworld/pdfid/47dfd9172.pdf.

[217] *Id*. at [330] – [331].

[218] *Id*. at [324] – [325].

[219] *Id*. (emphasis in original)

[220] *Id*.

prove the existence of sufficient organization. The DTOs fit at least four factors set forth in *Haradinaj*:[221] control of territory, access to weapons, recruits, and military training, a (very liberal) command structure, and the ability to use military tactics to accomplish their goal. Because there is no way to resolve the threshold question of whether meeting those four prongs is enough to qualify as organized in an internal armed conflict, this author submits that the DTOs are sufficiently organized, however it is important to note the plethora of factors that the DTOs do not meet. These factors include an ability to define a unified military strategy, speak with one voice, negotiate agreements such as peace accords or cease-fire agreements, and the existence of a headquarters.[222] The entire exercise of trying to make these factors fit a specific conflict will always be illusory. It is a set of square pegs attempting to be inserted into round holes. It is for this reason that a more stable test is needed to identify non-international armed conflicts, and the next section will propose this test based on the United States Supreme Court's methodology in *Hamdan v. Rumsfeld*.

2. The *Hamdan v. Rumsfeld* Contradistinction Paradigm

Prior to the 1990s, the question of whether a country was engaged in a non-international armed conflict had never really been at issue,[223] but that matter came to the

[221] Prosecutor v. Haradinaj, *supra* note 209, at ¶ 60.

[222] *Id*.

[223] States, for the most part, had no trouble delineating between incidents and skirmishes and actual armed conflicts between the 1940's and the 1990's. A non-exhaustive list includes the Korean War, the Yom Kippur War, El Salvador-Honduras, Vietnam, India-Pakistan, the Turkish invasion of Cyprus, the Falklands conflict, Russia-Chechnya, the Persian Gulf War, and the Iran-Iraq War. INTERNATIONAL LAW ASSOCIATION, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 13-14, 17, 2010, *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/1022 [hereinafter ILA Final Report].

forefront after the terrorist attacks of September 11, 2001 and the subsequent United States invasion into Afghanistan. The United States, also a party to the Geneva Conventions,[224] was confronted with the issue of classifying its ongoing struggle against non-state groups who plan and carry out terrorist acts against governments and people. The United States military incursions conducted in Afghanistan were done with the stated purpose of destroying al Qaeda's military capabilities.[225] Questions began to arise as to whether the Geneva Conventions applied to this conflict, and if they are applicable, can these incursions be classified as an international armed conflict or a non-international armed conflict? The White House and Justice Department maintained correctly that the conflict is not an international armed conflict because there is not a conflict between two states.[226] This left two alternatives: either that it is a non-international armed conflict or the Geneva Conventions are not applicable to this conflict.

The Bush Administration, in response to this issue, relied on two characteristics involving the "war on terror," namely the fact that al Qaeda is not a state, and that the conflict is not confined to one nation or even one area of the world.[227] Relying heavily

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[224] International Committee of the Red Cross, *International Humanitarian Law-State Parties/Signatories*, *available at* http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P (discussing the state parties to the first four Geneva Conventions, including the United States).

[225] Geoffrey Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295, 322 (2007) [hereinafter Corn, Hybrid Category]; Derek Jinks, *The Laws of War: Past, Present, and Future: The Applicability of the Geneva Conventions to the 'Global War on Terrorism'*, 46 VA. J. INT'L L. 165 (2005).

[226] ALBERTO GONZALES, MEMORANDUM FOR THE PRESIDENT: DECISION RE APPLICATION OF THE GENEVA CONVENTION ON PRISONERS OF WAR TO THE CONFLICT WITH AL QAEDA AND THE TALIBAN, Jan. 25, 2002, *available at* http://news.lp.findlaw.com/hdocs/docs/torture/gnzls12502mem2gwb.html [hereinafter Gonzales Memo] (stating that Guantanamo detainees were not entitled to any of the protections of the Geneva Conventions).

[227] *Id*.; Corn, Hybrid Category, *supra* note 225, at 324.

on a memorandum by Assistant Attorney General for the Office of Legal Counsel at the Justice Department[228] Jay Bybee stating that America's conflict with al Qaeda was not confined to one geographic area, but rather encompassed the globe, the White House and Justice Department concluded that this was also not a non-international armed conflict.[229] As a result of the so-called "Bybee Memo," President Bush accepted the "legal conclusion of the Department of Justice and determine[d] that Common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because… the relevant conflicts are international in scope" and common Article 3 is only applicable to non-international armed conflicts.[230] The Bybee Memo indicates that the drafters of the Geneva Conventions were only concerned with two types of armed conflicts as a matter of international concern: those between nations and civil war on a large scale within a nation.[231] Basically, the Bush Administration set up a paradigm in which it could benefit from the ability to kill combatants as a matter of first resort, but in which it was not bound to treat detainees humanely or comply with the gamut of other obligations placed on a state party to an armed conflict. This was the prevailing legal view until 2006, when the Supreme Court decided the *Hamdan* case.

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[228] Karl Vick, *Amid Outcry on Memo, Signer's Private Regret*, WASH. POST, Apr. 25, 2009, *available a*t http://www.washingtonpost.com/wp-dyn/content/article/2009/04/24/AR2009042403888.html.

[229] Gonzales Memo; JAY BYBEE, MEMORANDUM FOR ALBERTO R. GONZALES RE APPLICATION OF TREATIES AND LAWS TO AL QAEDA AND TALIBAN DETAINEES 8-9, Jan. 22, 2002, *available at* http://news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf. [hereinafter Bybee Memo]. (stating that the guarantees of Common Article 3 are not applicable to Guantanamo detainees).

[230] GEORGE W. BUSH, MEMORANDUM FOR THE VICE- PRESIDENT ET AL., HUMANE TREATMENT OF TALIBAN AND AL QAEDA DETAINEES, Feb. 7, 2002, *available at* w**ww**.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

[231] Bybee Memo at 6-9; Corn, Hybrid Category, *supra* note 225, at 324.

In November, 2001, during the conflict between the Taliban and the United States, Salim Hamdan, a Yemeni man with two children and a fourth-grade education,[232] was captured by American allies and handed over to United States military forces in Afghanistan.[233] Hamdan was, by his own admission, Osama Bin Laden's former driver and bodyguard.[234] By June of 2002, eight months after his capture, he was placed in Guantanamo Bay, Cuba, and held for over a year before being deemed eligible for trial by a military commission.[235] One year after his eligibility, he was charged with one count of conspiracy to commit offenses triable by military commission.[236]

Hamdan then filed a petition for a writ of habeas corpus and writ of mandamus challenging the Government's use of these commissions.[237] His proposition was that these commissions violated his guarantees under common Article 3 of humane treatment and trial by a regularly constituted tribunal. To get to the ultimate question as to whether the military commissions violated the Geneva Conventions, the Court had to determine whether the Conventions were triggered by the conflict in Afghanistan.

The Court of Appeals for the District of Columbia Circuit declined to find an armed conflict of either type for two reasons. First, it agreed with the Government that

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[232] *Bin Laden's Driver to be First Test of Gitmo Trials*, ASSOC. PRESS, Jul. 18, 2008, *available at* http://www.msnbc.msn.com/id/25730678/.

[233] Hamdan v. Rumsfeld, 548 U.S. 557, 566 (2006).

[234] Mark Tran, *Profile: Salim Ahmed Hamdan*, THE GUARDIAN, Jun. 5, 2007, *available at* http://www.guardian.co.uk/world/2007/jun/05/guantanamo.usa.

[235] Hamdan, 548 U.S. at 566.

[236] *Id*.

[237] *Id*. at 567.

Hamdan was captured as a result of the United States' war against al Qaeda, a non-state party, and not from the war against the Taliban.[238] Therefore, the Circuit Court held, Hamdan's capture was not incidental to an international armed conflict because al Qaeda is not a high contracting party. In so holding, the Circuit Court read the phrase "not of an international character" to mean that that common Article 3 only applies to those armed conflicts that are confined to one country.[239] Under the view of the majority, the Geneva Conventions did not apply in any form to the so-called "war on terror," and Hamdan was denied his international law claim that the Commissions were improperly constituted.[240]

After agreeing to hear the case, the majority of the Supreme Court classified the armed conflict by taking an almost exclusively textual approach. The text of common Article 3 clearly indicates its own trigger, a "conflict not of an international character."[241] Instead of focusing on the reason for the conflict, or the components of the parties involved, the Supreme Court determined that the conflict was an armed one.[242] The United States had declared its actions in Afghanistan to be a war, although that fact was not determinative, had sent troops, and had a stated mission to be accomplished with respect to al Qaeda.[243] The Court in *Hamdan* was satisfied that an armed conflict was ongoing between the United States and al Qaeda, so the only question became whether it was non-international or international.

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[238] Hamdan v. Rumsfeld, 415 F.3d 33, 41-2 (D.C. Cir. 1995).

[239] Hamdan, 415 F.3d at 41.

[240] *Id*.

[241] Geneva Conventions, *supra* note 16, at art. 3.

[242] Hamdan, 548 U.S. at 629-31.

[243] *Id*.

The plain text of common Article 3 articulates its application, the Court reasoned, solely by defining itself "in contradistinction"[244] to an international armed conflict. Applying this textual analysis, an armed conflict, if not between two high contracting parties, is automatically non-international. Using that paradigm, the Court had no problem finding the existence of a non-international armed conflict against al Qaeda. Instead of trying to make a set of facts fit the factors outlined in international criminal jurisprudence, the Court found common Article 3 to be the baseline of obligations for any armed conflict the United States found itself involved in.[245]

There is, however, a caveat that must be addressed. The Supreme Court's contradistinction analysis was limited almost exclusively toward the aspects of common Article 3 relating to humane treatment.[246] The Court did not address the other critical underpinnings of the Geneva Conventions: distinction, necessity, and proportionality.[247] Shortly after the *Hamdan* decision was released, the focus of many international humanitarian law observers switched to the five-week-long armed conflict between Hezbollah's military wing and the Israeli Defense Forces.[248] As a result of the collateral damage suffered by civilians, the bedrock principles of international humanitarian law came to the forefront of the debate. The "hit-and-respond cycle"[249] in which Israel found itself led to many commentators demanding that Israel act proportionally, and to

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[244] *Id*. at 630.

[245] *Id.* at 631 (citing *Nicaragua v. United States*, 1986 I.C.J. 14, 25 I.L.M. 1023).

[246] Hamdan, 548 U.S. at 631-34.

[247] *Infra* note 343; Corn, Hybrid Category, *supra* note 225, at 326-27.

[248] Richard Cohen, *...No, It's Survival*, WASH. POST, July 25, 2006, at A15.

[249] *Id*.

distinguish between combatants and civilians.[250] The international community's expectation that Israel, and to a lesser extent, Hezbollah, comply with the principles of war indicates that these principles are applicable to any conflict that falls short of international armed conflict.[251]

This revolutionary, yet simple way of conceptualizing the Geneva Conventions also avoids the empirical problem of states' refusal to acknowledge the existence of an armed conflict within their own borders,[252] because once the hostilities reach the threshold level, common Article 3 automatically applies to all parties to the conflict.

There are multiple reasons why a state is reluctant to acknowledge an armed conflict is being waged in its territory. First, a state acknowledging that it is locked in battle with an internal armed group suggests that the state is incapable of preventing that battle in the first place.[253] Secondly, deeming the struggle to be an armed conflict can be perceived as giving legitimacy to the combatants and their goals. States prefer to treat these situations as internal disturbances and suppress them with no limitation on the use of force.[254] Focusing on the pure interests of states helps illustrate the third reason why governments are disinterested in recognizing an armed conflict, namely that international

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[250] *Id*.

[251] Corn, Hybrid Category, *supra* note 225, at 326-27.

[252] Anthony Cullen, *The Parameters of Internal Armed Conflict in International Humanitarian Law*, 12 U. MIAMI INT'L & COMP. L. REV. 189, 197 (2004) [hereinafter Cullen, Parameters]. Some examples of Governments unwilling to acknowledge an armed conflict and apply IHL include Israel in the West Bank, Indonesia in East Timor, and Iraq in Kuwait. Theodore Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 261, n. 11 (2000).

[253] Cullen, *Parameters*, at 197.

[254] *Id*.

humanitarian law places a limit on the array of repressive methods available to a state to quell the uprising.[255]

Because of the natural hesitancy of states, the need to clarify conditions leading to a de facto state of armed conflict are of paramount concern. The Supreme Court's contradistinction paradigm makes the analysis simple and easy to apply. Under Supreme Court jurisprudence, a high contracting party can be involved in a non-international armed conflict with a terrorist organization, which leads to the question of whether it is possible for Mexico to be in involved in a non-international armed conflict against the DTOs.

3. Terrorism, Insurgency, and the DTOs

While it is possible for a high contracting party to the 1949 Geneva Conventions to be locked in a non-international armed conflict with a terrorist organization, it is important to determine whether DTOs are distinguishable from terrorist organizations. For the purposes of international humanitarian law, the means, methods, and structure of the DTOs are virtually indistinguishable from those of al Qaeda, and for this reason the conflict in Mexico can properly be characterized as a non-international armed conflict. Because we know that transnational terror groups can be parties to a non-international armed conflict, this section will use Al Qaeda as a model for drawing parallels between terrorists and the drug trafficking organizations in order to demonstrate that the DTOs can be parties to this non-international armed conflict in Mexico under the international humanitarian law.

[255] *Id*.

To be clear, this article will occasionally refer to the so-called "War on Terrorism" by that name, with the awareness that the term is more political than descriptive. Noted political scientist Francis Fukuyama is quick to remind us that terrorism is merely "a means to an end" and that using the phrase "War on Terrorism" is tantamount to declaring a "war on submarines."[256] What the political discourse really refers to is America's struggle against a movement that uses specific methods for achieving their stated goals. It is for this reason that terrorists[257] and the drug trafficking organizations are insurgent groups for the purposes of application of IHL.

a. Organization

Al Qaeda is one of many Islamist movements dedicated to expanding internationally, "sending its brigades in every Islamic country, destroying the blasphemer's fortresses, and purifying the Muslim's countries."[258] While we tend to think of terrorism as embodied by a monolithic, centralized organization, it is, in fact, a multitude of decentralized groups operating independently, but linked together by their common ideologies, languages, cultures, and religion[259] into a global network of people using the same means to accomplish similar goals. Al Qaeda's role in this global network is acting as one of these decentralized groups who provides advice, funding, propaganda

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[256] FRANCIS FUKUYAMA, PANEL III: INTEGRATING THE WAR ON TERRORISM WITH BROADER U.S. FOREIGN POLICY, The Brookings Institution, *available at* http://www.brookings.edu/comm/events/summary20030514.pdf.

[257] David J. Kilcullen, *Countering Global Insurgency*, 28 J. STRAT. STUDIES 579, 598 (2005) [hereinafter Countering Global Insurgency].

[258] *Id*. at 603. (citing AYMAN AL-ZAWAHIRI, KNIGHTS UNDER THE PROPHET'S BANNER, *reprinted in* Al-Sharq al-Awsat, Dec. 2, 2001, available at http://www.freerepublic.com/focus/f-news/813856/posts).

[259] *Id*. at 600-01.

and expertise to other decentralized allied groups.[260] In this respect, Osama Bin Laden[261] and his co-conspirators are just purveyors of information and resources in a larger crusade to install Islamic rule around the world. Al Qaeda is one of many participants in the global jihad movement,[262] but serves as a guide for understanding how almost all of these groups function.

After September 11, 2001, Al Qaeda shifted its structure from one closely resembling a military to one resembling a decentralized group of small units that sometimes work in concert to achieve their stated goals.[263] The purpose is that if Allied Forces, for example, were to take out the upper echelon of Al Qaeda leaders, the global jihad network could continue to operate and carry out most of its previous functions.[264] The infamous Al Qaeda training camps are decentralized as well, having been found in such diverse countries as Sudan, Yemen, Chechnya,[265] and Tajikistan.[266] Those who are

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[260] *Id*. at 601-02.

[261] This section of the paper was written before Osama Bin Laden was killed on May 1, 2011 in Pakistan. *Clinton: Bin Laden Death Shows 'You Cannot Defeat Us'*, CNN, May 2, 2011, *available at* http://www.cnn.com/2011/WORLD/asiapcf/05/02/bin.laden.dead/index.html. Because he is the figurehead leader of al Qaeda and to some extent the most ubiquitous terrorist, this paper will continue to reference his organization. *Good Riddance To Figurehead Of World Terrorism*, THE COURIER, May 2, 2011, *available at* http://www.thecourier.com.au/news/opinion/editorial/general/good-riddance-to-figurehead-of-world-terrorism/2150584.aspx.

[262] *Id*.

[263] Eben Kaplan, *The Rise of al-Qaedaism*, Council on Foreign Relations, July 18, 2007, *available at* http://www.cfr.org/terrorist-organizations/rise-al-qaedaism/p11033 [hereinafter Kaplan, Rise].

[264] Michael J. Buxton*, No Habeas For You! Al Maqaleh v. Gates, the Bagram Detainees, and the Global Insurgency*, 60 AM. U. INT'L L. REV. 519, 525-26 (2010) [hereinafter Buxton, Global Insurgency].

[265] *Id*. at 527, n. 51.

allied with Al Qaeda[267] are given the knowledge and skill necessary to train others and threaten those states against whom jihad has been declared.[268] Many of these trainees return to their home states and form their own cells to carry out attacks. Independence is seen as a virtue as well, as many of these cells have a propensity for raising their own funds.[269] In fact, the group that carried out the 2004 Madrid transportation bombings raised the necessary $10,000 funds by selling pirated compact discs and trafficking in narcotics.[270] The London Tube bombing in July, 2005, which cost the perpetrators $1,000 of their own, legally obtained money,[271] illustrates the relative ease of a cell springing up without the direct support of Al Qaeda, but any of these rogue groups may be able to procure weapons or guns through ties to Al Qaeda. Finally, while there is *some* vertical power structure in Al Qaeda, most groups allied with Al Qaeda have regional goals and use that training and expertise to carry out those goals.[272]

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[266] Praveen Swami, *Al-Qaeda Training Camp Uncovered In Tajikistan*, THE TELEGRAPH, Oct. 19, 2010, *available at* http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/8073451/Al-Qaeda-training-camp-uncovered-in-Tajikistan.html.

[267] Some examples of these allied groups include The Islamic Movement of Uzbekistan, Jemmah Islamiya in Indonesia, the Armed Islamic Group and the Salafist Group for Call and Combat in Algeria, and the Islamic Group and al Jihad in Egypt. KENNETH KATZMAN, CONG. RESEARCH SERV., RL 33038, AL QAEDA: PROFILE AND THREAT ASSESSMENT 7-8 (2005), *available at* http://www.fas.org/sgp/crs/terror/RL33038.pdf.

[268] Buxton, Global Insurgency, *supra* note 264, at 527.

[269] Kaplan, Rise, *supra* note 263.

[270] *Id*.

[271] Michael Buchanan, *London Bombs Cost Just Hundreds*, BBC NEWS, Jan, 3, 2006, *available at* http://news.bbc.co.uk/2/hi/uk_news/4576346.stm.

[272] *See supra* note 267.

Similarly, the DTOs function largely without the vertical integration of power, and organizationally, they are almost indistinguishable from terrorist organizations. Despite the appearance of having a loose hierarchy, the DTOs have groups of subordinates that are called in as needed based on the goal the DTO is trying to accomplish.[273] Just as Al Qaeda provides funding and training to groups who wish to carry out its goals, the DTOs provide guns, drugs, and money to groups that are willing to do its dirty work. It is precisely this power structure that allows the DTO to continue on in the face of the death of a leader, an assassin, a drug dealer, or due to members going rogue.[274] In the case of a power vacuum due to arrest or death, there are multiple figures able to rise up and take the reins of the organization.[275] It is for this reason that, despite President Calderon's success in capturing and extraditing DTO leadership,[276] the cartels have been able to weather the storm relatively easily.[277]

The Mexican DTOs are horizontally organized groups constituted by several forms. Starting from the bottom up, young men who have no other job prospects, but dream of upward mobility are given low-level military training and a salary, are tasked with carrying out most of the violent acts on behalf of the DTO.[278] Similar to recruiting disenfranchised youth and grooming them to be terrorists, many of these low-level criminals function as contractors, willing to do anything, including planting bombs, for

[273] Mafia & Co., *supra* note 55, at 44.

[274] Burton, Price of Peace, *supra* note 94.

[275] *Id*.

[276] Stratfor, Mexican Cartels, *supra* note 5, at 10.

[277] *See* Mafia & Co., *supra* note 55, at 103-11.

[278] Mafia & Co., *supra* note 55, at 40.

the equivalent of about 250 American dollars with no qualms.[279] In addition to being paid, these young men have the potential to move up the ladder and become assassins.[280] Above these young criminals, one finds drug and weapons dealers. These dealers are able to provide a neighborhood with pistols and revolvers in addition to illegal substances, but their power does not extend much further than their specific geographic area.[281] Dealers obtain their drugs and guns from a supplier, who also works for the cartels. In addition, there are larger groups of individuals whose job it is to commit specific crimes such as bank robbery, carjacking, and muggings.[282] These criminals are not unique to a specific area, and usually carry out these crimes far from their homes, but are called on as needed by the DTOs.[283]

Considered to be toward the top of the power chain are *sicarios* (contract killers).[284] Their ranks are populated with long-time criminals well-known for their work in conjunction with the cartels. The appeal of becoming a *sicario* is that they are given access to status symbols, specifically motorcycles and cars. *Sicarios* are generally the ones instigating and promoting the violence in major Mexican cities, and who are known for being stealthy about their whereabouts.[285] To maintain anonymity, the *sicarios* will sometimes contract their jobs out to other armed groups. The most prevalent example of

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[279] *Id*. at 40-1.

[280] *Id*.

[281] *Id*. at 44.

[282] *Id*.

[283] *Id*.

[284] *Id*.

[285] *Id*.

sicarios is Los Zetas, discussed above, that function as hit men and protectors of the DTO.[286]

Finally, to ensure compliance, the cartels have what can best be conceptualized as a cross between internal compliance officers and tax collectors. Literally translated, these *oficinas de cobro*, or collection offices, are usually run by hit men and tasked with recruiting men into the lower echelons, collecting drug money, and in some cases, laundering the money through shell businesses.[287] It is estimated that at the height of the Colombian Drug Cartels, there were as many as 55 *oficinas de cobro* in the state of Cali. This has been the classic organization for the DTOs dating back to those in Colombia, and to a great extent, are how the Mexican cartels are structured as well.[288] In addition to organization, the DTOs are similar to terrorist organizations through their means and methods.

b. Means and Methods

The means and methods used by the DTOs and Al Qaeda are, at times, indistinguishable and, at times, dissimilar. To explain this apparent paradox, this section will outline the characteristics of an insurgent group and apply those factors to both the DTOs and Al Qaeda. Using the insurgency classification to illustrate how each group thinks and acts will resolve this paradox and create a realization that the terrorists function almost the same way that the drug cartels do. These groups function in the same

[286] *See infra* Part II.C.i; Mafia & Co., *supra* note 55, at 88.

[287] *Id*. at 45-6.

[288] *See* Burton, Price of Peace *supra* note 94.

way, meaning because the *Hamdan* analysis applies to Al Qaeda, it also applies to the DTOs.

At its core, an insurgency is a power struggle between a state and at least one popularly based challenger over a contested a political space.[289] The goal of insurgencies is to overthrow solidified governments through the use of subversion, terrorism, and guerilla tactics.[290] The United States Army Counterinsurgency Manual defines insurgency as "an organized, protracted politico-military struggle designed to weaken the control and legitimacy of an established government, occupying power, or other political authority while increasing insurgent control."[291] Thus the lynchpin for an insurgency becomes a decrease in the control and legitimacy of the state counterbalanced by increasing control of the insurgent group. One of the key ways that an insurgency gains legitimacy is by mobilizing those within its sphere of influence. This can happen in one or more of the following ways: persuasion, coercion, reaction to abuses, foreign support, and apolitical motivation.[292]

Insurgency as a tactic fully explains the drug-related acts of violence in Mexico, in addition to Al Qaeda's use of terroristic acts to both gain and maintain power to the detriment of nation states. The DTOs are seeking to suppress any and all social, political, and military resistance to their drug distribution however they can, just as Al Qaeda is

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[289] David J. Kilcullen, *Three Pillars of Counterinsurgency*, Sept. 28, 2006, *available at* http://www.au.af.mil/au/awc/awcgate/uscoin/3pillars_of_counterinsurgency.pdf.

[290] Countering Global Insurgency, *supra* note 257, at 603.

[291] DEPARTMENT OF THE ARMY, COUNTERINSURGENCY MANUAL 1-1, December 2006, *available at* http://www.fas.org/irp/doddir/army/fm3-24.pdf [hereinafter Counterinsurgency Manual].

[292] *Id*. at 1-8.

seeking to break down support for states and non-fundamentalist regimes with any means available. Former Secretary Chertoff cautions us "that tolerating the rule of drug organizations in various cities in Northern Mexico is not an acceptable alternative for a modern democracy."[293] Secretary Chertoff's comment highlights the power held by the DTOs in contradistinction to traditional state apparatuses, similar to *Al Qaeda in the Arabian Peninsula* (AQAP)'s power over Yemen stolen from its recognized government.[294] While the DTOs are attempting to eliminate all barriers to moving drugs, Al Qaeda is attempting to eliminate states that are preventing the implementation of their ideological form of Islam. The only difference is each organization's endgame.

The most prevalent method for mobilizing support employed by the DTOs is coercion.[295] "Legitimacy is accorded to the element that can provide security, as citizens seek to ally with groups that can guarantee their safety…Militias sometimes use the promise of security, or the threat to remove it, to maintain control of cities and towns."[296] These coercive means carried out by the DTOs have been written about in great detail, and several reputable media outlets, including the *Washington Post, New York Times*, and *Los Angeles Times*, have full sections dedicated to coverage of this issue.[297] To illustrate

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[293] Chertoff, Nexus, *supra* note 47, at 685.

[294] *See* JULIE COHN, ISLAMIST RADICALISM IN YEMEN, Council on Foreign Relations, June 29, 2010, *available a*t http://www.cfr.org/yemen/islamist-radicalism-yemen/p9369 [hereinafter Radicalism in Yemen] (discussing why AQAP has been able to supplant the Yemeni Government as legitimate). Cohn is quick to note that AQAP is not the same as "al Qaeda central" and there are very few links between the two groups other than their name and ideology. *Id*.

[295] Counterinsurgency Manual, *supra* note 291, at 1-9.

[296] *Id*.

[297] The Los Angeles Times has set up an interactive site, complete with maps of the violence, a counter that keeps track of the DTO-related deaths, and a compilation of articles on the drug war written by staff reporters. *See* MEXICO UNDER SIEGE- THE DRUG WAR AT OUR DOORSTEP, L.A. TIMES,

this coercion, several gruesome, and in certain instances commonplace, means are regularly employed by the DTOs to maintain their power and legitimacy by removing the illusion of safety. To this end, the DTOs regularly engage in murder, not always involving the indiscriminate use of firearms. Grenades made by the United States and sent to Latin American countries during the Cold War are being used by the DTOs on the streets of Juárez.[298] This phenomenon is not an isolated incident either, as there have been seventy-two such grenade attacks between 2009 and 2010, and over 101 grenade attacks on government buildings in the past three and a half years.[299] These grenades have the added advantage of being relatively cheap, between $100 and $500 each.[300] In yet another show of power, evoking images of the Middle East, a DTO in Juárez used a remote-controlled car bomb, killing four people and injuring twenty in the summer of 2010.[301] The cartels have become especially sinister in this regard, as they used a wounded man to lure paramedics to the scene before detonating the car bomb, which had three-inch screws placed inside so as to maximize collateral damage.[302]

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http://projects.latimes.com/mexico-drug-war/#/its-a-war, accessed Nov. 11, 2010; The New York Times has a similar, but less comprehensive site. MEXICAN DRUG TRAFFICKING NEWS, L.A. TIMES, http://topics.nytimes.com/top/news/international/countriesandterritories/mexico/drug_trafficking/index.html?scp=1-spot&sq=mexico%20drugs&st=cse, accessed Nov 11, 2010; *See also Mexico at War*, WASH. POST, http://www.washingtonpost.com/wp-srv/world/interactives/mexico-at-war/.

[298] *Mexican Drug Cartel's Latest Weapon: Cold War-Era Grenades Made in the U.S.*, WASH. POST, July 17, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/07/16/AR2010071606252.html.

[299] *Id*.

[300] *Id*.

[301] Richard Esposito, *Mexican Drug Cartels' New Weapon in Border War- The Car Bomb*, ABC NEWS, Aug. 12, 2010, http://abcnews.go.com/Blotter/mexican-drug-cartels-weapon-border-war-car-bomb/story?id=11383665.

[302] *Id*.

The cartels kill indiscriminately and outrageously to evoke fear in the populace. Most famously, a serial killer known as El Pozolero ("The Soup Cook") "dissolved some 300 corpses in a broth of acid" before being captured by Mexican authorities.[303] The most gruesome methods, however, might be the ones used by the leaders of the Tijuana Cartel. Their trademarks include the "Colombian Necktie," where the murderer cuts the victim's throat under the chin and pulls his tongue through the wound while he bleeds out, "El Gordo," the '"fat man," suffocating the victim with a plastic bag while a large man bounces on his chest, and "carne asada," whereby whole families are murdered and their corpses are then placed on a "bed of flaming tires." [304]

Finally, there are the cases, almost always undocumented, where Mexican citizens disappear for good. Some citizens are murdered, but the rest are held for ransom, sold into prostitution, or trafficked to the United States and further.[305] It is impossible to get an accurate count, but these "disappearances" have become almost an epidemic.[306] People vanish after leaving their homes and never return.[307] Statistics used to be kept on how

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[303] *Under the Volcano*, THE ECONOMIST 29-31, Oct. 14, 2010, *available at* http://www.economist.com/node/17249102?story_id=17249102.

[304] Tim Padgett and Elaine Shannon, *La Nueva Frontiera: The Border Monsters*, TIME, Jun. 11, 2001, *available at* http://www.time.com/time/magazine/article/0,9171,1000094-1,00.html.

[305] Scott Stewart & Alex Posey, *Mexico: The War with the Cartels in 2009*, Strategic Forecasting, Sept. 12, 2009, *available at* http://www.ocnus.net/artman2/publish/Dark_Side_4/Mexico-The-War-with-the-Cartels-in-2009_printer.shtml.

[306] *Id*.

[307] Murder City, *supra* note 1, at 41.

many people had vanished, but that was abandoned before the year 2000.[308] It is unknown how many people have vanished, and the population is scared to ask.[309]

The coercion is rendered moot if the population is unaware of what is going on around them. To this end, DTOs will subtly announce their crimes by wrapping bodies in garbage bags, spiking heads on the fence outside a government office, and leaving headless bodies in upscale hotel rooms.[310] The best example of this happened in 2006, when several gunmen crashed into a nightclub, "fired shots into the air, ordered the patrons to lie down, and then lobbed five human heads onto the dance floor."[311] Mexican citizens know exactly what is happening to their country, their city, and their children, but know not to speak up, for fear of death, but also because they believe that their complaints to the government will be ignored.[312] It is this kind of coercion and control that allows the DTOs to do business without any friction from the locals.

Organizations such as Al Qaeda who engage in acts of terrorism also thrive when their actions are made public. To this end, terrorists, like the DTOs, commit murder through more than just the indiscriminate use of firearms, but rather through attacks on skyscrapers, embassies,[313] military infrastructure,[314] and mass transportation systems[315]

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[308] *Id*.

[309] *Id*.

[310] George Grayson, *Mexico and the Drug Cartels*, Aug. 2007, http://www.fpri.org/enotes/200708.grayson.mexicodrugcartels.html [hereinafter Grayson, Mexico & The Drug Cartels].

[311] *Id*.

[312] *Cf,* Murder City, *supra* note 1, at 17, 34 ("Some claim fear creates the silence… Mexican reporters who bother to report are sometimes murdered… This is the sound of the growing terror, this silence.")

[313] *See* Madeline Albright, *Remarks on Report of the Accountability Review Boards on the Embassy Bombings in Nairobi and Dar es Salaam*, U.S. State Dep't., Jan. 8, 1999, *available at*

using multiple different instruments such as grenades, planes, boats, and suitcase bombs.[316] Ultimately there are an unlimited number of tactical options that can be utilized at different times and in different places for strategic advantage. The thought that there could be an attack any time in any place is enough to confuse, confound, and place citizens in fear of imminent death to ensure their compliance, and even support. Several organizations use or have used suicide bombers as a means of guaranteeing not only indiscriminate death, but public acknowledgement of their complicity. In this respect, suicide bombings are the pinnacle of an insurgency strategy. The bomber chooses the time, place, and circumstances for detonation on the fly to ensure maximum damage.[317] It costs very little to put together and all but guarantees that their target group will be traumatized by the event, making this a cheap and efficient way of scaring the population into compliance.[318]

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http://secretary.state.gov/www/statements/1999/990108.html (discussing the 1998 bombings of American Embassies in Tanzania and Kenya).

[314] *See* RAPHAEL PERL, ET AL, TERRORIST ATTACK ON USS COLE: BACKGROUND AND ISSUES FOR CONGRESS, CONG. RESEARCH SERV., RS 20721, Jan. 30, 2001, *available at* http://news.findlaw.com/cnn/docs/crs/coleterrattck13001.pdf (discussing the attack on the USS Cole b a smaller boat carrying explosives).

[315] *See London Bombings Toll Rises to 37*, BBC NEWS, July 7, 2005, *available at* http://news.bbc.co.uk/2/hi/uk_news/4661059.stm; *See also Suicide Bomber Injures 21 in Israel*, CNN, Aug. 28, 2005, *available at* http://articles.cnn.com/2005-08-28/world/mideast.blast_1_israeli-provocations-attack-by-palestinian-militants-beit-umar?_s=PM:WORLD.

[316] *See generally Terrorist Methods*, Security Service MI-5, *available at* https://www.mi5.gov.uk/output/terrorist-methods.html.

[317] Revital Sela-Shayovitz & David Yellin, *Suicide Bombers in Israel: Their Motivations, Characteristics, and Prior Activity*, 1 INT'L J. CONFLICT & VIOLENCE 160 (2007), *available at* http://ijcv.org/index.php/ijcv/article/viewPDFInterstitial/13/13.

[318] *Id*. at 161.

It is also important to note that beyond physical coercion, exploitation of poverty and economic need can be a powerful form of coercion. This is true not only in the Mexican towns controlled by the DTOs, but also in places such as rural areas of Colombia that are heavily involved in drug trafficking, and the ghettos of Rio de Janeiro, Brazil.[319] Juan Carlos Garzon, specialist for the Political Affairs Secretary of the Organization of American States, explains that the entire drug operation is completely reliant on the "cooperation of impoverished citizens, who are without work and without defined future prospects."[320] This is especially true in places where there is a lack of services and there are very few job opportunities for the populace, as the DTOs are able to rally the communities around illegal activities by providing economic opportunities.[321] The new recruits are given not only economic compensation but, at times, also a modicum of control over things like distribution, debt collection, and sales.[322] In return for this compensation and control, the recruits willingly follow the directions of their bosses.[323] As the revenue streams become greater, the leaders of the DTOs are able to reinvest in the community. This reinvestment allows them to function as the government does; to secure the loyalty of the people, legitimize the DTOs' acquisition of wealth, and achieve an atmosphere of impunity for their actions.[324] For this reason, the DTOs are able to easily win over the impoverished citizens using a carrot, instead of, and sometimes in

[319] Mafia & Co., *supra* note 79, at 110.

[320] *Id.* at 110.

[321] *Id.*

[322] *Id.* at 110-11.

[323] *Id*.

[324] *Id.* at 111.

conjunction with, a stick. That which is "illegal becomes what seems reasonable and necessary."[325]

Yemen is the terrorist analogue to the DTOs in providing the population with a way to channel their anger and fear.[326] The situation in Yemen is bleak: the unemployment rate is over forty percent, more one third of the population is malnourished, over half live in abject poverty,[327] and it is predicted that in a matter of years,[328] the country will have no oil reserves, which accounts for one-third of its GDP, and no fresh water supply. To add to the problem, over ninety percent of men and over one quarter of women are addicted to khat, a shrub that functions similarly to methamphetamines.[329] Realizing this situation, Al Qaeda in the Arabian Peninsula has allied itself with the south in its quest to secede and posited itself as the leader of the secessionist movement in order to gain legitimacy,[330] because the recognized government is plagued by rampant corruption, and severely lacking in domestic credibility.[331] All of these factors plus a strong sympathy towards radical Islam among its inhabitants leaves

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[325] *Id*.

[326] Radicalism in Yemen, *supra* note 294; STAFF OF S. COMM. ON FOREIGN RELATIONS, 111ST CONG., AL QAEDA AND SOMALIA: A TICKING TIME BOMB (Comm. Print 2010), *available at* foreign.senate.gov/reports/download/?id=21fc926c-aa4c-4d40-b583-c32780d8568a [hereinafter Ticking Time Bomb].

[327] Ticking Time Bomb at 8-9; Fawaz A. Gerges, *Al Qaeda Has Bounded Back in Yemen*, CNN, Jan, 7, 2010, available at http://www.cnn.com/2010/OPINION/01/07/gerges.yemen.us.terrorism/index.html; *Yemen: Al-Qaeda's New Staging Ground?*, TIME, Dec. 28, 2009 [hereinafter New Staging Ground].

[328] Radicalism in Yemen, *supra* note 294; Ticking Time Bomb at 8-9.

[329] New Staging Ground, *supra* note 327.

[330] *Id*.

[331] *Id*.

the population extremely susceptible to influence from extremists, which is exactly what AQAP has been able to capitalize on.[332] This concern of economic decline leading to extremism has been a problem in other areas of the world, specifically in Somalia,[333] where Al Qaeda has stepped in and seized control over most of the country. Somalia, Yemen, and Mexico are all in varying degrees of economic decline, but the pattern is clear: the more impoverished the citizens are, the more likely they are to become radicalized.[334]

These DTOs are able to win over not only the impoverished, but also those in the upper social echelons, including businessmen, judges, prosecutors, and political representatives. This becomes a self-reinforcing principle. The incumbent politicians benefit from the increased violence and crime through promises of fixing the problem, which motivates the people to vote for them. Once reelected, these politicians are able to sculpt the law to create impunity for their own actions and those of the DTOs.[335] The political system is further reified through structural flaws such as a lack of stable constituencies, especially in Mexico where it is unclear who each elected lawmaker is supposed to represent, [336] creating a system where the people have no recourse and leaders are accountable only to those who pay their salaries, fringe benefits, pensions, and

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[332] Ticking Time Bomb, *supra* note 294, at 8-11; Radicalism in Yemen, *supra* note 294.

[333] For a more thorough discussion of Somalia and its problems, *see* Ticking Time Bomb, *supra* note 294, at 13-15.

[334] *Id*.

[335] *Id*.

[336] George W. Grayson, *Vigilantism: Increasing Self-Defense Against Runaway Violence in Mexico?*, Oct. 2009, *available at* http://www.fpri.org/enotes/200910.grayson.vigilantism.mexico.html.

travel funds.[337] To add to the problem, the governors of each of Mexico's thirty-one states exercise vast power over their respective states, and recently this power has been used to make the press comply, take away government contracts to businesses, and buy off state legislatures with 'incentives' for rubber-stamping gubernatorial initiatives.[338]

The police are the ones in the country most susceptible to the will of the DTOs. In Mexico, twenty-six percent of the population trusts the police.[339] A combination of the low confidence in law enforcement and low wages, the inability to protect the police officers, and an environment that favors impunity results in a high probability that the DTOs will coopt the police force. This cooption takes the form of bribes, willful blindness, or active participation in protection of drug trafficking.[340]

The United States Supreme Court held that Al Qaeda could be a party to a non-international armed conflict with the United States.[341] This section has argued that the DTOs function similarly to various terrorist organizations, both through the indiscriminate killing of civilians and those not part of the military, but also through their command structures and tactics. Both the DTOs and Al Qaeda are made up of a loose group of people, each with their own roles to play in terms of furthering the goals of the organization, and the leaders are able to break off from the larger group for the same reasons. It is for this reason that the contradistinction paradigm, articulated in *Hamdan v.*

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[337] *Id*.

[338] *Id*.

[339] Mafia & Co., *supra* note 79, at 145. *See also* chart at *id*.

[340] *Id*. at 145-46.

[341] Hamdan, 548 U.S. at 629-31.

Rumsfeld, means that any armed conflict not between two or more states is automatically a non-international armed conflict. This analysis is equally applicable to both Al Qaeda and the drug trafficking organizations in Mexico. The next section will discuss the applicable rules that serve to limit the actions of the parties during a non-international armed conflict.

C. Key Rules That Apply to Constrain The Parties

Given that the violence in Mexico is properly characterized as a non-international armed conflict, this section discusses the basic principles of international law, especially those arising under the Geneva Conventions, that both constrain and empower the parties to the conflict. In particular, common Article 3 of the 1949 Geneva Conventions sets forth important rules for this conflict.

International humanitarian law is founded on two simple and related principles: limitation and humanity.[342] The principle of limitation is a direct rejection of total, unregulated warfare,[343] meaning that contracting parties have placed limits on the methods and means of conducting war. In practice, this has lead to the specific prohibition of certain weapons, especially those that cause unnecessary suffering.[344] The

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[342] *See generally* THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW (Martinus Nijhoff Publishers 2006) [hereinafter Meron, Humanization].

[343] James M. Strong, *Comment: Blinding Laser Weapons and Protocol IV: Obscuring the Humanitarian Vision*, 15 DICK. J. INT'L L. 237, 248(1996) (citing JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 79 (Martinus Nijhoff Publishers 1985)); Timothy J. Heverin, *Case Comment: Legality Of The Threat Or Use Of Nuclear Weapons: Environmental And Humanitarian Limits On Self-Defense*, 72 NOTRE DAME L. REV. 1277, 1293 (1997); Kolb & Hyde, *supra* note 186, at 45 (discussing the bedrock principles of IHL).

[344] Meron, Humanization at 69-73 (discussing tests to determine unnecessary suffering); Crawford, Treatment of Combatants, *supra* note 191, at 36-37.

principle of humanity, at its core, requires that those who are not involved in the armed conflict be treated humanely.[345]

To this end, the Conventions outline several principles to ensure compliance with the mandates of limitation and humanity. The first principle is that of distinction. Distinction means that forces must delineate between military and civilian objectives, and attack solely military objectives.[346] The second major principle is that of necessity, meaning that the armed forces may use only the measures that are completely necessary to bring the other state into submission and surrender.[347] The third principle is that of proportionality: any military action taken by one of the parties must be proportionate to accomplishing the goal sought.[348] These principles comport with the underlying goals of international humanitarian law, namely to prevent unnecessary suffering, an escalation or spread of the conflict, and the effects of full scale unregulated warfare, and to protect the civilian population, civilian property, and those combatants who are *hors de combat*, meaning they are no longer involved in the fighting.[349] Articulating the rules mandated under international humanitarian law is a fairly simple venture; deciding when and how they should be applied is a difficult exercise.

In determining when these principles are applicable, the Geneva Conventions outline two types of conflicts: international and non-international. Many scholars have

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[345] *See generally* Meron, Humanization, *supra* note 342.

[346] Meron, Humanization at 62-3; Crawford, Treatment of Combatants, *supra* note 191, at 31-33; Kolb & Hyde, *supra* note 186, at 46-7.

[347] Crawford, Treatment of Combatants, *supra* note 191, at 35-36; Kolb & Hyde, *supra* note 186, at 47-8.

[348] Meron, Humanization at 61-2.

[349] *Id*. at 49.

commented on the problems inherent in placing a wall between international and non-international armed conflicts, especially given the tendency for conflicts to be both types at the same time or have characteristics of each at different times. For example, it is not uncommon to find an armed conflict where the combatants themselves are from the same country, but the arms being used have been obtained abroad, foreign soldiers and advisors are present, or foreign governments are helping to fund the conflict.[350] The dichotomy itself has been blurred for these reasons. Many tribunals and courts have had to wrestle with this problem,[351] but have conceded that the norms of common Article 3 should be treated "as elementary considerations of humanity" applicable to all armed conflicts.[352] For this reason, the protections of common Article 3 apply regardless of the species of armed conflict. The rationale for common Article 3 is best explained by the official commentary to the Geneva Conventions.

> We think… that the scope of application of the [common[Article [3] must be as wide as possible. There can be no drawbacks in this, since the Article in its reduced form, contrary to what might be thought, does not in any way limit the right of a State to put down rebellion, nor does it increase in the slightest the authority of the rebel party. It merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and embodied in the national legislation of the States in question, long before the Convention was signed… No Government can object to observing, in its dealings with enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, when dealing with common criminals. Speaking generally, it must be recognized that the conflicts referred to in

[350] Bahia Tazhib-Lie & Olivia Swaak-Goldman, "Determining the Threshold for the Application of International Humanitarian Law", in Liesbeth Lijnzaad et al, ed., MAKING THE VOICE OF HUMANITY HEARD 241 (Martinus Nijhoff Publishers 2004) [hereinafter Threshold for Application].

[351] *See e.g. id.* at 240-41, Tadic Jurisdiction Decision, *supra* note 134, at ¶ 98, Akayesu at ¶ 608.

[352] Threshold for Application at 241, n. 11.

> [common] Article 3 are armed conflicts, with 'armed forces' on either side engaged in 'hostilities' -- conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country.[353]

This is a specific recognition that one cannot divorce the applicability of regulation from the necessity for that regulation.[354]

As described in detail in the previous section, the situation in Mexico is one requiring the use of common Article 3.[355] Specifically, both Mexico and each DTO is obligated to comply with the provisions outlined in that article. This paper has articulated several egregious violations being perpetrated by both sides in Part II and Part III.B.III,

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[353] JEAN DE PREUX, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 36-7 (Jean S. Pictet ed., A.P. de Heney, trans., Int'l. Comm. Red Cross 1960), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-III.pdf.

[354] Corn, Hybrid Category, *supra* note 225, at 310.

[355] It is important to note the guarantees of Common Article 3 here. The article states, in relevant part, that:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

Geneva Conventions, *supra* note 16, at art. 3.

supra, and includes the torture and murder of civilians, and the indiscriminate killing of those *hors de combat*. The next section is concerned with the international mechanisms that exist to ensure compliance with these common Article 3 obligations.

Part IV- Ensuring Compliance with International Humanitarian Law

It has been said that generally violations of international humanitarian law happen not because of the inadequacy of the rules, but rather because of an unwillingness to respect them, a lack of means for enforcement, uncertainty as to their application, and ignorance of the rules by those in charge, civilians, and those on the battlefield.[356] This paper has made the case that the situation in Mexico is non-international armed conflict, in which there is a major problem of unwillingness to follow, enforce, understand, and apply relevant international legal rules. This section will propose action by the United States, the International Committee of the Red Cross, and the Office of the Prosecutor of the International Criminal Court in order to compel compliance and punish those in violation of the precepts of international humanitarian law in Mexico, in addition to eliminating the impunity by the Mexican Government.

In reference to the armed conflict in Sierra Leone, the UN Commission on Human Rights cautioned that

> [I]n any armed conflict, including an armed conflict not of an international character, the taking of hostages, willful killing and torture or inhuman treatment of persons taking no active part in the hostilities constitute grave breaches of international humanitarian law, and that all countries are under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and

[356] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME 1: RULES xxvii (Cambridge University Press 2005).

> to bring such persons, regardless of their nationality, before their own courts.[357]

It should be noted that the conflict in Sierra Leone is very similar to the one in Mexico. Unlike many contemporary conflicts based on ethnicity in Africa, Sierra Leone's conflict had a "distinct lack of ethnic undertones."[358] So what explains the purpose of the internal armed conflict? Similarly to Mexico, the war is being waged over natural resources, only there it was diamonds and not drugs at the center of the conflict. Specifically, the conflict was over control of the diamond fields and the revenues brought in by these diamonds.[359]

The gross violations committed by both the DTOs and the Mexican Government, explained in Part II and Part III, Section B, reinforce the idea that the applicability of the Geneva Conventions including common Article 3 "has been denied [so often] that the rule has been rejection of the law, rather than its formal acknowledgment and recognition."[360] Indiscriminate murder by all sides to the conflict, a pattern of forced disappearances, and torture are illustrative of the

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[357] Situation of Human Rights in Sierra Leone, U.N Comm'n of Hum. Rights., 54th Sess., U.N. Doc. E/CN.4/RES/1999/1 (1999).

[358] Babafemi Akirinade, *International Humanitarian Law and the Conflict in Sierra Leone,* 15 NOTRE DAME J. L. ETHICS & PUB. POL'Y 396-97 (2001) [hereinafter Sierra Leone].

[359] *Id*. at 397; IAN SMILLIE, ET AL, THE HEART OF THE MATTER- SIERRA LEONE, DIAMONDS, AND HUMAN SECURITY 1.2, Partnership Africa Canada 2000, *available at* http://action.web.ca/home/pac/attach/Heart%20of%20the%20Matter%20complete.rtf.

[360] Theodor Meron, *Note And Comment: On The Inadequate Reach Of Humanitarian And Human Rights Law And The Need For A New Instrument*, 77 AM. J. INT'L L. 589, 598 (1983).

egregious humanitarian violations[361] committed by both sides in Mexico's non-international armed conflict with the DTOs.

Despite Mexico's stated commitment to IHL and its obligation to educate its soldiers on the laws of armed conflict,[362] these humanitarian violations continue to amass. The national director of international humanitarian law for the Mexican Red Cross explains that "there has yet to be full and adequate knowledge of international humanitarian law even within the government." This lack of education regarding international humanitarian law is endemic because there are no classes dedicated to teaching the Geneva Conventions, and the few undergraduate institutions that do teach these rules are dealt with only in the context of human rights, leading to a blurring of concepts.[363]

This section draws on observations made by international humanitarian law experts, and the work of international criminal legal scholars to articulate methods the international community can use to mandate compliance with the Geneva Conventions in Mexico and punish those who refuse to comply.

A. Mexico's National Legal Obligations

Mexico has accepted certain key obligations under international law, specifically with regard to international humanitarian law. This section will briefly discuss Mexico's

[361] *See, e.g.*, *Amnesty International Report 2010: Human Rights in United Mexican States*, AMNESTY INTERNATIONAL, 2010, *available at* http://www.amnesty.org/en/region/mexico/report-2010.

[362] Relation to Mexico, *supra* note 122.

[363] *Id*. at 300.

ratification of the Geneva Conventions and Mexico's public commitment to the precepts contained therein.

The Constitution of the United Mexican States[364] sets up a "federal democratic, representative Republic composed of free and sovereign states."[365] which is very similar to that of the United States. The constitution creates three branches: legislative, executive, and judicial.[366] The legislative branch is bicameral, containing the Chamber of Deputies and the Chamber of Senators.[367] Representatives in the former house are elected every three years, whereas in the Chamber of Deputies, there are two members for every state in Mexico, and two for the federal district, totaling 128 members. The term for each Senator is 6 years.[368] Similarly to the United States, only the Senate has the power "to approve the treaties and diplomatic conventions made by the President of the Republic with foreign powers."[369] The Constitution of Mexico says that "this Constitution, the laws of the Congress of the Union that emanate therefrom, and all treaties that have been made

[364] This is the actual legal name of the country, as defined in the Constitution of Mexico. Constitución Política de los Estados Unidos Mexicanos, *as amended*, Diario Oficial de la Federación, 5 de Febrero de 1917 (Mex.) (Author's note- For this article, I will be referencing the English language version of the Constitution, provided by the Organization of American States, *available at* http://www.oas.org/juridico/MLA/en/mex/en_mex-int-text-const.pdf) [hereinafter Constitution of Mexico].

[365] *Id*. at art. 40.

[366] *Id*. at art. 49.

[367] *Id*. at art. 50.

[368] *Id*. at art. 56-57. According to the Constitution, there are 32 states or territories in Mexico plus the Federal District. *Id*. at art. 43.

[369] *Id*. at art. 76(I).

and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole union."[370]

In Mexico, there is no question as to whether treaties are self-executing or not.[371] As soon as a treaty is approved by the Senate, it becomes binding domestic law.[372] In addition, the treaty trumps any conflicting federal law.[373] Thus the consequence of ratification of the Geneva Conventions is that Mexico is legally obligated both internationally and domestically to comply with the four Geneva Conventions.[374]

The former National Director of international humanitarian law at the Mexican Red Cross, Antonio Lopez de la Rosa, explains that "Mexico has always contributed to the development and reaffirmation of international humanitarian law."[375] To reaffirm its commitment to international humanitarian law, the Mexican Red Cross has set up an infrastructure for educating the Army, Navy, and diplomats on the Geneva Conventions by way of national seminars, and "a large number of courses and seminars on the local, state, and regional levels."[376] Consistent with this assent to the principles of international humanitarian law, Mexico allowed the International Committee of the Red Cross (ICRC)

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[370] Constitution of Mexico at art. 133.

[371] Luis Miguel Diaz, *National Treaty Law and Practice: Mexico*, *in* NATIONAL TREATY LAW AND PRACTICE 451 (Duncan B. Hollis, et al eds., 2005).

[372] *Id*.

[373] *Id*. at 452-53.

[374] *Supra* notes 122, 123.

[375] Antonio Lopez de le Rosa, *The Protocols Additional to the 1949 Geneva Conventions in Relation to Mexico*, 27 INT'L REV. RED CROSS 297, 298 (1987) [hereinafter de la Rosa, Relation to Mexico].

[376] *Id*. at 301.

to set up an office in Mexico City[377] to ensure compliance with the Geneva Conventions by regional countries, including Costa Rica, Cuba, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, and Panama.[378] This ICRC branch has been used for training federal police in the legitimate use of force and for procedures for detainment and arrest.[379]

Under the *Hamdan* contradistinction paradigm, the armed conflict in Mexico is not of an international character. Because the Mexican Senate ratified the Geneva Conventions, Mexico's obligations with respect to non-international armed conflicts under the four Geneva Conventions of 1949 are applicable as a matter of Mexican law. The rest of this Part is dedicated to outlining methods of compliance that can be undertaken by the international community, and punishing those who do not comply with common Article 3's obligations.

B. The Role of the ICRC

Internationally, there is no specific legal apparatus for ensuring compliance with international humanitarian law, but there are several international organizations with the capacity and experience to make a difference in the region. One of the most prominent organizations, the ICRC describes itself as "an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of

[377] Note Verbale Dated 4 September 2008 From The Permanent Mission Of Mexico To The United Nations Addressed To The Secretariat Of The United Nations, ¶ II.A.4, *delivered to the Human Rights Council and General Assembly*, U.N. Doc. A/63/795 (Mar. 30, 2009).

[378] *The ICRC Regional Delegation in Mexico*, Oct. 29, 2010, *available at* http://www.icrc.org/eng/where-we-work/americas/mexico/overview-mexico.htm.

[379] *Supra* note 377.

victims of armed conflict and other situations of violence and to provide them with assistance". The ICRC "also endeavours [sic] to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles."[380] To this end, the ICRC, specializes in providing protection to people involved in an armed conflict[381]. The ICRC has international legitimacy and experience dealing with situations of armed conflict, internal disturbances, and relief actions, and carrying out treacherous humanitarian missions such as distributing food to prisoners of war, being a neutral messenger between two opposing sides of a conflict, and negotiating agreements between parties to the conflict.[382] That the ICRC has yet to act and ensure compliance with international humanitarian law with relation to Mexico serves to illustrate the reluctance to accept that an armed conflict exists.

Upon the outbreak of both international and non-international hostilities, it is the job of the ICRC to formally inform all parties to the conflict of their obligations under international humanitarian law.[383] Generally this is done by confidential letter, but because it would not likely be possible to serve the heads of the DTOs with letters, there is a fallback provision.[384] In these types of situations, the ICRC will generally issue a press release publicly cautioning the armed force of its obligations.[385] If the ICRC is

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[380] INTERNATIONAL COMMITTEE OF THE RED CROSS, THE ICRC: ITS MISSION AND WORK 4, 2009, *available at* http://www.icrc.org/eng/assets/files/other/icrc_002_0963.pdf.

[381] Kolb & Hyde, *supra* note 186, at 116-18.

[382] *Id*. at 121.

[383] ICRC, Increasing Respect, *supra* note 197, at 17.

[384] *Id*.

[385] *Id*.

unable to make meaningful contact with the DTOs, it can recruit a neutral third party to help bring the groups to the table.[386] The ICRC then has a few options at its disposal to improve compliance with international humanitarian law. It may propose special agreements between the parties to comply with specific facets of the applicable law and address violations of the rule.[387] It is for this reason that the ICRC should pursue its mandate and attempt to ensure humanitarian protection for all civilians. To make matters easier, the ICRC already has a presence in Mexico, with its office in Mexico City.[388] The ICRC is uniquely suited and located to attempt the protection of those not involved in the hostilities. Because the ICRC does not have its own armed forces or political mandate, Mexico and the DTOs are less likely to deem the presence of the ICRC as a threat to their power. Realistically, the odds of the DTOs agreeing to negotiate with the Mexican Government seems highly unlikely, especially when they stand to earn over $500 billion in revenue every year.[389] Additionally, knowing that the DTOs will probably refuse to negotiate, Mexico will be reluctant to limit its options for fighting the DTOs. It is for this reason that both sides need specific incentives to comply with humanitarian law.

C. The United States and The Merida Initiative

In addition to the parties to the conflict, the United States has a vested interest in combatting the violence caused by and the drugs distributed by the DTOs. In the Merida Initiative, Congress earmarked a significant amount of money to help Mexico fight their

[386] *Id*.

[387] *Id*. at 18.

[388] *Supra* note 377.

[389] *Supra* note 20.

drug problem. For this reason, the United States is uniquely situated to condition those funds on compliance with international humanitarian law. The section describes the scheme set up by the Initiative, how the money is already conditioned on certain human rights benchmarks, and how Congress could further condition the funds on compliance with international humanitarian law.

Being cognizant of the effects that the DTOs are having on the United States, Congress passed the Merida Initiative in 1998. This initiative is a program geared towards cooperation with Mexican authorities to counter drug-fueled violence that is spilling over into border cities in the United States.[390] Since 2008, the United States has pledged over $1.5 billion to Mexico alone under the Initiative.[391] In seeking to curb violations of human rights and humanitarian law in Mexico, Congress conditioned fifteen percent of the funds under the Initiative on Mexico meeting certain human rights conditions outlined by the U.S. State Department.[392] These conditions are (1) ensuring that civilian prosecutors and judicial authorities are investigating and prosecuting members of the federal police and military forces who have been credibly alleged to have violated human rights, (2) enforcing the prohibition on the use of testimony obtained through torture, (3) improving the transparency and accountability of federal police forces and work with state and municipal authorities to improve the transparency and accountability of state and municipal police forces, and (4) Mexico conducting regular consultations with Mexican human rights organizations and civil society on

[390] *Merida Initiative Fact Sheet*, U.S. DEP'T OF STATE, June 23, 2009, *available at* http://www.state.gov/p/inl/rls/fs/122397.htm.

[391] *Id*.

[392] *Supra* note 361.

recommendations for the implementation of the Merida Initiative.[393] The State Department reports indicate that Mexico has fallen far short of these bench marks, but despite that failure, the conditioned fifteen percent of the pledged money in 2008 and 2009 has been given to Mexico anyway.[394]

The atrocities described in this article are merely the tip of the iceberg in terms of violations being committed by Mexico. Mexico's National Human Rights Commission (CNDH) has reported many violations of both international humanitarian law and international human rights law. The list of violations articulated by the CNDH includes unlawful killing by armed forces, poor prison conditions, confessions procured through torture, and violence against civilians, including women and children.[395] In addition to the failing grade given to Mexico from the United States, the Human Rights Council of the United Nations has taken notice of the numerous international humanitarian law and human rights violations transpiring in Mexico.[396]

With all of this international pressure to comply with its treaty obligations, Mexico is in breach, and the United States is uniquely suited to use the funds as a carrot and stick to maintain compliance. Congress is aware of the danger to American citizens

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[393] *US: Withhold Funds for Mexico Tied to Human Rights Performance*, HUMAN RIGHTS WATCH, Sep. 14, 2010, *available at* http://www.hrw.org/en/news/2010/09/09/mexico-letter-president-Calderon.

[394] CLARE RIBANDO SEELKE & KRISTIN M. FINKLEA, CONG. RESEARCH SERV., R 41349, U.S.-MEXICAN SECURITY COOPERATION: THE MÉRIDA INITIATIVE AND BEYOND, (2011), *available at* http://fpc.state.gov/documents/organization/156546.pdf.

[395] 2009 Human Rights Report: Mexico, United States State Dep't, Mar. 11, 2010, *available at* http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136119.htm; *Infra* note 396.

[396] Universal Periodic Review, *Report of the Working Group on the Universal Periodic Review*, ¶ 30, 42, *delivered to the Human Rights Council and the General Assembly*, U.N. Doc. A/HRC/11/27 (Mar. 2, 2009).

and cities as a result of the cartels, and should act to compel Mexico to comply with human rights and IHL obligations to ensure the protection of its citizens.[397]

D. The International Criminal Court

Mexico is a party to the Rome Statute for the International Criminal Court (ICC),[398] which means that Mexico has acceded to the jurisdiction of the court for crimes within its jurisdiction. Therefore, the Prosecutor's Office of the ICC[399] should exercise its *proprio motu* power,[400] and institute investigations in the pre-trial chamber against the most serious offenders on both sides of the conflict in Mexico. This *proprio motu* power is one of three ways that an investigation may be brought before the ICC.[401] *Proprio motu* ("on his own motion") allows the prosecutor to bring charges against those involved in an armed conflict when a party to the conflict is unable or unwilling to prosecute those responsible for violations of the laws and customs of war domestically, and has ratified the Rome Statute or accepted the jurisdiction of the ICC.

The Rome Statute provides in Article 5 that war crimes[402] fall within the ICC's subject matter jurisdiction and gives an exhaustive list of offenses constituting war crimes

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[397] *Supra* note 361; *See also* CLARE RIBANDO SEELKE, CONG. RESEARCH SERV., R 40135, MÉRIDA INITIATIVE FOR MEXICO AND CENTRAL AMERICA: FUNDING AND POLICY ISSUES (2009).

[398] United Nations Treaty Collection, Rome Statute of the International Criminal Court, April 12, 2011, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en.

[399] Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 1002 [hereinafter Rome Statute].

[400] *Id*. at art. 15.

[401] *Id*. at art. 13. The other two ways that an investigation may be launched is either through a referral by a state party or by the United Nations Security Council under Chapter XII of the U.N. Charter. *Id.*

[402] Rome Statute at art. 5(c), 8.

in a non-international armed conflict. At the same time, the preamble to the Rome Statute reflects the state primacy principle, meaning that it is "the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes."[403] Ultimately the ICC does not have jurisdiction over violations of the laws and customs of war if "the case is being prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution."[404] ICC jurisdiction is also improper where a state with jurisdiction has investigated the crimes, but has elected not to prosecute, "unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute."[405]

In the case of Mexico, the military justice system currently in place is inadequate for genuinely carrying out a prosecution due to its lack of transparency and its tendency to hear cases involving the military regardless of the act.[406] Mexico's Constitution gives jurisdiction to the military system for "crimes and faults against military discipline."[407] This is consistent with their international legal obligations, but in practice, the Federal Attorney General's Office automatically sends all cases where an active duty military member commits a crime to the military courts, allowing the military to look in to all abuses.[408] Normally, this would likely preclude action on the part of the Prosecutor, but the military justice system contains several caveats that prevent it from being fully

[403] *Id*. at art. 6.

[404] Rome Statute at art. 17.

[405] *Id*.

[406] Uniform Impunity, *supra* note 120, at 12-15.

[407] Constitution of Mexico, *supra* note 364, at art. 13.

[408] Uniform Impunity, at 12-13.

effective, and may allow the Prosecutor to bring investigations in the Hague, citing these deficiencies.

Human Rights Watch has articulated the problems inherent in Mexico's military justice system. First, the Secretary of Defense is in charge of the military justice system in that he has the ability to appoint all the military prosecutors, public defenders, and judges.[409] While this may not seem to be problematic, the Secretary's powers also include the ability to order a prosecutor to end an investigation and to order judges to issue pardons upon conviction of soldiers.[410] In addition, judges are not independent actors; they can be removed at the whim of the Ministry of Defense and can be reprimanded by judiciary councils .[411] Obviously this creates an incentive on the part of the judges to rule in a way that is favored by the Ministry. Additionally, there is very limited oversight from the civilian legal mechanisms. Victims are unable to challenge the use of military commissions or to remove the case to civilian courts.[412] According to the Ministry of Defense, on appeal, federal judges generally uphold the decisions of the military courts, and, in any event, do not review whether there is military jurisdiction in the first place.[413] Federal courts are unable to overturn the decision of a military prosecutor, taking away much of the efficacy of the appellate process.[414] Finally, the entire process is fairly opaque. Nothing about the proceedings is made public until a final ruling is reached,

[409] *Id*. at 16.

[410] *Id*.

[411] *Id*. at 17.

[412] *Id*. at 18.

[413] *Id*.

[414] *Id*. at 19.

hearings are not announced, and the Ministry will not provide dates and times of hearings that are forthcoming.[415] In addition, the Ministry uses confidentiality to shield any information related to the proceedings involving military crimes against civilians.[416]

There have been reports involving the military and the rape of an indigenous woman in 2002, where the military court formally ended the case in 2006, citing insufficient evidence, and the victim instead had to pursue her case before the Inter-American Commission on Human Rights.[417] A 16-year old indigenous woman was also raped by two soldiers in 2002, while six other soldiers watched. Without telling anyone, the military ended its investigation in 2004, again citing a lack of evidence against the soldiers.[418]

More recently, the Mexican military has been committing violations of international humanitarian law in the course of going after the DTOs. In 2007, several unknown people attacked and killed five soldiers. In response, a few hundred soldiers, while searching for the perpetrators, arbitrarily detained thirty-six people for eighty-four

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[415] *Id*. at 20.

[416] *Id*.

[417] *Id*. at 31-2. It is important to note that the IACHR issued a report on the merits regarding her case and then referred her case to the Inter-American Court of Human Rights. Inter-American Commission on Human Rights, Application to the Inter-American Court of Human Rights in the case of Ortega v. United Mexican States, Case 12.580, May 7, 2009, *available at* http://www.cidh.org/demandas/12.580%20Ines%20Fernandez%20Ortega%20Mexico%207mayo09%20ENGLISH.pdf. ("The application also deals with the lack of due diligence in investigating and punishing those responsible for the incident; the failure to provide due redress to the victim and her next-of-kin; the use of the military justice system to investigate and prosecute human rights violations; and the difficulties encountered by indigenous people, women in particular, in securing access to justice"). *Id* at ¶ 2.

[418] *Id*. at 35.

hours.[419] During this detention, the detainees were repeatedly beaten, burned, and waterboarded, and several of those held captive were girls under age eighteen who described being sexually abused and raped to get them to provide information about the drug traffickers.[420] In 2009, the military was still investigating, but told an NGO that there were no new criminal investigations being conducted as a result of these allegations.[421]

It is for this reason that the Office of the Prosecutor for the ICC has a convincing case that complimentarity is not at issue here because the Mexican military and civilian justice systems are unwilling to honestly investigate and punish these acts. Additionally, the Rome Statue states that a state is merely exercising jurisdiction to shield its own citizens from the reach of the ICC, or if the proceedings are not conducted independently or impartially, the ICC will be allowed to exercise jurisdiction.[422]

To begin a full investigation, the Prosecutor is required to determine that the information is valid and the charges are serious. There must be "a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed."[423] In making this finding, the Prosecutor is allowed to rely on "information from States, organs of the United Nations, intergovernmental or non-governmental

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[419] *Id*. at 38.

[420] *Id*.

[421] *Id*. at 39.

[422] Rome Statute at art. 20(3).

[423] *Id*. at art. 53.

organizations, or other reliable sources that he or she deems appropriate."[424] Once the Prosecutor has this belief, he must submit the case to the Pre-Trial Chamber for further determination.[425]

The Prosecutor is the ideal candidate to refer this to the ICC. There are two other ways for prosecutions to reach the Trial Chamber, but are more politically treacherous. State parties to the ICC can refer cases, as well as the United Nations Security Council under an Article VII determination that there has been a breach or threat to the peace, or an act of aggression.[426] States are reluctant to refer each other to the ICC,[427] either because they are allies or fear reprisal. In addition, action by the Security Council is subject to the political will of the Council, in addition to a veto by any of the members.[428] For this reason, it is in the best interest of the victims of this violence and the international community for the Prosecutor to refer these investigations to the Pre-Trial Chamber of the ICC.

The Rome Statute expressly provides jurisdiction for specific prohibited acts amounting to war crimes during non-international armed conflicts.[429] These acts largely mirror the obligations under Common Article 3. The Statute states that:

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[424] *Id*. at art. 15(2)

[425] *Id*. at art. 15(4).

[426] U.N. Charter art. VII; Rome Statute at art. 13(b).

[427] Jing Guan, *The ICC's Jurisdiction Over War Crimes in Internal Armed Conflicts: An Insurmountable Obstacle for China's Accession?*, 28 PENN. ST. INT'L L. REV. 703, 738 (2010).

[428] *Id*. at 738-39 (citing Antonio Cassese, *Is the ICC Still Having Teething Problems?*, 4 J. INT'L CRIM. JUST. 434 (2006)).

[429] Rome Statute at art. 8(2)(c),(e).

> In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions … namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
> (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (iii) Taking of hostages;
>
> (iv) The passing of sentences and the carrying out of executions without previous judgement [sic] pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.[430]

The Statute also mentions several other prohibited acts, including "[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities"[431] and "[c]ommitting rape, sexual slavery, enforced prostitution, forced pregnancy… enforced sterilization, and any other form of sexual violence also constituting a serious violation of [common] article 3."[432] The ongoing violence, torture, and taking of hostages being carried out with no restraint by both sides of the armed conflict in Mexico is enough for the ICC to obtain subject matter jurisdiction if the Prosecutor chooses to pursue investigations.

The final piece of the ICC jurisdiction puzzle is the method by which the ICC can obtain personal jurisdiction over the individuals who are committing these Common Article 3 violations. The relevant personal jurisdiction sections of the Rome Statute are

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[430] *Id*. at art. 8(2)(c).

[431] *Id*. at art. 8(2)(e)(i).

[432] *Id*. at art. 8(2)(e)(vi).

Articles 12 and 13.[433] Article 12(2)(a) states that so long as the case is not referred to the ICC by the Security Council, which would not be the case here, all that is required to gain jurisdiction over the person is that state where the alleged crime took place is a party to the Rome Statute. As stated above, Mexico ratified[434] the Rome Statute on October 28, 2005, so under the plain text of the founding statute, any war crimes committed by anyone within the confines of the Mexican borders can subject to the jurisdiction of the International Criminal Court.

This section has laid out the requirement for the Office of the Prosecutor of the ICC to bring those responsible for the drug-related violence in Mexico to justice. The Mexican judicial system has shown extreme reluctance to fully and wholeheartedly investigate and punish members of the military who are torturing, kidnapping, and raping their own citizens. Additionally, a referral to the Pre-Trial Chamber will send a message to the heads of the DTOs that they are not safe from international humanitarian law and that non-compliance with its obligations will not be tolerated by the international community.

Part V- Conclusion

Drug-related violence that is a daily part of life for citizens of Mexico. The conflict between the DTOs and Mexican Government is not based on a political ideology, but rather the greed, profits, and violence that exist as a result of the DTOs. These DTOs unique in that, despite appearing to be merely organized crime, the way that the DTOs

[433] *Id*. at art. 12-13; Marcella David, *Grotius Repudiated: The American: Objections To The International Criminal Court And The Commitment To International Law*, 20 MICH. J INT'L L. 337, 369 (1999).

[434] *Supra* note 398.

are structured and are able to sever and reunite as needed to avoid defeat makes them a special case from a Geneva Conventions standpoint.

The traditional view under international humanitarian law compartmentalizes international and non-international armed conflicts. Those conflicts between two or more states are automatically considered international armed conflicts, and trigger the entire corpus of the Geneva Conventions. The problem experienced by academics, international tribunals, and combatants is determining where and when there is an armed conflict not of an international character. Using the prevailing view outlined in *Prosecutor v. Tadic* and its ICTY and ICTR progeny means applying a nebulous set of factors to determine a threshold question absent an actual threshold of how much organization is required. This paper argues that the Supreme Court's test for finding a non-international armed conflict is the correct methodology. It is a simple brightline test that can be easily applied to almost any conflict without quantifying or qualifying the parties involved, amount of force used, command structure, or ability to procure weapons. Simply put, if there are hostilities between a state and a dissident group other than a state amounting to protracted armed violence, a non-international armed conflict should be recognized by the arbiter or tribunal, and the state should comply with its international legal obligations under common Article 3.

In Mexico, President Calderon has made it his personal crusade to take his country back from the DTOs who are threatening to render the Mexican Government irrelevant. The use of armed forces, grenades, rifles, rocket launchers, and submarines by both Mexico and the DTOs reinforces the notion that this is more than a law enforcement

problem. Applying the *Hamdan* test, the state of Mexico is fighting several drug trafficking organizations throughout the territory of Mexico.

Because there is an armed conflict between one state and various non-state groups, there is a non-international armed conflict transpiring now. As such, Mexico is legally obligated to ensure their compliance with the basic protections outlined in common Article 3, including humane treatment and protection of civilians. Mexican forces have been committing egregious violations of international humanitarian law many through the torture, rape, kidnapping and indiscriminate killing of its own citizens, despite the Mexican Supreme Court holding these actions to be against domestic penal law. As for the DTOs, they are committing the most flagrant violations of common Article 3 with public beheadings, the indiscriminate use of grenades on civilians and ambulances, torture, recruitment of children, and kidnapping.

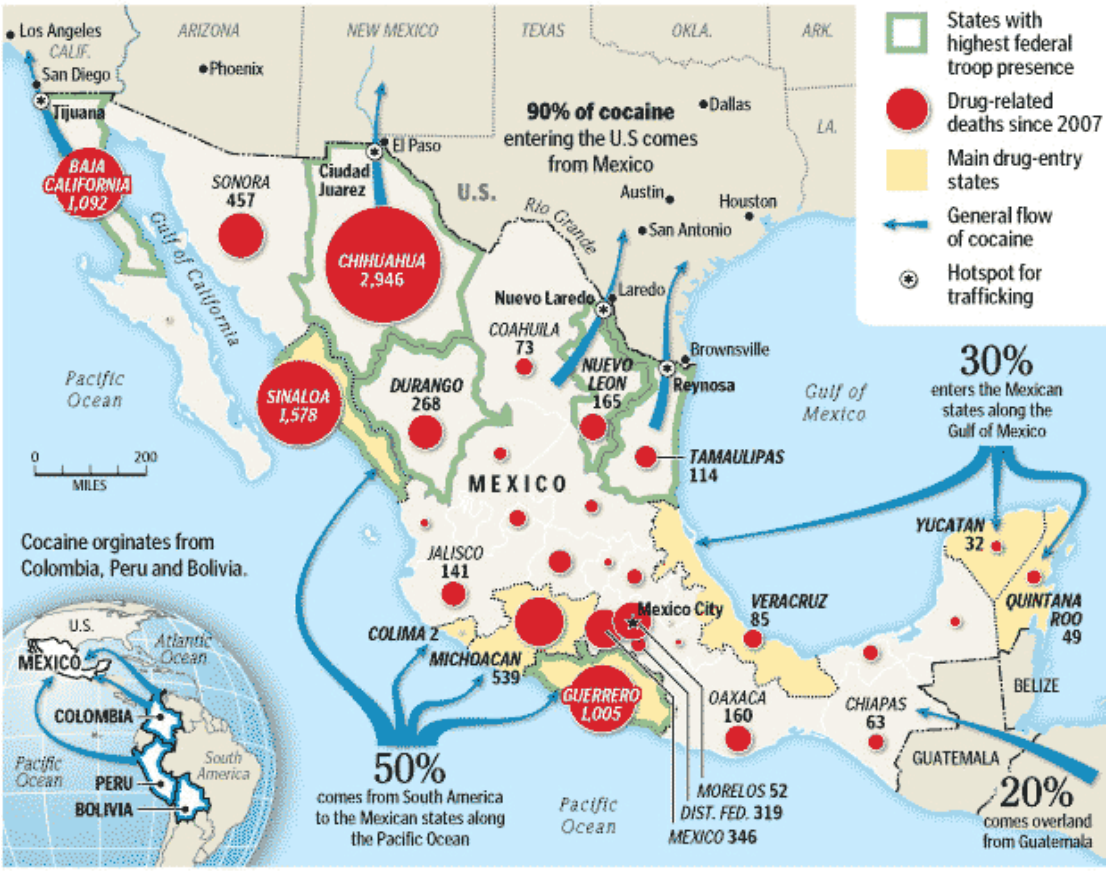
This extreme violence underscores the need for international intervention and protection. The United States is starting to take notice because the violence is spilling over into border towns and big cities in the United States; this is slowly becoming America's problem as well. Cutting off funding to Mexico based on violations of international law is a good start, but has the potential to curb only Mexico's behavior and not that of the DTOs. The ICRC, in addition, should be more involved in defending the rights of civilians Mexico. With its experience, the ICRC is uniquely suited to serve as monitors and international whistleblowers, in addition to acting as diplomats in search of a quick and humanitarian-focused resolution to the violence in Mexico.

Finally, because Mexico itself has shown it is politically unwilling to domestically prosecute offenders of the law on both sides, this conflict is ripe for referral to the International Criminal Court by the Office of the Prosecutor. The aforementioned acts being carried out by both the DTOs and the Mexican Army are violations of Common Article 3 and are war crimes for the purpose of the Rome Statute. Because the civilians of Mexico who are caught in between the two factions can do very little to protect themselves, and it is unlikely that either the Security Council or another state will stand refer this matter to the ICC, the Prosecutor must act. History is on the side of prosecution, as trials of top officials for violations of the Geneva Conventions in armed conflicts can serve to mobilize international condemnation.[435] It is for these reasons that something can be done and must be done using already existing and applicable international legal mechanisms to curb the violence and ensure compliance with the mandates of international humanitarian law during and after this non-international armed conflict in Mexico.

[435] Theodor Meron, *Centennial Essay: Reflections On The Prosecution Of War Crimes By International Tribunals*, 100 AM. J. INT'L L. 551, 563 (2006).

Appendix A- Maps

Stratfor, Mexican Cartels, *supra* note 5, at 3.



Calderon's Military Call-Up, WASH.POST, Apr. 2, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/graphic/2009/04/01/GR2009040103531.html.