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

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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

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

and a handful of Mexican drug trafficking organizations² (DTOs) throughout Mexico. These DTOs, in addition to fighting the Mexican Government, are also locked in a power struggle between each other for control over the supply and distribution routes of illegal drugs.³ Caught in the crossfire are innocent civilians, soldiers, Mexican law enforcement, and even United States citizens⁴ in and around Mexican border towns.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 number of murders at over 5,000 in 2008, an almost 100% percent increase from 2007.⁶ Juárez alone experienced over 870 drug-related murders between January and May of 2010.⁷

Since taking power in 2006, Mexican President Felipe Calderon'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 While the Mexican government has been able to slightly diminish the power of the cartels, drug-related violence continues to escalate.⁹ As a result of Mexican counter-narcotics efforts, the drug cartels have become more resourceful both in their methods for moving the drugs and for

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. Therefore, throughout this article, these terms will be used interchangeably. 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].

3. *Id.* at 1–3.

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

5. STRATFOR, MEXICAN DRUG CARTELS: GOVERNMENT PROGRESS AND GROWING VIOLENCE 2–3 (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. STRATFOR, MEXICAN DRUG CARTELS: AN UPDATE 5, (May 17, 2010); GEORGE GRAYSON, MEXICO: NARCO-VIOLENCE AND A FAILED STATE? 97 (2010).

8. STRATFOR, DRUG CARTELS, *supra* note 5, at 11.

9. *Under the Volcano*, ECONOMIST, Oct. 14, 2010, at 29–31, available at http://www.economist.com/node/17249102?story_id=17249102.

surviving attacks from the Mexican Government.¹⁰

This article 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, and not between Mexico and another State, the armed conflict cannot be classified as an “international armed conflict;” it is, however, a non-international armed conflict within the meaning of Common Article 3 of the 1949 Geneva Conventions. Support for the proposition that a non-international armed conflict exists in Mexico can be found in the United States Supreme Court’s decision 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, and in particular Common Article 3, imposes important obligations on and grants certain privileges to each party to the conflict. For example, under the law of armed conflict, a soldier is allowed to shoot and kill an enemy soldier at any time, so long as the enemy soldier is actively taking part in the hostilities.¹¹ Conversely, those obligations placed on parties to the conflict include the prohibition on committing violence, killing, mutilating, torturing, and treating cruelly any person *not actively involved* in the conflict.¹² While it is simple to posit certain rights and obligations, there remain practical problems in the implementation and enforcement of these obligations. Specifically, the greatest hurdles to compliance with international humanitarian law include 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 holding those who commit violations of the Geneva Conventions responsible for their actions.¹³

10. STRATFOR, DRUG CARTELS, *supra* note 5, at 2.

11. 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).

12. FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR 69–70 (2001) (citing to article 3 of the Geneva Conventions).

13. *Id.* at 69.

Part II of this article recounts the background to the conflict, including the rise of the cartels, the unique forms of violence they employ, and several of the methods used to obtain and secure control over sections of Mexico. Part III addresses the requirements for the application of international humanitarian law under the Geneva Conventions, with a specific emphasis on conflicts “not of an international character.”¹⁴ Focusing on the problems inherent in defining and recognizing the existence of non-international armed conflicts, Part III proposes a new methodology for applying international humanitarian law to the violence in Mexico. Finally, Part IV addresses the privileges and obligations placed on both the Mexican Government and the drug cartels. It also proposes several options available to international actors to ensure compliance with international humanitarian law by Mexico and the DTOs.

II. THE SITUATION IN MEXICO

Understanding how the DTOs function, the power they wield, and Mexico’s military response provides the 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 under the exclusive purview of the domestic legal system.¹⁵ The current violence in Mexico has become so omnipresent and the DTOs have been, to a significant extent, successful in infiltrating the ranks of law enforcement that the only effective

14. 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 art. 3, Aug. 12, 1949, 75 U.N.T.S. 970 (1949) [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 75 U.N.T.S. 971 (1949) [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 972 (1949) [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 973 (1949) [hereinafter Geneva IV] [collectively hereinafter Geneva Conventions].

15. U.S. DEP’T OF STATE, U.S. CONSULATE FOR TIJUANA, MEXICO’S CRIMINAL JUSTICE SYSTEM: A GUIDE FOR U.S. CITIZENS ARRESTED IN MEXICO (July 18, 2011), available at <http://tijuana.usconsulate.gov/root/pdfs/telegalcriminalguide.pdf>.

response Mexico feels that it has is to utilize its armed forces against the DTOs.¹⁶ In doing so, the Mexican Army, however, is operating outside the bounds of the law through internationally proscribed tactics such as the torture and indiscriminate killing of civilians.¹⁷

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,¹⁸ and now by smuggling drugs, people,¹⁹ and weapons.²⁰

Each DTO has great economic incentive to survive, as the global illegal drug trade generates earnings of \$500 billion annually.²¹ While about four-tenths of one percent of Mexico's population²² is addicted to drugs, the true consumers are located just north; the United States is responsible for consuming almost \$64 billion worth of drugs per year.²³ In 2009 alone, 21.8 million Americans, or 8.7% of the population, had used illegal

16. 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.

17. *Id.*

18. GEORGE W. GRAYSON, MEXICO'S STRUGGLE WITH DRUGS AND THUGS 9–10, 31 (2009) [hereinafter DRUGS AND THUGS].

19. Josh Meyer, *Drug Cartels Raise the Stakes on Human Smuggling*, L.A. TIMES, Mar. 23, 2009, <http://www.latimes.com/news/nationworld/nation/la-na-human-smuggling23-2009mar23,0,5345333,full.story>.

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

21. General Barry McCaffrey, *McCaffrey Urges Global Cooperation Against Drug Trafficking*, EL UNIVERSAL (Mexico City), Feb. 8, 2000, available at <http://usinfo.org/wf-archive/2000/000208/epf209.htm> [hereinafter *McCaffrey Urges Global Cooperation*].

22. 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.

23. Nick Gillespie, *Paying with Our Sins*, N.Y. TIMES, May 17, 2009, <http://www.nytimes.com/2009/05/17/opinion/17gillespie.html?sq=paying%20with%20our%20sins%20drugs&st=cse&scp=1&pagewanted=print>.

drugs.²⁴ With that kind of market for illicit substances,²⁵ it is not surprising that one of the largest drug operations in history is taking place just south of the border.

The market for these drugs started during the American Civil War, where morphine became heavily prescribed to deal with a host of medical issues. As generations passed, the population became increasingly addicted to these drugs, and the U.S. Government sought to regulate the drug market.²⁶ In 1912, the United States Government and twelve other nations entered into the International Opium Convention,²⁷ agreeing to “limit the manufacture, trade and use of these products to medical use, cooperate in order to restrict use and to enforce restriction efficiently,. . . penalize possession,. . . and prohibit selling to unauthorized persons,”²⁸ effectively creating a new black market for opium products.

During World War II, Mexico became a provider of morphine to the legal market and heroin to the illegal one.²⁹ After the war, some American service members returned home with a drug addiction, and the demand for other drugs such as marijuana, methamphetamines, and cocaine began to take off as well.³⁰ Since then, the cartels have been capitalizing on demand in the United States and using those profits to challenge the power of the Mexican Government, the United States Drug Enforcement Agency, and other cartels.³¹

24. OFFICE OF NATIONAL DRUG CONTROL POLICY, 2009 NATIONAL SURVEY ON DRUG USE AND HEALTH: VOLUME 1. SUMMARY OF NATIONAL FINDINGS (2010), *available at* <http://www.whitehousedrugpolicy.gov/publications/pdf/nsduh.pdf>.

25. The Office of National Drug Control Policy defines “illicit” drugs as prescription drugs for non-medical use, marijuana, MDMA (“ecstasy”), cocaine, heroin, inhalants, and LSD. *See id.* at 13.

26. *See generally* DRUGS AND THUGS, *supra* note 19.

27. International Opium Convention Signed at The Hague, Jan. 23, 1912, 8 L.N.T.S. 222. 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.

28. *The Beginnings of International Drug Control*, UN CHRONICLE, Summer 1998, *available at* http://findarticles.com/p/articles/mi_m1309/is_2_35/ai_54157834.

29. *Id.* at 15.

30. *Id.*

31. *See generally* DRUGS AND THUGS, *supra* note 19.

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 brought into the United States from Mexico alone.³² 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 goods (and drugs) from Mexico into the United States and Canada much easier.³³ As a direct result of NAFTA, there are more trucks heading north and not enough customs agents to search every truck.³⁴

B. More Than Organized Crime

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

Former United States Secretary of Homeland Security Michael Chertoff was specifically referencing the drug cartels in Northern Mexico when he said that "not surprisingly, when you strike at organized criminal groups, they strike back."³⁵ The tactics carried out by "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."³⁶ 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."³⁷

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

33. MURDER CITY, *supra* note 2, at 98.

34. *Cf. id.*

35. Secretary Michael Chertoff, *Keynote Address: The Nexus Between Drug Trafficking, Terrorism, and Organized Crime*, 13 CHAP. L. REV. 681, 685 (2010) [hereinafter Chertoff].

36. *Id.*

37. *Id.*

While it would be easy to gloss over the power dynamics in Mexico by referring to this problem simply as one of “organized crime,” giving DTOs that label overlooks the scope of the violence and lawlessness occurring everyday in Mexico. Even the Mexican Government is unwilling to resort to this classification; President Calderon has referred to the violence as a threat to the very existence of the Mexican State.³⁸ It is incorrect to write these drug trafficking organizations off as mere organized crime.

While cartels conduct several activities that are normally defined as “organized crime”,³⁹ the cartels should instead be seen as non-state parties to a non-international armed conflict, within the meaning of the laws and customs of war, which is more consistent with their actions.⁴⁰ 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 whether a non-state group is sufficiently organized, as sufficient organization is a lynchpin for the existence of a non-international armed conflict.⁴¹ At any given time, it is almost impossible to know the state of each cartel and whether they are working in concert, so applying a set of nebulous factors to determine whether the cartels are sufficiently organized is an extremely difficult task.⁴²

38. CRS Report, *supra* note 3, at 16.

39. 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. *Organized Crime—Glossary of Terms*, FEDERAL BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/investigate/organizedcrime/glossary> (last visited Jan. 6, 2012).

40. *Infra* Part III. B.

41. Anthony Cullen, *The Threshold of Non-International Armed Conflict, in the Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court*, in *INTERNATIONAL CRIMINAL LAW* (William A. Schabas ed., 2010).

42. JUAN CARLOS GARZON, *MAFIA & CO.: THE CRIMINAL NETWORK IN MEXICO, BRAZIL, AND COLOMBIA* 172 (Kathy Ogle trans., Woodrow Wilson Center for Scholars

Over time, the DTOs have learned to survive against the State precisely because they are able to break the organization up into smaller groups and reunite when the threat has subsided. They will also spontaneously form and dissolve alliances with other DTOs when strategically necessary.⁴³ Breaking the organization up into smaller components makes it a more elusive target for Governments, motivating the State to pursue other, larger DTOs.⁴⁴ Even the leadership roles within each cartel are generally nebulous,⁴⁵ 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. This decentralization and diffusion of control makes it significantly more difficult for the authorities to bring down the entire organization.

There are at least seven major drug cartels operating in Mexico,⁴⁶ but only a few DTOs are responsible for the vast majority of the violence and drugs in Mexico. The major DTOs, the Gulf, Sinaloa, Juárez, and Tijuana Cartels, are constantly fighting each other in addition to the Mexican Government for supremacy in trafficking routes and control over the drug market.⁴⁷ The following briefly discusses these four major DTOs in Mexico, and their struggle to survive despite constant threats from the Mexican Army and each other.

1. *The Gulf Cartel and Los Zetas*

The Gulf Cartel started out as an organization whose main source of income and power was the import of contraband goods, including alcohol, from Mexico into the United States in the 1940s.⁴⁸ Back then, the organization was known as the Matamoros Cartel,⁴⁹ and it remained successful by co-opting political leaders and those in the upper echelons of the

2008) [hereinafter MAFIA & CO.].

43. STRATFOR, DRUG CARTELS, *supra* note 5, at 11–12.

44. MAFIA & CO., *supra* note 43, at 103.

45. *Id.* at 102.

46. CRS Report, *supra* note 3, at 1.

47. MAFIA & CO., *supra* note 43, at 102.

48. *Id.* at 83.

49. *Id.*

petroleum and transportation sectors.⁵⁰ In 1994, Mexican President Zedillo began to specifically target the organization and its leaders, leaving a power vacuum and instability among the remaining members.⁵¹ Around 1996, the cartel merged with another DTO in Laredo.⁵² The cartel became so big, however, that its then-leader, Osiel Cardenas, divided up the territory and control of the cartel to subunits.⁵³ Each leader promised allegiance to Cardenas, and in return, Cardenas promised protection of the leaders by the state, federal, and municipal authorities working for him.⁵⁴ 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 the group.⁵⁵ In response, Cardenas did something unprecedented; he created his own paramilitary group whose job it was to protect and defend the cartel.⁵⁶

This new paramilitary group was known as Los Zetas. These fighters were, at first, directly recruited from Mexico's Airborne Special Forces Group.⁵⁷ The Special Forces were chosen to give Los Zetas access to sophisticated arms and the ability to carry out more complex operations, such as staging a prison break or responding to a military incursion.⁵⁸ It is unknown how many members make up Los Zetas, but the group now counts members of federal, state, and local law enforcement among their ranks; estimates range from 31 to over 200.⁵⁹ In 2003,

50. *Id.*

51. *Id.* at 84.

52. *Id.*

53. *Id.*

54. *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 85–86.

55. *Id.* at 86–87.

56. CRS Report, *supra* note 3, at 7; MAFIA & CO., *supra* note 43, at 88.

57. CRS Report, *supra* note 3, at 7.

58. MAFIA & CO., *supra* note 43, at 88; CRS Report, *supra* note 3, 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”).

59. MAFIA & CO., *supra* note 43, at 88; Tim Padgett, *The Killers Next Door*, TIME, Apr. 18, 2005; CRS Report, *supra* note 3, at 7.

despite having his own private military force, Cardenas was captured at his home, arrested, and later extradited to the United States.⁶⁰ Since that time, Los Zetas have become increasingly independent from the Gulf Cartel and several reports indicate that it is no longer tied to the Gulf Cartel.⁶¹

The Gulf Cartel's area of control is generally believed to be the entire Texas border, except for Juárez, and the Eastern Coast of Mexico.⁶² Los Zetas continue to maintain control over the Northern Mexican cities of Nuevo Laredo and Matamoros,⁶³ and are thought to be in control of the lucrative trafficking routes along the eastern part of the United States border.⁶⁴

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.⁶⁵ Los Zetas is not just making money from protection and drug running, but is also increasingly engaging in other illegal business activities, such as extortion, prostitution, and human kidnapping,⁶⁶ in addition to selling other types of contraband to the local population.⁶⁷

2. *The Sinaloa Cartel*

The Sinaloa Cartel maintains control over most of the Pacific coast of Mexico, including most of Baja California.⁶⁸ The

60. MAFIA & CO., *supra* note 43, at 88–89; CRS Report, *supra* note 3 at 8.

61. MAFIA & CO., *supra* note 43, at 93.

62. *Cf.* CRS Report, *supra* note 3, at 3.

63. *Id.* at 8.

64. Ed Vulliamy, *The Zetas: Gangster Kings of Their Own Brutal Narco-State*, THE OBSERVER, Nov. 15, 2009, <http://www.guardian.co.uk/world/2009/nov/15/zetas-drugs-mexico-us-gangs/print>. (“[N]ot only had the Zetas sealed off the bridges around Reynosa, but international bridges into the United States as well”).

65. *Id.*

66. 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, *supra* note 6, at 5. This human smuggling results in a profit for the cartels to the tune of \$10,000 per person. *Id.*

67. MAFIA & CO., *supra* note 43, at 96; STRATFOR, DRUG CARTELS, *supra* note 6, at 5.

68. JUNE S. BEITTEL, CONG. RESEARCH SERV., R40582, MEXICO'S DRUG RELATED

rise of the Sinaloa Cartel is similar to that of the Gulf Cartel; both arose as the Matamoros Cartel began to decline in the late 1980s.⁶⁹ As the DEA was beginning to gain momentum in taking out Matamoros, their leader, Miguel Angel Felix Gallardo, was arrested and the territory he controlled was divided quasi-geographically; with one of those territories becoming the Sinaloa DTO.⁷⁰

The Sinaloa leaders, having control over 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.⁷¹ This area is particularly mountainous, making it beneficial to poppy farmers because the terrain makes it difficult for law enforcement to eradicate the plants before they can be cultivated.⁷²

The Sinaloa Cartel is widely considered the most active and successful smuggler of cocaine,⁷³ being able to establish operations in places like Argentina, Paraguay, and Peru.⁷⁴ This is especially astounding considering that the Sinaloa DTO has been the main target of President Calderon’s military counter-cartel efforts.⁷⁵

3. *The Juárez Cartel*

Just like the other cartels, the Juárez Cartel, also known as the Vicente Carrillo Fuentes (VCF) Organization, was created when the Matamoros Cartel was spun off into smaller cartels.⁷⁶ VCF was the first to transport cocaine from Colombia to Mexico using a fleet of planes, rather than using ground

VIOLENCE 7 at fig. 1 (2009) [hereinafter BEITTEL, DRUG RELATED VIOLENCE].

69. Cf. MAFIA & CO., *supra* note 43, at 83, 98.

70. *Id.* at 98.

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

72. Cf. MAFIA & CO., *supra* note 43, at 104.

73. BEITTEL, DRUG RELATED VIOLENCE, *supra* note 68, at 4; STRATFOR, DRUG CARTELS, *supra* note 6, at 6–7.

74. STRATFOR, DRUG CARTELS, *supra* note 6, at 7.

75. “[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 State.” *Id.*

76. MAFIA & CO., *supra* note 43, at 98.

transportation.⁷⁷ This became a highly lucrative venture, earning the DTO up to \$200 million per week.⁷⁸

Several sources have reported that the Sinaloa and Juárez cartels have merged, along with the smaller Guadalajara Cartel to form one big cartel known as “The Federation.”⁷⁹ Illustrating the fluidity and nebulousness of the cartels, in 2008 the Juárez Cartel partnered with Los Zetas to help it ward off the Sinaloa Cartel for control of the city of Juárez.⁸⁰ 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 when the Matamoros Cartel ended, with Felix Gallardo giving control over the land south of California to his nephews.⁸¹ The city of Tijuana’s proximity to the United States and the ocean make it prime real estate for the DTOs.

In the past few years, the influence 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.⁸² The United States used the coast guard to stop drug shipments into West Coast ports, and to capture Tijuana Cartel leaders hiding on boats.⁸³ At the same time, Mexico started to send Army troops to Baja California in January 2007, to stop the violence and combat corruption.⁸⁴ As a result of these actions, plus internal instability, the Tijuana Cartel now only has the ability and power to operate in the city of Tijuana, while the Gulf and Sinaloa Cartels continue to fight

77. *Id.* at 98–99.

78. *Id.* at 99.

79. See e.g. MAFIA & CO., *supra* note 43, at 99; CRS Report, *supra* note 3, at 1 (“The Cartels work together, but remain independent organizations”).

80. Daniel Borunda, *La Linea, Zetas Cartels Pact May Shift Power in Mexico*, EL PASO TIMES, June 4, 2011, http://www.elpasotimes.com/communities/ci_18204094.

81. See MAFIA & CO., *supra* note 43, at 98.

82. STRATFOR, DRUG CARTELS, *supra* note 6, at 8–9.

83. Fred Burton, *Mexico: The Price of Peace in the Cartel Wars*, STRATFOR (May 2, 2007), available at http://www.stratfor.com/mexico_price_peace_cartel_wars.

84. *Id.*

for the rest of Western Mexico.⁸⁵

D. Mexican President Felipe Calderon's Response to the Violence

President Felipe Calderon took power in 2006 after the Mexican Courts controversially declared him the winner.⁸⁶ Calderon, a member of the center-right National Action Party (PAN), made a campaign pledge to create jobs, and fight poverty and crime.⁸⁷ Almost immediately after being sworn in, he instead turned his focus and resources to going after the DTOs.⁸⁸ This shift in priorities was likely prompted by the more than 1,000 drug-related deaths⁸⁹ between the time Calderon was declared President-elect in September and when he was sworn in December, 2006. At the core of President Calderon's anti-drug policy was the utilization of the Mexican Army to engage in direct conflict with the DTOs by arresting traffickers, burning growing fields, and intercepting shipments of drugs.⁹⁰ Due to reports of rampant corruption among federal and local police officers,⁹¹ President Calderon chose to utilize primarily

85. *Id.*

86. See *Calderon Declared Mexico's President-Elect*, ASSOC. 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 Calderon winning by .56% of the total vote, or almost 234,000 votes. *Id.*; see also Manuel Roig-Franzia, *Calderon's Offensive Against Drug Cartels*, WASH. POST, July 7, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/07/AR2007070701280.html>.

87. George W. Grayson, *Mexico and the Drug Cartels*, FOREIGN POL'Y RES. INST. (Aug. 2007), <http://www.fpri.org/enotes/200708.grayson.mexicodruggcartels.html>.

88. *Id.*

89. *Id.*

90. BEITTEL, DRUG RELATED VIOLENCE, *supra* note 68, at 3.

91. CRS Report, *supra* note 3, at 9–10; Tim Padgett, *Mexico's Calderon Needs to Listen, Not Just Lecture U.S.*, TIME (May 19, 2010), <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), <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.”).

the Army to fight the DTOs, rather than law enforcement.⁹²

Deploying 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.⁹³ Lieutenant Colonel Julian Leyzaola Perez, a soldier who took over the job of Police Chief of Tijuana, explains 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,”⁹⁴ but now the violence is committed with “a couple of guys in old cars [wielding] pistols.”⁹⁵

Despite this result, there are still lingering concerns about the use of the military.⁹⁶ 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 Mexican citizens who were taken into custody by the Army.⁹⁷ 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 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

92. BEITTEL, DRUG RELATED VIOLENCE, *supra* note 69, at 9.

93. Finnegan, *supra* note 17.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

couldn't breathe. It felt like years passed. Too long.⁹⁸

According to Castellanos, the abuse continued for two days, and on the second day, when the soldiers began to make violent threats against his wife and daughters, Castellanos finally gave in and signed their denunciation form.⁹⁹ This form contained a list of names of people suspected of working for the DTOs who were then picked up by the Army and allegedly tortured just as he was.¹⁰⁰ "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 forms of torture by the Army, such as attempted suffocation with plastic bags, waterboarding,¹⁰¹ being struck with rebar and assault rifles, and the use of electrodes placed on the victim's genitals.¹⁰² As for the man behind the alleged abuse, the Colonel maintains that people have been physically hit, but not tortured.¹⁰³ His job, according to him, is to execute arrest orders and hand the suspects over to the Army.¹⁰⁴

In addition to Castellanos' allegations, there have been over 4,000 complaints filed against soldiers for acts including torture, rape, and kidnapping since President Calderon instituted his military strategy.¹⁰⁵ These abuses continue to happen because

98. *Id.*

99. *Id.*

100. *Id.*

101. "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), <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 as torture.

102. 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 cannot return to their homes. Finnegan, *supra* note 17.

103. *Id.*

104. *Id.*

105. 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

the military is allowed to act as both judge and jury. In the past, President Calderon has proposed trying some of these crimes in civilian courts instead of military commissions,¹⁰⁶ but under his plan, the most egregious violations, like murder, would still be investigated and prosecuted by the military.¹⁰⁷

Even the United States has started threatening to withhold foreign aid from the Mexican Government in order to spur a change toward military accountability and away from impunity.¹⁰⁸ Various non-governmental organizations have also started to voice their disapproval. For example, Human Rights Watch has unsuccessfully requested a list of prosecutions carried out by the Mexican Military from the Ministry of Defense (MOD).¹⁰⁹ The MOD has asserted that there have been many convictions, but denies access to any information related to Army cases that are currently pending.¹¹⁰ This situation makes it extremely difficult to ascertain to what extent soldiers are being held accountable for their actions.¹¹¹

As discussed below, the drug-related violence in Mexico is a “non-international armed conflict” within the meaning of 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.

WATCH, UNIFORM IMPUNITY: MEXICO’S MISUSE OF MILITARY JUSTICE TO PROSECUTE ABUSES IN COUNTERNARCOTICS AND PUBLIC SECURITY OPERATIONS 2, (2009), available at http://www.hrw.org/sites/default/files/reports/mexico0409web_0.pdf [hereinafter UNIFORM IMPUNITY].

106. Archibold, *A Proposal to Address Rights Abuse in Mexico*, *supra* note 106; UNIFORM IMPUNITY, *supra* note 106, at 3.

107. Archibold, *A Proposal to Address Rights Abuse in Mexico*, *supra* note 106.

108. *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.”).

109. UNIFORM IMPUNITY, *supra* note 106, at 3.

110. *Id.*

111. *Id.*

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,¹¹² on August 8, 1949, and ratified the Conventions on October 29, 1952.¹¹³ Under the Geneva Conventions, if a situation of violence can at some point be regarded as rising to a level of “armed conflict,” it triggers a set of rules that apply to the parties engaged in the armed conflict.¹¹⁴ These rules are derived from customary international humanitarian law and codified in the Geneva Conventions of 1949.¹¹⁵ The goal is to both inhibit and empower the parties in important ways, including restraining the parties from committing acts of “wanton cruelty and ruthlessness,”¹¹⁶ and providing protection to those who are affected the most by the conflict, namely those not engaged in active hostilities.¹¹⁷ Consequently, an important initial matter is determining whether the drug-related violence

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

113. U.N. Office of Legal Affairs, Report of Mexico on the Status of the Protocols Additional to the Geneva Conventions of 1949, Pursuant to United Nations General Assembly Resolution 63/125 (June 2, 2010), http://www.un.org/en/ga/sixth/65/StatProtGeneva_StatesComments/Mexico_E.pdf; *International Humanitarian Law: State Parties/Signatories*, INT'L COMM. OF THE RED CROSS, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P#ratif> (last visited Oct. 25, 2011) (listing all the IHL treaties that Mexico ratified or acceded); *International Treaty Adherence: Mexico*, Geneva Acad. Of Int'l Humanitarian and Human Rights, http://www.adh-geneva.ch/RULAC/international_treaties.php?id_state=145 (last updated Jan. 13, 2010) (listing all the IHL and International Human Rights treaties that Mexico has ratified). Mexico has yet to ratify Protocol Additional II to the Geneva Conventions. *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].

114. JEAN DE PREUX, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 36–37 (A.P. de Heney, trans., Jean S. Pictet ed. 1960), available at http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-III.pdf.

115. Geneva III, *supra* note 15, art. 2–3.

116. KALSHOVEN & ZEGVELD, *supra* note 13, at 12.

117. *Id.*

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 3,¹¹⁸ however it identifies the type of situation that must exist to trigger application of this body of international law. The rationale for using the phrase “armed conflict” is that it:

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 between two or more Contracting Parties brings [the Convention] automatically into operation.¹¹⁹

At the time the Geneva Conventions were codified, there was no legal definition of “armed conflict.”¹²⁰ The commentary to the First Geneva Convention explains that “armed conflict” instead of “war” was deliberately used.¹²¹ Fearing that states would redefine their hostile acts as something other than war,¹²² the phrase “armed conflict” was designed to avoid linguistic wordplay.¹²³

In 1995, the International Criminal Tribunal for the Former

118. Geneva III, *supra* note 15, 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, 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...”).

119. JEAN PICTET, COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (Int’l. Comm. Red Cross 1952), available at http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf.

120. ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 27 (2010).

121. PICTET, *supra* note 120.

122. *Id.* (giving “engaging in a police action” and “acting in legitimate self-defense” as alternate names for armed conflict).

123. *Id.*

Yugoslavia (ICTY), in *Prosecutor v. Tadic*, articulated a definition of “armed conflict.”¹²⁴ Dusko Tadic was the President of the Local Board of the Serb Democratic Party (SDS).¹²⁵ 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.¹²⁶ After the SDS had captured the town, Tadic became instrumental in collecting and moving the Croatian and Muslim population out of town.¹²⁷ Many were shot as they were being led out of town, and those who survived were placed in internment camps, beaten, sexually assaulted, executed, and tortured, in addition to suffering degrading psychological treatment at the hands of the soldiers.¹²⁸ The ICTY Trial Chamber found Tadic guilty of crimes against humanity and violations of the laws and customs of war, and sentenced him to 20 years imprisonment.¹²⁹

On appeal Tadic argued, in addition to other theories,¹³⁰ that the ICTY had no subject matter jurisdiction, based on the fact that none of these crimes had taken place during an armed conflict.¹³¹ An ICTY appeals chamber held that the *sine qua non* for application of the Geneva Conventions is an armed conflict,¹³² and proceeded to define the term. “[A]n armed

124. *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995) [hereinafter *Tadic Jurisdiction Decision*].

125. *Prosecutor v. Tadic*, Case No. IT-94-1-I, Sentencing Judgment, ¶ 40 (Int’l Crim. Trib. For the Former Yugoslavia July 14, 1997).

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

127. *Id.*

128. *Id.*; *Prosecutor v. Tadic*, Case No. IT-94-1-I, Indictment (Amended) ¶ 4–4.5 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 14, 1995).

129. *ICTY Tadic Case Sheet*, *supra* note 127, at 1, 5.

130. *See generally id.* (describing the final conviction after appeal, showing challenge to jurisdiction as being unsuccessful); *Tadic Jurisdiction Decision*, *supra* note 125 (discussing Tadic’s other challenges to jurisdiction under theories that the ICTY was unlawfully established, and that the ICTY did not have primacy over the courts of Bosnia and Herzegovina).

131. *Tadic Jurisdiction Decision*, *supra* note 124, ¶ 65.

132. *Id.* ¶ 67.

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.”¹³³ This groundbreaking definition has been widely used since 1995 as a test for the characterization of armed conflict¹³⁴ 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.¹³⁵ The use of this definition in the jurisprudence of the ICC, as well as its use in relation to conflicts in East Timor,¹³⁶ Lebanon,¹³⁷ Somalia,¹³⁸ and the Sudan¹³⁹ supports the notion that it is now to be regarded as customary international law.¹⁴⁰ 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 is 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,¹⁴¹ and each conflict must be categorized on an individualized basis.¹⁴² Since the *Tadic* case, various authorities have indicated

133. *Id.* ¶ 70.

134. CULLEN, *supra* note 121, at 120–21.

135. *Id.* at 120–21 nn. 18–25.

136. EAST TIMOR ACTION NETWORK, REPORT OF THE COMMISSION FOR RECEPTION, TRUTH, AND RECONCILIATION IN EAST TIMOR ¶ 141 (2005), available at <http://www.etan.org/news/2006/cavr.htm>.

137. 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).

138. 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).

139. 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).

140. *Id.* ¶¶ 121–22.

141. *Tadic* Jurisdiction Decision, *supra* note 124; 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).

142. Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 93 (Int’l Crim. Trib. for Rwanda Dec. 6, 1999) (“[W]hether or not a situation can be

key factors to be considered in categorizing conflicts. For example, a Trial Chamber of the ICTY, presiding over the trial of Slobodan Milosevic, articulated some factors for measuring the intensity of the conflict.¹⁴³ These factors focused on the protracted nature of the conflict and seriousness of the armed clashes,¹⁴⁴ the spread of clashes over the territory,¹⁴⁵ the increase in the number of governmental forces deployed,¹⁴⁶ as well as the weapons used by both parties.¹⁴⁷

The situation in Mexico far exceeds the Trial Chamber's description of the protracted nature of the conflict in the *Milosevic* case. The Chamber found the existence of an armed conflict because the Kosovo Liberation Army (KLA) "conducted many operations against the police, including killing people who had been employees of the police and those who had cooperated with the police, amounting to about 20 persons in 1997."¹⁴⁸ Following that reasoning, the first prong of the *Milosevic* test, protracted nature of the conflict and seriousness and increases in armed clashes, is met in Mexico.

The type and variety of weapons used by the cartels is enough to satisfy another prong of the *Milosevic* armed conflict test: weapons being used by both parties.¹⁴⁹ The Trial Chamber in *Milosevic* found that the Kosovo Liberation Army was equipped with "rifles, guns, and mortars."¹⁵⁰ Certainly if the

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 (Int'l Crim. Trib. for Rwanda Dec. 2, 1998) ("For a finding to be made on the existence of an internal armed conflict . . . it will be therefore necessary to evaluate both the intensity and organization of the parties to the conflict.").

143. Prosecutor v. Milosevic, Case No. IT-02-54-T Decision on the Motion for Judgment of Acquittal, ¶¶ 28–31 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2008) [hereinafter *Milosevic Case*].

144. *Id.* ¶ 28.

145. *Id.* ¶ 29.

146. *Id.* ¶ 30.

147. *Id.* ¶ 31.

148. *Id.* ¶ 28.

149. *See id.* ¶¶ 16, 31–32; Memorandum from Gen. Barry R. McCaffrey to Col. Michael Meese, United States Military Academy (Nov. 25, 2008), *available at* http://www.unc.edu/depts/diplomat/item/2009/0103/comm/mccaffery_mexico.html [hereinafter McCaffrey, *Narco-Violence*].

150. *Milosevic Case*, *supra* note 144, ¶ 31.

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 rifles¹⁵¹ in Mexico is enough to establish the existence of an armed conflict.

The next prong of the *Milosevic* test is the spread of clashes over the territory. 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,” the Chamber held that the Geneva Conventions apply to the entire area of the nation state involved in the armed conflict.¹⁵² 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.”¹⁵³ Therefore, international humanitarian law applies to the entirety of the territories under the DTO’s control, whether or not combat is taking place there.¹⁵⁴

In Mexico, there is both a “spread of clashes throughout the territory,”¹⁵⁵ as stated above, and an increase in governmental forces being utilized in Mexico.¹⁵⁶ The violence in Mexico has consistently taken place in a few specific areas 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 (containing Tijuana).¹⁵⁷ President Calderon has chosen several “hotspots” to focus the efforts of the military, and has sent over

151. See McCaffrey, *Narco-Violence*, *supra* note 150.

152. *Tadic* Jurisdiction Decision, *supra* note 125, ¶ 67.

153. *Id.* ¶ 70.

154. Bahia Tazhib-Lie & Olivia Swaak-Goldman, *Determining the Threshold for the Application of International Humanitarian Law*, in MAKING THE VOICE OF HUMANITY HEARD 239, 246 (Liesbeth Lijnzaad et al. eds., 2004).

155. See *supra* Part II.C; Grayson, *Mexico and the Drug Cartels*, *supra* note 88.

156. This is the third prong of the “Intensity of the Conflict” analysis, which is the second element of the *Tadic* test. See *Milosevic* Case, *supra* note 144, ¶¶ 16–17, 30.

157. Scott Stewart & Alex Posey, *Mexico: The War With the Cartels in 2009*, STRATFOR (Dec. 9, 2009), http://www.stratfor.com/weekly/20091209_mexico_war_cartels_2009.

35,000 soldiers to those places.¹⁵⁸ In early 2009, he sent over 5,000 troops to Juárez to engage the Juárez Cartel.¹⁵⁹ A month later, President Calderon was forced to deploy 3,000 more troops, totaling over 8,000 military troops by mid-2009.¹⁶⁰

Applying the *Milosevic* standard to the Mexican situation demonstrates it has risen to the level of an armed conflict. There is another non-exclusive 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 an “irregular and sporadic basis” due to “frequent exchanges of gunfire between the Israeli Defense Forces and Palestinian gunmen.”¹⁶¹ Mr. Dugard’s analysis suggests that the minimum requirement for an armed conflict is a situation involving more than sporadic exchanges of gunfire.¹⁶²

Under this paradigm, 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 agents¹⁶³ have been dispatched to strategic locations in Mexico to fight the DTOs, and the fighting in the streets has led to over 10,000 deaths in fewer than three years.¹⁶⁴ The Army “increasingly appears to have been drawn into a deepening

158. *Id.*

159. See BEITTEL, DRUG RELATED VIOLENCE, *supra* note 69, at 13.

160. *See id.*

161. Special Rapporteur on Human Rights, *Rep. on the Situation of Human Rights in the Palestinian Territories Occupied by Israel Since 1967*, Comm’n on Human Rights, ¶ 13, U.N. Doc. A/56/440 (Oct. 4, 2001)(by John Dugard) [hereinafter Special Rapporteur, *Report on Human Rights*]; see also United Nations, Econ. & Soc. Council, Comm’n on Human Rights, Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine, ¶ 18, U.N. Doc. E/CN.4/2002/32 (2002) (stating that at times the conflict “probably qualifies as an armed conflict as a result of the protracted armed violence between the IDF and Palestinian militia . . .”).

162. See Special Rapporteur, *Report on Human Rights*, *supra* note 162, ¶ 13.

163. See BEITTEL, DRUG RELATED VIOLENCE, *supra* note 69, at 3.

164. See Steve Fainaru & William Booth, *As Mexico Battles Cartels, the Army Becomes the Law*, WASH. POST, Apr. 2, 2009, at A12.

morass of cartel rivalries, local political disputes, and blood feuds.”¹⁶⁵ In a southern Mexican State, the Army increased its presence by killing reputed drug traffickers and making scores of arrests.¹⁶⁶ 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.¹⁶⁷ The Mexican military is issuing “automatic rifles, high-caliber ammunition, grenade launchers, and fragmentation grenades to” state and local officers who pass a security clearance,¹⁶⁸ in order to combat the rocket-propelled grenades, bazookas, and automatic weapons in the hands of the DTOs.¹⁶⁹ 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.¹⁷⁰

Therefore, under Special Rapporteur Dugard’s conceptualization of armed conflict, the situation in Mexico simply is a true armed conflict under international law.

Applying the *Tadic* and *Milosevic* decisions, in addition to John Dugard’s analysis, demonstrates that the conflict between the Mexican government and the DTOs is very clearly an armed conflict. Since an armed conflict is ongoing in Mexico, the next

165. *See id.*

166. *See id.*

167. *See id.*

168. *Id.*

169. *See* McCaffrey, *Narco-Violence*, *supra* note 150; David Luhnnow & Jose de Cordoba, *The Perilous State of Mexico*, WALL ST. J., Feb. 21–22, 2009, at W1–2.

170. McCaffrey, *Narco-Violence*, *supra* note 150.

step is to determine whether it can properly be classified as 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 must be determined whether the armed conflict is “international” or “non-international” in nature. This further classification is critical 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 are fewer obligations placed on the parties to the conflict.¹⁷¹ 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).¹⁷² Neither of these protections are mandatory in a non-international armed conflict.¹⁷³ Instead, Common 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.¹⁷⁴

As will be explained below, the Mexican armed conflict is one of a non-international character. This designation means that, consistent with Common Article 3, the DTOs and the Mexican Army are prohibited from committing “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” against those

171. EMILY CRAWFORD, *THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT* 78 (2010).

172. *See id.*

173. *See id.*

174. *See id.*

not involved in hostilities¹⁷⁵

Since the *Tadic* decision, international and domestic tribunals have struggled with determining when a “non-international” armed conflict exists. Several tribunals have proposed non-determinative factors, while others have chosen to rely on the observations of those on the ground in deeming the armed conflict non-international. The International Criminal Tribunals for Yugoslavia and Rwanda have addressed this issue and ruled each respective conflict to be non-international for completely different reasons. Due to these variances, there remains no articulated and consistent way to determine when an armed conflict is non-international.

The term “not of an international character” was left undefined by States who attended the drafting convention because they could not reach a consensus on a definition.¹⁷⁶ 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.¹⁷⁷

The most common type of contemporary armed conflicts are those that are non-international in character,¹⁷⁸ 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 to be customary international law,¹⁷⁹ this section will argue for the United States Supreme Court’s conceptualization of a non-international armed conflict as the default when the conflict does not involve two or more States.

175. Geneva Conventions, *supra* note 15.

176. CULLEN, *supra* note 121, at 44–51 (discussing several positions held by the delegates regarding how to define armed conflict not of an international character).

177. CRAWFORD, *supra* note 172, at 69–74.

178. Michelle Mack, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, INTERNATIONAL COMM. OF RED CROSS (Feb. 5, 2008), http://www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf.

179. 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).

This paradigm removes the perpetually gray area surrounding classification of the armed conflict.

1. *Tadic and its Progeny*

The ICTY Trial Chamber in *Prosecutor v. Tadic* articulated a two prong test, wherein “the intensity of the conflict and the organization of the parties to the conflict”¹⁸⁰ should be used for the purposes of applying “the rules contained in Common Article 3.”¹⁸¹ *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,¹⁸² Many of these cases beg the threshold question: how organized does the group have to be? Must the group contain a minimum number of members? Must there be a general in charge or can the power be split horizontally between multiple leaders? Must there even be echelons within the group? It is because of these unresolved issues that it is nearly impossible to draw 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*.¹⁸³ Choosing to focus on the governing body of the KLA, the Chamber looked at a plethora of factors not articulated in *Tadic*. The court first looked at the KLA’s ‘General Staff,’ comprised of those who made the decisions for the entire

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

181. *Id.*

182. *See Prosecutor v. Akayesu*, *supra* note 143, ¶ 626 (describing the degree of organization as being “such so as to enable the armed group or dissident forces to plan and carry out concerted military operations, and to impose discipline in the name of a *de facto* authority . . . [to] be able to dominate a sufficient part of the territory so as to maintain sustained and concerted military operations and to apply Additional Protocol II. In essence, the operations must be continuous and planned.”); *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Trial Chamber Judgment, ¶¶ 91, 92, 94 (Int’l Crim. Trib. for Rwanda Dec. 6, 1999) (discussing how the evaluation of the degree of an organization must be done on a case by case basis).

183. *Prosecutor v. Limaj*, Case No. IT-03-66-T, Trial Chamber Judgment, ¶¶ 83–86 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

KLA.¹⁸⁴ The Chamber noted that the General Staff's members included at least seven people.¹⁸⁵ The Chamber then focused on the duties carried out by the Staff, which included¹⁸⁶ responsibility for appointing the commander in each of the seven areas controlled by the KLA,¹⁸⁷ controlling where weapons were procured and distributed,¹⁸⁸ issuing communiqués and political statements,¹⁸⁹ and authorizing military action by the KLA.¹⁹⁰ 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 “[t]he level of organisation [sic] in each zone [controlled by the KLA] was fluid and developing and not all zones had the same level of organisation and development.”¹⁹¹

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.¹⁹² *Limaj*, however, 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 in hopes of encouraging all parties to the conflict to follow international humanitarian law. Conversely, the fact that the KLA was gaining legitimacy among international governments, was willing to comply with the rules of war, and operated with a somewhat top-down command structure lead to the Chamber's decision. Either way, the ICTY's factors can be thought of as round holes and the unique circumstances of each armed conflict as square pegs, requiring some maneuvering to make them fit

184. *Id.* ¶¶ 96, 99–101.

185. *Id.* ¶ 94.

186. *Id.* ¶¶ 95–101.

187. *Id.* ¶¶ 95–96.

188. *Id.* ¶ 100.

189. *Id.* ¶ 101.

190. *Id.* ¶ 46.

191. *Id.* ¶ 95.

192. *Id.* ¶ 171.

the unique characteristics of each potential non-international armed conflict.

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*.¹⁹³ The *Haradinaj* Chamber concluded that the true requirement for an armed conflict is sufficient organization such that each side can militarily confront each other.¹⁹⁴ 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.¹⁹⁵

The Chamber then states that *none* of these factors are essential to establish whether the party is sufficiently organized for the purposes of an armed conflict.¹⁹⁶ The holding leaves a gap between theory and practice, forcing on future tribunals many nebulous, non-essential, and non-specific factors on which to base its conclusion; thus, rendering the exercise of determining organization completely arbitrary.

Adding further confusion to 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

193. *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Trial Chamber Judgement, ¶¶ 50–60 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

194. *Id.* ¶ 60.

195. *Id.*

196. *Id.*

constituted a non-international armed conflict in *Prosecutor v. Akayesu*.¹⁹⁷ In finding a non-international armed conflict in Rwanda, the Chamber held that both parties had forces that were considered to be separate, well-organized armies.¹⁹⁸ 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 a non-international armed conflict existed.¹⁹⁹

In two different international criminal tribunals (and interpreting the same law), each respective Trial Chamber used completely different criteria and forms of information in determining that the situation on the ground was a non-international armed conflict. The ICTY in *Milosevic* looked for a chain of command, ability to procure arms, and various other military metrics, whereas the ICTR looked at firsthand reports from observers concluding that the Rwandan government was involved in a non-international armed conflict. It is this kind of inconsistency between tribunals that makes it nearly impossible to articulate when the non-state parties are organized enough under *Tadic*.

The approach taken by the United Kingdom Asylum and Immigration Tribunal provides a real world illustration of the problems inherent in attempting to apply these factors to contemporary conflicts. Here, the Tribunal was confronted with determining whether the conflict in Somalia was international or non-international for the purposes of asylum proceedings.²⁰⁰ In holding that individuals outside of Mogadishu may not bring a claim for asylum, the tribunal found that a non-international armed conflict existed in Somalia, but omitted any coherent rationale or explanation for its holding.²⁰¹ The Tribunal cautioned against the use of the *Tadic* factors in making broad

197. *Prosecutor v. Akayesu*, *supra* note 143.

198. *Id.* ¶¶ 620–21.

199. *Id.* ¶¶ 115, 621.

200. *Somalia v. Sec'y of State for the Home Dep't*, [2008] UKAIT 22 (appeal taken from Eng.), *available at* <http://unhcr.org/refworld/pdfid/47dfd9172.pdf>.

201. *Id.* at 330–31, 343.

factual findings.²⁰² These 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.²⁰³ 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.”²⁰⁴ The UK Asylum and Immigration Tribunal recognized that the finding of an armed conflict, and the character of that armed conflict, is always going to be a factual question.²⁰⁵ For this reason, 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 this approach serves no precedential advantage for future conflicts. To illustrate this point, a fact finder could choose to apply only those factors outlined in the above cases that tend to prove the existence of sufficient organization to the armed conflict in Mexico. The DTOs satisfy at least four factors set forth in *Haradinaj*:²⁰⁶ 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 guide for resolution of the threshold question, a tribunal faced with this question could easily find that the DTOs are sufficiently organized. There exists, however, a plethora of factors that the DTOs do not meet, but are suggested by the ICTY and ICTR. These factors include an ability to define a unified military strategy, the ability to speak with one voice, the existence of a headquarters, and the ability to negotiate agreements such as peace accords or cease-fire agreements.²⁰⁷ The entire exercise of trying to make these factors fit a specific conflict will always be illusory—a set of square pegs attempting to be inserted into round holes. It is for this reason that a more

202. *Id.* at 317, 324.

203. *Id.* at 324–25.

204. *Id.* (emphasis in original)

205. *Id.*

206. Prosecutor v. Haradinaj, *supra* note 194, ¶ 60.

207. *Id.*

stable test is needed to identify non-international armed conflicts. The next section proposes 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 in contention.²⁰⁸ In the aftermath of the September 11, 2001, terrorist attacks and the subsequent United States invasion into Afghanistan, this question became a critical one. The United States, also a party to the Geneva Conventions,²⁰⁹ 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.²¹⁰ The United States military incursions conducted in Afghanistan were carried out with the stated purpose of destroying al Qaeda's military capabilities.²¹¹ Questions began to arise as to whether the Geneva Conventions applied to this conflict, and if applicable, would these incursions be classified as an international armed conflict or a non-

208. International Law Association Hague Conference on Use of Force, 2010, *Final Report on the Meaning of Armed Conflict in International Law*, 13-4, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1022> (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).

209. International Committee of the Red Cross (ICRC), *International Humanitarian Law-State Parties/Signatories*, (Aug. 1949), 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).

210. See 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, 168-78 (2005)(discussing whether or not the Global War on Terror is considered an "armed conflict" as non-state actors and the consequences of such a classification as evidenced by the United States reaction to the attacks of September 11).

211. See Memorandum from Jay Bybee to Alberto Gonzales (Jan. 22, 2002), available at <http://news.findlaw.com/hdocs/docs/doj/bybee12202mem.pdf> [hereinafter Bybee Memo]; 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, 321-22 (2007).

international armed conflict?²¹² The White House and Department of Justice maintained correctly that the conflict is not an international armed conflict because it does not involve two or more States.²¹³ This left two alternatives: either it is a non-international armed conflict or the Geneva Conventions are not applicable to American military action in Afghanistan.

The Bush administration, in response to this issue, argued that al Qaeda is not a State, and that the conflict is not confined to one nation or even one area of the world.²¹⁴ Relying heavily on a memorandum by Assistant Attorney General 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 Department of Justice concluded that this was also not a non-international armed conflict.²¹⁵ 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.²¹⁶ Essentially, 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.²¹⁷ This was the prevailing legal view until 2006, when the Supreme Court decided the *Hamdan* case.

212. See Bybee Memo, *supra* note 212, at 3–5.

213. Memorandum from Alberto Gonzales to the President (Jan. 25, 2002), available at <http://news.lp.findlaw.com/hdocs/docs/torture/gnzls2502mem2gwb.html> [hereinafter Gonzales Memo] (stating that Guantanamo detainees were not entitled to any of the protections of the Geneva Conventions).

214. *Id.*; Corn, *supra* note 212, at 324.

215. Gonzales Memo, *supra* note 214; Bybee Memo, *supra* note 212 (stating that the guarantees of Common Article 3 are not applicable to Guantanamo detainees); Karl Vick, *Amid Outcry on Memo, Signer's Private Regret*, WASH. POST, Apr. 25, 2009, available at <http://www.washingtonpost.com/wpdyn/content/article/2009/04/24/AR2009042403888.html>.

216. Memorandum from the President to the Vice President on the Humane Treatment of Taliban and Al Qaeda Detainees (Feb. 7, 2002).

217. Corn, *supra* note 212, at 296.

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,²¹⁸ was captured by American allies and handed over to United States military forces in Afghanistan.²¹⁹ Hamdan was, by his own admission, Osama Bin Laden's former driver and bodyguard.²²⁰ In June of 2002, eight months after his capture, Hamdan was placed in Guantanamo Bay, Cuba, and held for over a year before being deemed eligible for trial by a military commission,²²¹ where he was charged with one count of conspiracy "to commit . . . offenses triable by military commission."²²²

Hamdan then filed a petition for a writ of habeas corpus and writ of mandamus challenging the government's use of these commissions, arguing that these commissions violated his guarantees under Common Article 3 of humane treatment and trial by a regularly constituted tribunal.²²³ To resolve the ultimate question as to whether the military commissions violated the Geneva Conventions, the Court had to determine whether the guarantees of Geneva were applicable to those captured in 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 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.²²⁴ 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.²²⁵ Second, under the view of the majority, the Geneva Conventions did not apply in

218. *Bin Laden's Driver to be First of Gitmo Trials*, ASSOC. PRESS, July 18, 2008, available at <http://www.msnbc.msn.com/id/25730678>.

219. *Hamdan v. Rumsfeld*, 548 U.S. 557, 556 (2006).

220. Mark Tran, *Profile: Salim Ahmed Hamdan*, GUARDIAN, June 5, 2007, <http://www.guardian.co.uk/world/2007/jun/05/guantanamo.usa>.

221. *Hamdan*, 548 U.S. at 566.

222. *Id.*

223. *Id.* at 567.

224. *Hamdan v. Rumsfeld*, 415 F.3d 33, 40–42 (D.C. Cir. 1995).

225. *Id.*

any form to the so-called “war on terror,” and Hamdan was denied his international law claim that the commissions were improper.²²⁶

After granting certiorari, the majority of the Supreme Court reversed the decision of the Circuit Court, and classified the armed conflict using an almost exclusively textual approach. Instead of focusing on the reasons for the conflict, or the components of the parties involved, the Supreme Court simply determined that the conflict was an armed one.²²⁷ 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.²²⁸ 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.

The text of Common Article 3 clearly indicates its own trigger, a “conflict not of an international character.”²²⁹ Therefore, the plain text of Common Article 3 articulates its application solely by defining itself “in contradistinction” to an international armed conflict.²³⁰ Stated another way, under Supreme Court jurisprudence, *any* armed conflict not between two or more 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.²³¹ 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 in which the United States found itself involved.²³²

This revolutionary, yet simple way of conceptualizing the Geneva Conventions also avoids the empirical problem of States’

226. *Id.* at 40–42.

227. *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006).

228. *See id.* at 567–68.

229. Geneva Conventions, *supra* note 15.

230. *Id.* at 630.

231. *Id.* at 630–31.

232. *Id.* at 628–32.

refusals to acknowledge the existence of an armed conflict within their own borders.²³³ 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 would be reluctant to acknowledge an armed conflict is being waged within its territory. First, a State's acknowledgment 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.²³⁴ Second, deeming the struggle to be an armed conflict can be perceived as giving legitimacy to the combatants and their goals.²³⁵ States prefer to treat these situations as internal disturbances and suppress them with no limitation on the use of force.²³⁶ Focusing on the pure interests of States helps illustrate the third reason why governments are disinterested in recognizing an armed conflict, namely that international humanitarian law places a limit on the array of repressive methods available to a State to quell the uprising.²³⁷

Because of the natural hesitancy of States, the need to clarify conditions leading to a de facto state of armed conflict is 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, meaning that it is possible for Mexico to be involved in a non-international armed conflict against the DTOs.

3. *Terrorism, Insurgency, and the DTOs*

Because it is possible for a high contracting party to the Geneva Conventions to be locked in a non-international armed

233. 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).

234. Cullen, *Parameters*, *supra* note 234, at 197.

235. *Id.*

236. *Id.*

237. *Id.*

conflict with a terrorist organization, it is important to draw parallels between the DTOs and traditional 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 DTOs in Mexico can be properly characterized as parties to a non-international armed conflict.

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 Muslims’ countries.”²³⁸ This is accomplished by linking a multitude of decentralized groups operating independently into a global network of people using the same means to accomplish similar goals.²³⁹ Al Qaeda’s role in this global network is acting as one of these decentralized groups that provides advice, funding, propaganda, and expertise to other decentralized allied groups.²⁴⁰ In this respect, Osama Bin Laden²⁴¹ 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,²⁴² 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 a decentralized set of

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

239. *Id.* at 598–600.

240. *Id.* at 600.

241. 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), <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*, COURIER (May 2, 2011), <http://www.thecourier.com.au/news/opinion/editorial/general/good-riddance-to-figurehead-of-world-terrorism/2150584.aspx>.

242. Kilcullen, *Countering Global Insurgency*, *supra* note 239, at 602.

small units that sometimes work in concert to achieve their stated goals.²⁴³ The rationale for this decentralization is that if the 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.²⁴⁴ The infamous al Qaeda training bases are decentralized as well, having been found in such diverse countries as Sudan, Yemen, Chechnya,²⁴⁵ and Tajikistan.²⁴⁶ Those who are allied with al Qaeda²⁴⁷ are given the knowledge and skill necessary to train others and threaten those States against whom jihad has been declared.²⁴⁸ 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.²⁴⁹ In fact, the group that carried out the 2004 Madrid transportation bombings raised the necessary \$10,000 in funding by selling pirated compact discs and trafficking in narcotics.²⁵⁰ The London Underground bombing in July 2005, which cost the perpetrators a mere \$1,000 of their own legally obtained money, illustrates the relative ease of a cell springing up without the direct support of al Qaeda; On the other hand, any of these rogue groups may be able to procure weapons through ties to al Qaeda,²⁵¹ and most groups allied with al Qaeda use those

243. Eben Kaplan, *The Rise of al-Qaedaism*, COUNCIL ON FOREIGN REL., (July 18, 2007), <http://www.cfr.org/terrorist-organizations/rise-al-qaedaism/p11033>.

244. 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).

245. *Id.* at 527, n.51.

246. Praveen Swami, *Al-Qaeda Training Camp Uncovered In Tajikistan*, TELEGRAPH, (Oct. 19, 2010), <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/8073451/Al-Qaeda-training-camp-uncovered-in-Tajikistan.html>.

247. 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/sfp/crs/terror/RL33038.pdf>.

248. Buxton, *supra* note 245, at 527.

249. Kaplan, *supra* note 244.

250. *Id.*

251. Michael Buchanan, *London Bombs Cost Just Hundreds*, BBC NEWS, (Jan. 3,

weapons to commit acts of terrorism locally.²⁵²

Similarly, the DTOs function largely without the vertical integration of power, and organizationally, they are almost indistinguishable from terrorist organizations. Just as al Qaeda provides funding and training to groups who wish to carry out its goals, DTOs provide guns, drugs, and money to groups that are willing to do its dirty work.²⁵³

Starting from the bottom up, primarily young men who have no other job prospects are given low-level military training and provided a salary to carry out violent acts on behalf of the DTO.²⁵⁴ Similar to recruiting disenfranchised youth to be terrorists, many of these low-level criminals function as contractors, willing to do anything, including planting bombs, for the equivalent of about \$250.²⁵⁵ In addition to being paid, these young men have the potential to move up the ladder and become assassins.²⁵⁶

Larger groups of individuals commit specific crimes such as bank robberies, carjackings, and muggings.²⁵⁷ These criminals are called upon as needed by the DTOs.²⁵⁸ Above these young criminals, one finds drug and weapons dealers. These dealers are able to provide neighborhoods with guns in addition to illegal substances, but their power does not extend much further than their specific geographic area.²⁵⁹ Dealers obtain their drugs

2006), [http:// news.bbc.co.uk/2/hi/uk_news/4576346.stm](http://news.bbc.co.uk/2/hi/uk_news/4576346.stm); Hannah K. Strange, *July 7 Bombings 'Cost Just \$1000'*, UPI, (Jan. 3, 2007), http://www.upi.com/Business_News/Security-Industry/2006/01/03/July-7-bombings-cost-just-1000/UPI-61541136332929/.

252. KATZMAN, *supra* note 248.

253. NAT'L GANG INTELLIGENCE CTR., NAT'L GANG THREAT ASSESSMENT: EMERGING TRENDS 26 (2011), *available at* <http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment/2011%20National%20Gang%20Threat%20Assessment%20%20Emerging%20Trends.pdf>.

254. *Id.* at 40.

255. *Id.* at 43.

256. *See id.* at 44.

257. MAFIA & CO., *supra* note 43, at 44.

258. *Id.*

259. *See id.* at 44.

and guns from suppliers, who also work for the cartels.²⁶⁰

Considered to be toward the top of the power chain are *sicarios* (contract killers).²⁶¹ Their ranks are populated with long-time criminals well known for their work in conjunction with the cartels. Becoming a *sicario* is a highly sought-after position because they are given access to status symbols, specifically motorcycles and cars.²⁶² *Sicarios* are known for being stealthy about their whereabouts.²⁶³ To maintain anonymity, the *sicarios* will sometimes contract their jobs out to other armed groups. The most prevalent example of *sicarios* is Los Zetas, discussed above, that function as hit men and protectors of the DTO.²⁶⁴

Finally, to ensure compliance, the cartels have what can best be described 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 finding recruits to work for the cartels, collecting drug money, and in some cases, laundering the money through shell businesses.²⁶⁵ It is estimated that at the height of the Colombian drug cartels, there were as many as fifty-five *oficinas de cobro* in the state of Cali.²⁶⁶ These groups were critical to the Colombian cartels, and to a great extent, are critical to the Mexican cartels as well.²⁶⁷ In addition to group structure, the DTOs are similar to terrorist organizations in their means and methods.

It is precisely this power structure that allows a DTO to continue on when faced with the death of a leader, an assassin,

260. NAT'L GANG INTELLIGENCE CTR., *supra* note 254, at 26.

261. *See id.* at 44–45.

262. *Id.* at 45.

263. *Id.*

264. *See supra* Part II.C; MAFIA & CO., *supra* note 43, at 88.

265. MAFIA & CO., *supra* note 43, at 45.

266. *Id.* at 46.

267. *See Money, Guns, and Drugs: Are U.S. Inputs Fueling Violence on the U.S.-Mexico Border?: Hearing Before the Subcomm. on Nat'l Sec. and Foreign Affairs of the H. Comm. on Oversight and Gov't Reform*, 111th Cong. 34 (2009) (statement of Michael A. Braun, Managing Partner, Spectre Group International, LLC.).

a drug dealer, or members going rogue.²⁶⁸ In the case of the arrest or death of a leader, there are multiple figures able to rise up and take the reins of the organization.²⁶⁹ It is for this reason that, despite President Calderon's success in capturing and extraditing DTO leadership to the United States,²⁷⁰ the cartels have been able to prevent their total demise.²⁷¹

b. Means and Methods

The means and methods used by the DTOs and al Qaeda are, to a great extent, indistinguishable. For this reason, if the *Hamdan* analysis is applicable to al Qaeda, it is also applicable to the Mexican DTOs. This section outlines the characteristics of an insurgent group and applies those factors to both the DTOs and al Qaeda.

At its core, an insurgency is a power struggle between a State and at least one popularly based challenger over a contested political space.²⁷² 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.”²⁷³ The lynchpin for an insurgency is a decrease in the control and legitimacy of the State counterbalanced by increasing control by the insurgent group. Insurgencies increase their control in one or more of the following ways: persuasion, coercion, reaction to abuses, foreign support, and apolitical motivation.²⁷⁴

Insurgency as a tactic fully explains the drug-related acts of violence in Mexico, in addition to al Qaeda's use of terroristic

268. Burton, *supra* note 84.

269. *Id.*

270. STRATFOR, DRUG CARTELS, *supra* note 6, at 10.

271. See MAFIA & CO., *supra* note 43, at 106–07.

272. David J. Kilcullen, *Three Pillars of Counterinsurgency*, Remarks at the U.S. Government Counterinsurgency Conference (Sept. 28, 2006), available at http://www.au.af.mil/au/awc/awcgate/uscoin/3pillars_of_counterinsurgency.pdf at 2.

273. DEPARTMENT OF THE ARMY, COUNTERINSURGENCY MANUAL ¶¶ 1–2 (2006), available at <http://www.fas.org/irp/doddir/army/fm3-24.pdf>.

274. *Id.* ¶¶ 1–41.

acts, to both obtain and maintain power to the detriment of nation states. The DTOs seek to suppress any and all social, political, and military resistance to their drug distribution however they can, just as al Qaeda seeks to break down support for States and non-fundamentalist regimes by any means available.

Former Secretary Chertoff cautioned us “that tolerating the rule of drug organizations in various cities in northern Mexico is not an acceptable alternative for a modern democracy.”²⁷⁵ Secretary Chertoff’s comment highlights the power held by the DTOs exists in lieu of traditional State apparatuses.²⁷⁶ While the DTOs attempt to eliminate all barriers to moving drugs, al Qaeda attempts to eliminate States that prevent the implementation of their ideological form of Islam. The only difference, then, is each organization’s endgame.

The most prevalent method for mobilizing support employed by the DTOs is coercion.²⁷⁷ These coercive means have been written about in great detail,²⁷⁸ but are untraditional in that

275. Chertoff, *supra* note 36, at 685.

276. See Julie Cohn, *Islamist Radicalism in Yemen*, COUNCIL ON FOREIGN REL. (July 26, 2010), available at http://www.yementimes.com/defaultdet.aspx?SUB_ID=34468 (discussing why AQAP has been able to supplant the Yemeni Government as legitimate and noting that AQAP is not the same as “al Qaeda central,” with very few links between the two groups other than their name and ideology).

277. See COUNTERINSURGENCY MANUAL, *supra* note 274, ¶¶ 1–43 to –44.

278. Several reputable media outlets, including the *Washington Post*, *New York Times*, and *Los Angeles Times*, have full sections dedicated to coverage of this issue. See *Mexico Under Siege: The Drug War at Our Doorstep*, L.A. TIMES, <http://projects.latimes.com/mexico-drug-war/#/its-a-war> (last visited Nov. 11, 2010) (tracking the number of DTO-related deaths, mapping the violence, and compiling articles written by staff reporters about the Mexican drug war); see *Mexican Drug Trafficking*, N.Y. TIMES, http://topics.nytimes.com/top/news/international/countriesandterritories/mexico/drug_trafficking/index.html (last visited Nov. 11, 2010) (assembling New York Times articles and multimedia about the drug war, linking to related articles from different sources around the web); see *Mexico at War: On the Front Lines*, WASH. POST, <http://www.washingtonpost.com/wp-srv/world/interactives/mexico-at-war/> (last visited Nov. 11, 2010) (compiling Washington Post articles and multimedia discussing the conflict in Mexico); See also Nina Mandell, *Drug Gangs Up the Stakes, Try to Outdo Each Other with Mass Murders in Mexico, Report Says*, N.Y. DAILY NEWS (Oct. 8, 2011), http://articles.nydailynews.com/2011-10-08/news/30272726_1_drug-gangs-mexican-drug-

they employ more than just the indiscriminate use of firearms. Grenades made by the United States and sent to Latin American countries during the Cold War are now being used by the DTOs on the streets of Juárez.²⁷⁹ There have been seventy-two street grenade attacks between 2009 and 2010, and over 101 grenade attacks on government buildings in the past three and a half years.²⁸⁰ These grenades have the added advantage of being relatively cheap, with a cost of between \$100 and \$500 each.²⁸¹ 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.²⁸² The cartels have become especially sinister in this regard, using a wounded man to lure paramedics to the scene before detonating the car bomb, which contained three-inch screws to maximize collateral damage.²⁸³ 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.²⁸⁴

The most gruesome methods, however, might be the ones used by the leaders of the Tijuana cartel. Their trademarks include the “Colombian Necktie,” in which the murderer cuts the victim’s throat under the chin and pulls his tongue through the wound while he bleeds out,²⁸⁵ “El Gordo,” or the “fat man,” suffocating the victim with a plastic bag while a large man bounces on his chest,²⁸⁶ and “carne asada,” whereby whole

zetas.

279. Nick Miroff & William Booth, *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>.

280. *Id.*

281. *Id.*

282. 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>.

283. *Id.*

284. *Under the Volcano*, ECONOMIST, Oct. 14, 2010, available at http://www.economist.com/node/17249102?story_id=17249102.

285. Tim Padgett & Elaine Shannon, *La Nueva Frontera: The Border Monsters*, TIME, June 11, 2001, available at <http://www.time.com/time/magazine/article/0,9171,1000094-1,00.html>.

286. *Id.*

families are murdered and their corpses are then placed on a “bed of flaming tires.”²⁸⁷

Finally, there are the cases in which 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 destinations.²⁸⁸ It is impossible to get an accurate count, but these “disappearances” have almost become an epidemic.²⁸⁹ People vanish after leaving their homes and never return.²⁹⁰ Records used to be kept on how many people had vanished, but that practice was abandoned over a decade ago.²⁹¹ It is impossible to know how many people have disappeared, and the population is scared to ask.²⁹²

To make sure the population is aware of its power, DTOs will subtly announce their crimes by wrapping bodies in garbage bags, spiking heads on the fence outside government offices, and leaving decapitated bodies in upscale hotel rooms.²⁹³ The best example of this happened in 2006, when several gunmen rushed into a nightclub, “fired shots into the air, ordered the patrons to lie down, and then lobbed five human heads onto the dance floor.”²⁹⁴ Mexican citizens know exactly what is happening, but have learned not to speak up for fear of death, in addition to the belief that their testimony will be ignored.²⁹⁵

Organizations such as al Qaeda who engage in acts of terrorism also thrive only when their actions are made public. To this end, terrorists, like the DTOs, commit murder through more than just the indiscriminate use of firearms. These attacks

287. *Id.*

288. See Stewart & Posey, *supra* note 158.

289. Sara Miller Llana, *Mexican Families Struggle to Find Drug War's Disappeared*, CHRISTIAN SCI. MONITOR, Sept. 21, 2011, available at <http://www.csmonitor.com/World/Americas/2011/0921/Mexican-families-struggle-to-find-drug-war-s-disappeared>.

290. MURDER CITY, *supra* note 2, at 41.

291. *Id.*

292. *Id.*

293. Grayson, *Mexico and the Drug Cartels*, *supra* note 88.

294. *Id.*

295. Cf. MURDER CITY, *supra* note 2, 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.”)

are carried out against skyscrapers, embassies,²⁹⁶ military infrastructure,²⁹⁷ and mass transportation systems²⁹⁸ using multiple instruments such as grenades, planes, boats, and suitcase bombs.²⁹⁹

Ultimately both the DTOs and traditional terrorist groups have a virtually unlimited number of tactical options that can be utilized at different times and in different places for strategic advantage. “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.”³⁰⁰ The idea of an attack at any time and 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 also as a projection of their power.³⁰¹ In this respect, suicide

296. See Madeline Albright, U.S. Sec’y of State, Remarks on Report of the Accountability Review Boards on the Embassy Bombings in Nairobi and Dar es Salaam (Jan. 8, 1999), available at <http://secretary.state.gov/www/statements/1999/990108.html> (discussing the 1998 bombings of American Embassies in Tanzania and Kenya).

297. See RAPHAEL PERL ET AL., CONG. RESEARCH SERV., TERRORIST ATTACK ON USS COLE: BACKGROUND AND ISSUES FOR CONGRESS 1–2 (2001), available at <http://news.findlaw.com/cnn/docs/crs/coleterrattck13001.pdf> (discussing the attack on the USS Cole by a smaller boat carrying explosives).

298. 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 *Officials: 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.

299. See *generally Terrorist Methods*, SECURITY SERVICE (MI-5), available at <https://www.mi5.gov.uk/output/terrorist-methods.html> (last visited Oct. 22, 2011); Arup Roychoudhury & Paul de Bondern, *Al Qaeda Affiliate Suspected in Delhi Blast*, REUTERS, Sept. 7, 2011, available at <http://www.reuters.com/assets/print?aid=USTRE7860SV20110907>; Izaz Mohmand, *Woman Bomber, Roadside Bomb Kill Seven in NW Pakistan*, REUTERS, Aug. 11, 2011, available at <http://www.reuters.com/assets/print?aid=USTRE77A0LE2011081>; Jeffrey F. Addicott, *Contractors on the “Battlefield:” Providing Adequate Protection, Anti-Terrorism Training, and Personnel Recovery for Civilian Contractors Accompanying the Military in Combat and Contingency Operations*, 28 HOUS. J. INT’L L. 323, 326 n.11 (2006).

300. See COUNTERINSURGENCY MANUAL, *supra* note 274, ¶¶ 1–43 to –44.

301. See J.S. Piven, *Psychological, Theological, and Thanatological Aspects of*

bombings are the pinnacle of an insurgency strategy. The bomber chooses the time, place, and circumstances for spontaneous detonation to ensure maximum damage.³⁰² The entire operation costs very little to execute and all but guarantees that the public will be traumatized by the event, making this a cheap and efficient way of scaring the population into compliance.³⁰³

It is also important to note that beyond physical coercion, exploitation of poverty and economic circumstances can be a powerful form of coercion. 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.”³⁰⁴ The DTOs are able to rally the communities around illegal activities by providing economic opportunities that did not previously exist.³⁰⁵ For example, the average daily wage in Mexico has dropped to \$3.70,³⁰⁶ sometimes prompting campesinos to participate in drug cultivation and smuggling.

The new recruits are given not only economic compensation, but also the ability to earn a modicum of control over distribution, debt collection, and sales.³⁰⁷ In return for this compensation and control, the recruits willingly follow the directions of their bosses.³⁰⁸ As the revenue streams become greater, the leaders of the DTOs are able to reinvest in the community.³⁰⁹ This reinvestment allows them to function as the government does: securing the loyalty of the people, legitimizing

Suicidal Terrorism, 39 CASE W. RES. J. INT'L L. 731 (2007–2008); Emanuel Gross, *The Struggle of a Democracy Against the Terror of Suicide Bombers: Ideological and Legal Aspects*, 22 WIS. INT'L L.J. 597 (2004); Revital Sela-Shayovitz & David Yellin, *Suicide Bombers in Israel: Their Motivations, Characteristics, and Prior Activity*, 1 INT'L J. CONFLICT & VIOLENCE 160, 161 (2007).

302. Sela-Shayovitz & Yellin, *supra* note 363, at 161.

303. *Id.*

304. MAFIA & CO., *supra* note 43, at 110.

305. *Id.*

306. MURDER CITY, *supra* note 2, at 89.

307. *Id.* at 110–11.

308. *Id.*

309. *Id.* at 111.

the DTOs' acquisition of wealth, and creating an atmosphere of impunity for their actions.³¹⁰ The DTOs are able to easily win over the impoverished citizens using a carrot in conjunction with a stick. That which is "illegal becomes what seems reasonable and necessary."³¹¹

Yemen is the terrorist analogue to the situation in Mexico.³¹² The outlook in Yemen is bleak: the unemployment rate is forty percent, more than one third of the population is malnourished, nearly half live in abject poverty,³¹³ and it is predicted that in a matter of years, the country will have no oil reserves, accounting for one-third of its GDP, and no fresh water supply.³¹⁴ As a result, al Qaeda in the Arabian Peninsula (AQAP) has aligned itself with secessionists in Southern Yemen in order to gain legitimacy.³¹⁵ This alliance allows AQAP to capitalize on the recognized government's rampant corruption and lack of domestic credibility.³¹⁶ All of these factors plus a strong sympathy towards radical Islam among the population leaves it extremely susceptible to influence from extremists.³¹⁷ Economic decline giving way to extremism has been a problem in other areas of the world, especially in Somalia, where al Qaeda has stepped in and seized control over most of the country.³¹⁸ Somalia, Yemen, and Mexico are all in varying degrees of economic decline, but the pattern is clear: the more

310. *Id.*

311. *Id.*

312. Cohn, *supra* note 277; STAFF OF S. COMM. ON FOREIGN RELATIONS, 111ST CONG., AL QAEDA AND SOMALIA: A TICKING TIME BOMB 8–12 (Comm. Print 2010), available at foreign.senate.gov/reports/download/?id=21fc926c-aa4c-4d40-b583-c32780d8568a [hereinafter TICKING TIME BOMB].

313. TICKING TIME BOMB, *supra* note 313, at 8–9; Fawaz A. Gerges, *Al Qaeda Has Bounded Back in Yemen*, CNN (Jan. 7, 2010), <http://www.cnn.com/2010/OPINION/01/07/gerges.yemen.us.terrorism/index.html>; Andrew Lee Butters et al., *Yemen: Al-Qaeda's New Staging Ground?*, TIME, Dec. 28, 2009, available at <http://www.time.com/time/magazine/article/0,9171,1950952,00.html> [hereinafter *New Staging Ground*].

314. Cohn, *supra* note 276; TICKING TIME BOMB, *supra* note 313, at 8.

315. *New Staging Ground*, *supra* note 313.

316. *Id.*

317. TICKING TIME BOMB, *supra* note 313, at 8–11; Cohn, *supra* note 276.

318. See TICKING TIME BOMB, *supra* note 313, at 13–16 (discussing Somalia and its problems).

impoverished the citizens are, the more likely they are to become radicalized.³¹⁹

This section argues that the DTOs function similarly to various terrorist organizations, both through the indiscriminate killing of civilians and also through their organizational structures. For this reason, both al Qaeda and the DTOs in Mexico are parties to non-international armed conflicts. The next section discusses 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

Having established that the violence in Mexico qualifies as a non-international armed conflict, Common Article 3 of the 1949 Geneva Conventions sets forth the applicable rules for this conflict.

The Geneva Conventions are founded on two simple and related principles: limitation and humanity.³²⁰ The principle of limitation is a direct rejection of total, unregulated warfare, in favor of placing limits on the methods and means of conducting war.³²¹ In practice, this has led to the specific prohibition of certain weapons, especially those that cause unnecessary suffering.³²² The principle of humanity, at its core, requires that those who are not involved in the armed conflict be treated humanely.³²³

To this end, the Conventions outline several constraints on

319. *See id.* (providing the limited resources of the Yemeni and Somalia governments, low literacy rates, and high unemployment as factors for extremist recruiting).

320. *See generally* THEODOR MERON, *THE HUMANIZATION OF INTERNATIONAL LAW* (2006) [hereinafter MERON, HUMANIZATION].

321. James M. Strong, *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 (1985)); Timothy J. Heverin, *Legality of the Threat or Use of Nuclear Weapons: Environmental and Humanitarian Limits on Self-Defense*, 72 *NOTRE DAME L. REV.* 1277, 1293 (1997); ROBERT KOLB & RICHARD HYDE, *AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS* 45 (Hart Publishing 2008) (discussing the bedrock principles of IHL).

322. MERON, HUMANIZATION, *supra* note 321, at 69–73 (discussing tests to determine unnecessary suffering); CRAWFORD, *supra* note 172, at 36–37.

323. *See generally* MERON, HUMANIZATION, *supra* note 320.

the use of force consistent with the mandates of limitation and humanity. The first principle is that of distinction, meaning that forces must delineate between military and civilian objectives, and attack solely military objectives.³²⁴ The second major principle is that of necessity - armed forces may use only the measures that are completely necessary to bring the other State into submission and surrender.³²⁵ The third principle is that of proportionality—any collateral consequences of military action cannot be excessive when compared to the military value gained.³²⁶ These principles exist namely to prevent unnecessary suffering, an escalation or spread of the conflict, and the protection of the civilian population, its property, and those combatants who are *hors de combat* (those no longer involved in the fighting).³²⁷ Articulating the rules mandated under international humanitarian law is a fairly simple venture, whereas deciding when and how they should be applied is a difficult exercise.

As discussed previously, the Geneva Conventions outline two types of armed conflicts: international and non-international. Many scholars have 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.³²⁸ They argue, for

324. MERON, HUMANIZATION, *supra* note 321, at 62–63; CRAWFORD, *supra* note 172, at 31–33; KOLB & HYDE, *supra* note 322, at 46–47.

325. CRAWFORD, *supra* note 172, at 35–36; KOLB & HYDE, *supra* note 322, at 47–48.

326. MERON, HUMANIZATION, *supra* note 321, at 61–62.

327. *Id.* at 49.

328. See Knut Dörmann, *War Crimes Under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes*, 7 MAX PLANCK YEARBOOK OF UN LAW 347–48 (describing the “regrettable” decision not to include the same provisions in non-international armed conflicts as international conflicts); William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EUR. J. INT’L L. 741, 760 (2005) (describing difference in distinguishing between “combatants” in international law by their uniforms with “insurgents” and “sympathizers” for internal conflicts since they may not be easy to identify); Theodor Meron, *Is International Law Moving Towards Criminalization?*, 9 EUR. J. INT’L L. 18, 25 (1998) (“[T]he distinction between international and non-international armed conflicts, often artificial in contemporary conflicts . . .”).

example, that it is not uncommon to find an armed conflict in which 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.³²⁹ These factors have blurred the dichotomy. Many tribunals and courts have wrestled with this problem,³³⁰ but have conceded that the norms of Common Article 3 should be treated “as elementary considerations of humanity” applicable to all armed conflicts.³³¹ 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 [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.³³²

329. Tazhib-Lie & Swaak-Goldman, *supra* note 155, at 241.

330. *Id.* at 240–41; Tadic Jurisdiction Decision, *supra* note 124, ¶ 98; Prosecutor v. Akayesu, *supra* note 143, ¶ 608.

331. Tazhib-Lie & Swaak-Goldman, *supra* note 155, at 241 n.11.

332. JEAN DE PREUX, THE GENEVA CONVENTIONS OF 12 AUGUST 1949:

This is a specific recognition that one cannot divorce the applicability of regulation from the necessity for that regulation.³³³

As described in detail in the previous section, the situation in Mexico is one requiring the application of Common Article 3.³³⁴ Specifically, both Mexico and each DTO are obligated to comply with the provisions outlined in that article. This article described several egregious violations being perpetrated by both sides, including 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.

IV. ENSURING COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW

Generally, violations of international humanitarian law occur not because of the inadequacy of the rules, but rather an unwillingness to respect them, a lack of means for enforcement,

COMMENTARY GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 36–37 (Jean S. Pictet ed., A.P. de Heney, trans., 1960), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-III.pdf.

333. Corn, *supra* note 211, at 310.

334. It is important to note the guarantees of Common Article 3 here. The article states, in relevant part, that “[i]n 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 14, art. 3.

uncertainty as to their application, or ignorance of the rules by those in charge, civilians, and those on the battlefield.³³⁵ The situation in Mexico illustrates the unwillingness to follow, enforce, understand, and apply relevant international legal rules. This section proposes 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 doing so, the goal is to eliminate the impunity of these violations by the Mexican government.

Indiscriminate murder by all sides to the conflict, a pattern of forced disappearances, and torture are illustrative of the egregious humanitarian violations committed by both sides in Mexico's non-international armed conflict with the DTOs.³³⁶

The gross violations committed by both the DTOs and the Mexican government, explained in Part II and Part III, reinforce the wisdom that the applicability of Common Article 3, "has been denied [so often] that the rule has been rejection of the law, rather than its formal acknowledgment and recognition."³³⁷

This section proposes several methods the international community can utilize to compel compliance with the Geneva Conventions in Mexico and punish those who refuse to comply.

Before continuing the discussion of how to mandate compliance, it is important to briefly discuss the Martens clause to the Hague Convention of 1907.³³⁸ 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

335. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME 1: RULES* xxxii (2005).

336. See, e.g., *Mexico—Amnesty International Report 2010: Human Rights in United Mexican States*, AMNESTY INTERNATIONAL (2010), <http://www.amnesty.org/en/region/mexico/report-2010>.

337. M.J. Peterson, *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).

338. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

fallback provision meant to bind States to the laws of war in all circumstances.³³⁹ The so-called Martens clause states that

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.³⁴⁰

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 proscribed.³⁴¹ The signatories to the Geneva Conventions understood that the Martens Clause covered all aspects of international humanitarian law.³⁴²

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.³⁴³ During the Nuremberg War Crimes Trials, the majority concluded that it is “a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention. . . do not cover specific cases occurring in warfare, or concomitant to warfare.”³⁴⁴

This concept has been applied to the armed conflict in Sierra Leone, where the United Nations Commission on Human Rights cautioned that

339. See CULLEN, *supra* note 121, at 25.

340. Convention Respecting the Laws and Customs of War on Land, *supra* note 339, at 2279–80.

341. See KOLB & HYDE, *supra* note 322, at 62–63.

342. Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT'L L. 78, 79 (2000) [hereinafter Meron, *Martens Clause*].

343. See KOLB & HYDE, *supra* note 322, at 63.

344. Meron, *Martens Clause*, *supra* note 343, at 80 (citing *In Re Krupp*, 15 Ann. Dig. 620, 622 (U.S. Mil. Trib. Nuremberg 1948)).

in 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 to bring such persons, regardless of their nationality, before their own courts.³⁴⁵

It should be noted that the conflict in Sierra Leone was 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."³⁴⁶ Just like in Mexico, the conflict was being waged over natural resources, namely control over the diamond fields and their revenues.³⁴⁷

Consequently, 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.

A. *Mexico's National Legal Obligations*

Mexico has accepted certain key obligations under international law, specifically with regard to international humanitarian law. This section briefly discusses Mexico's ratification of the Geneva Conventions and its public commitment to the precepts contained therein.

The Constitution of the United Mexican States³⁴⁸ sets up a

345. U.N. Comm'n of Human Rights, 55th Sess., U.N. Doc. E/CN.4/RES/1999/1 (1999).

346. Babafemi Akinrinade, *International Humanitarian Law and the Conflict in Sierra Leone*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 391, 396-97 (2001).

347. *Id.* at 446-47; IAN SMILLIE, ET AL, THE HEART OF THE MATTER: SIERRA LEONE, DIAMONDS, & HUMAN SECURITY 9 (2000), available at [http://action.web.ca/home/pac/attach/Heart% 20of%20the%20Matter%20complete.rtf](http://action.web.ca/home/pac/attach/Heart%20of%20the%20Matter%20complete.rtf).

348. This is the actual legal name of the country, as defined in the Constitution of Mexico. *Constitucion Política de los Estados Unidos Mexicanos [C.P.]*, as amended, *Diario Oficial de la Federacion [DO]*, 5 de Febrero de 1917 (Mex.). The English language version of the Constitution will be referenced in this article. *Constitution of Mexico*,

“federal democratic, representative Republic composed of free and sovereign States,”³⁴⁹ similar to that of the United States. The constitution creates three branches: legislative, executive, and judicial.³⁵⁰ The legislative branch is bicameral, containing the Chamber of Deputies and the Chamber of Senators.³⁵¹ Only the Chamber of Senators has the power “to approve the treaties and diplomatic conventions made by the President of the Republic with foreign powers.”³⁵² “[A]ll treaties that have been made 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.”³⁵³

In Mexico, there is no question as to whether treaties are self-executing or not;³⁵⁴ as soon as a treaty is approved by the Senate, it becomes binding domestic law.³⁵⁵ The Constitution also states that a treaty trumps any conflicting federal law.³⁵⁶ Therefore, Mexico’s ratification of the Geneva Conventions legally obligates international and domestic compliance with the four Geneva Conventions.³⁵⁷

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.”³⁵⁸ To reaffirm its commitment to international

ORGANIZATION OF AMERICAN STATES, [http:// www.oas.org/juridico/MLA/en/mex/en_mex-int-text-const.pdf](http://www.oas.org/juridico/MLA/en/mex/en_mex-int-text-const.pdf) (last visited Oct. 20, 2011).

349. *Id.* art. 40.

350. *Id.* art. 49.

351. *Id.* art. 50.

352. *Id.* art. 76(I).

353. *Id.* art. 133.

354. Luis Miguel Diaz, *National Treaty Law and Practice: Mexico*, in NATIONAL TREATY LAW AND PRACTICE 439, 451 (Duncan B. Hollis et al. eds., 2005).

355. *Id.*

356. *Id.* at 452–53.

357. Lopez de la Rosa, *supra* note 113; see U.N. Office of Legal Affairs, Report of Mexico on the Status of the Protocols Additional to the Geneva Conventions of 1949, Pursuant to United Nations General Assembly Resolution 63/125 (June 2, 2010), http://www.un.org/en/ga/sixth/65/StatProtGeneva_StatesComments/Mexico_E.pdf (showing that Mexico has ratified the Geneva Convention).

358. Lopez de la Rosa, *supra* note 113.

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.”³⁵⁹ Consistent with this assent to the principles of international humanitarian law, Mexico allowed the International Committee of the Red Cross (ICRC) to set up an office³⁶⁰ in Mexico City to ensure compliance with the Geneva Conventions by regional countries, including Costa Rica, Cuba, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, and Panama.³⁶¹ This ICRC branch has been used for training federal police in the legitimate use of force and for procedures for detainment and arrest.³⁶²

Despite Mexico’s commitment to international humanitarian law and its obligation to educate its soldiers on the laws of armed conflict, the humanitarian violations continue to amass.³⁶³ Former Director de la Rosa explains that despite the infrastructure to educate the population on IHL matters, “we cannot say that there is full and adequate knowledge of international humanitarian law even within the government.”³⁶⁴

The remainder of this article will propose several methods of compliance that can be undertaken by the international community and means of 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 enforcing international humanitarian law, but there are several

359. *Id.* at 301.

360. 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) [hereinafter Note Verbale From The Permanent Mission Of Mexico].

361. *The ICRC Regional Delegation in Mexico*, INTERNATIONAL COMMITTEE OF THE RED CROSS (June 1, 2011), <http://www.icrc.org/eng/where-we-work/americas/mexico/overview-mexico.htm>.

362. Note Verbale From The Permanent Mission Of Mexico, *supra* note 361.

363. Lopez de la Rosa, *supra* note 113.

364. *Id.* at 300.

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 victims of armed conflict and other situations of violence and to provide them with assistance”.³⁶⁵ The ICRC “also endeavours [sic] to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles.”³⁶⁶ To this end, the ICRC specializes in providing protection to people involved in an armed conflict,³⁶⁷ and has much experience dealing with situations of armed conflict, internal disturbances, and relief actions. In the past, it has carried out treacherous humanitarian missions such as distributing food to prisoners of war, acting as a neutral messenger between two opposing sides of a conflict, and negotiating agreements between parties to the conflict.³⁶⁸ That the ICRC has yet to act in relation to Mexico highlights a 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 inform all parties to the conflict of their obligations under international humanitarian law.³⁶⁹ The ICRC then has a few options at its disposal to improve compliance with international humanitarian law, including proposing special agreements between the parties to comply with applicable law and addressing violations of that law.³⁷⁰ It is for this reason that the ICRC should pursue its mandate and attempt to ensure humanitarian protection for all civilians.

The ICRC is uniquely suited and located to attempt the

365. *The Mission*, INTERNATIONAL COMMITTEE OF THE RED CROSS (last visited Oct. 24, 2011), <http://www.icrc.org/HOME.NSF/060a34982cae624ec12566fe00326312/125ffe2d4c7f68acc1256ae300394f6e?OpenDocument>.

366. *The ICRC's Mission*, THE ICRC: ITS MISSION AND WORK, 4 (last visited Oct. 24, 2011), http://www.icrc.org/eng/assets/files/other/icrc_002_0963.pdf.

367. KOLB & HYDE, *supra* note 322, at 116–18.

368. *Id.* at 121.

369. Mack, *supra* note 179, at 15.

370. *See id.* at 16.

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. On the other hand, the prospect 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.³⁷¹ Consequently, if the DTOs refuse to negotiate, Mexico will be loath to limit its own 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*

Being cognizant of the effects that the DTOs are having on the United States, Congress passed the Merida Initiative in 1998.³⁷² This initiative provides funding to Mexico (and to a lesser extent other Central American countries) to assist in countering drug-fueled violence spilling over into border cities in the United States.³⁷³ Since 2008, the United States has pledged \$1.5 billion to Mexico alone under the initiative,³⁷⁴ but in seeking to curb violations of human rights in Mexico, Congress conditioned fifteen percent of the funds on Mexico meeting certain benchmarks outlined by the U.S. State Department.³⁷⁵ These conditions are:

- (1) Ensuring that civilian prosecutors and judicial authorities are investigating and prosecuting

371. *McCaffrey Urges Global Cooperation*, *supra* note 22.

372. The So-Called Mérida Initiative was first inserted into the Supplemental Appropriations Act of 2008, 110 Pub. L. No. 252, 122 Stat. 2323 (2008); CLARE RIBANDO SEELKE & KRISTIN M. FINKLEA, CONG. RESEARCH SERV., R 41349, U.S.-MEXICAN SECURITY COOPERATION: THE MÉRIDA INITIATIVE AND BEYOND (2011); *see also* U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-10-837, MÉRIDA INITIATIVE: THE UNITED STATES HAS PROVIDED COUNTERNARCOTICS AND ANTICRIME SUPPORT, BUT NEEDS BETTER PERFORMANCE MEASURES (2010) [hereinafter GAO REPORT]. The Mérida Initiative was also extended in 2009 via Omnibus Appropriations, 2009, Pub. L. No. 111-8, § 7045, 123 Stat. 524, 886–887 (2009); and Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, Title XI, 123 Stat. 1859, 1893 (2009).

373. *McCaffrey Urges Global Cooperation*, *supra* note 22.

374. *Id.*

375. *Mexico—Amnesty International Report 2010: Human Rights in United Mexican States*, *supra* note 337; GAO REPORT, *supra* note 372, at 19–20.

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 recommendations for the implementation of the Merida Initiative.³⁷⁶

The State Department reports that Mexico has fallen far short of these benchmarks, but the conditioned fifteen percent of the pledged money in 2008 and 2009 has been given to Mexico anyway.³⁷⁷

The atrocities described in this article are merely a sampling of the 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.³⁷⁸ 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.³⁷⁹ In addition to the failing grade given to Mexico from the United States, the United Nations Human Rights Council has taken notice of the numerous international humanitarian

376. *US: Withhold Funds for Mexico Tied to Human Rights Performance*, HUMAN RIGHTS WATCH (Sept. 14, 2010), <http://www.hrw.org/en/news/2010/09/09/mexico-letter-president-Calderon>.

377. 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>.

378. BUREAU OF DEMOCRACY, U.S. DEP'T OF STATE, 2009 HUMAN RIGHTS REPORT: MEXICO, (2010), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2009/wha/136119.htm>.

379. *Id.*; *see also* U.N. H.R.C. Rep. of the Working Group on the Universal Periodic Review, Feb. 2–13, 2009, ¶¶ 39, 73, U.N. Doc. A/HRC/11/27 (Mar. 3, 2009) [hereinafter U.N. H.R.C. Rep.].

law and human rights violations occurring in Mexico.³⁸⁰

With all of this international pressure to comply with its treaty obligations, the United States is uniquely suited to use the funds as a carrot and stick to mandate compliance. Congress is aware of the danger to American citizens and cities as a result of the cartels, and should condition more aid on compliance with its human rights and international humanitarian law obligations to ensure the protection of its citizens.³⁸¹

D. The International Criminal Court

Mexico has also ratified the Rome Statute for the International Criminal Court (ICC), allowing the Court to exercise jurisdiction over war crimes that occur within Mexico's borders.³⁸² For this reason, the Prosecutor's Office of the ICC should institute investigations in the pre-trial chamber against offenders on both sides of the conflict in Mexico. *Proprio motu* ("on his own motion") allows the prosecutor to commence an investigation 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.³⁸³

The Rome Statute provides in Article 5 that war crimes fall within the ICC's subject matter jurisdiction and gives an exhaustive list of offenses constituting war crimes in a non-international armed conflict.³⁸⁴ 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

380. See U.N. H.R.C. Rep., *supra* note 380, ¶¶ 30, 42.

381. See CLARE RIBANDO SEELKE AND JUNE S. BEITTEL, CONG. RESEARCH SERV., R40135, MÉRIDA INITIATIVE FOR MEXICO AND CENTRAL AMERICA: FUNDING AND POLICY ISSUES (2009).

382. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en [hereinafter Rome Statute].

383. See Cassandra Jeu, *A Successful, Permanent International Criminal Court . . . "Isn't It Pretty To Think So?"*, 26 HOUS. J. INT'L L. 411, 433-34 (2004).

384. Rome Statute, *supra* note 383, art. 5(c), 8.

criminal jurisdiction over those responsible for international crimes.”³⁸⁵ Ultimately the ICC does not have jurisdiction over violations of the laws and customs of war if “[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”³⁸⁶ 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.”³⁸⁷

In the case of Mexico, the Federal Attorney Generals are unwilling to investigate in good faith, and the military justice system currently in place is inadequate for genuinely carrying out a prosecution due to its lack of transparency.³⁸⁸ Mexico’s Constitution gives jurisdiction to the military system for “crimes against and violation of military discipline.”³⁸⁹ In practice, however, the Federal Attorney General’s Office automatically sends all cases in which an active duty military member commits a crime to the military to investigate these abuses.³⁹⁰ Normally, this would prevent action on the part of the ICC Prosecutor, but the Mexican military justice system is structured to preclude genuine prosecution.

Human Rights Watch has reported the problems inherent in Mexico’s military justice system. First, the Secretary of Defense has the power to appoint all of the military prosecutors, public defenders, and judges.³⁹¹ This is especially problematic in light of the fact that the Secretary wields the power to order a prosecutor to end an investigation and order judges to issue pardons upon conviction of soldiers.³⁹² Judges may be removed

385. *Id.* pmb. 6.

386. *Id.* art. 17.

387. *Id.*

388. UNIFORM IMPUNITY, *supra* note 106, at 15–21.

389. *Constitution of Mexico*, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/juridico/MLA/en/mex/en_mex-int-text-const.pdf (last visited Oct. 20, 2011) (citing from article 13).

390. UNIFORM IMPUNITY, *supra* note 106, at 12–13.

391. *Id.* at 16–17.

392. *Id.*

at any time at the discretion of the Ministry of Defense, and reprimanded by judiciary councils,³⁹³ creating an incentive on the part of the judges to rule consistently with the whims of the Secretary. Victims are unable to challenge the use of military commissions or to remove the case to civilian courts.³⁹⁴ On appeal, the cases are overwhelmingly upheld, likely because military jurisdiction does not get challenged,³⁹⁵ while victims have even been deemed to lack standing to challenge jurisdiction in the first place.³⁹⁶ Federal courts are also unable to force a military prosecutor to close a case, knowing that only closed cases can be moved to civilian courts.³⁹⁷

Finally, the entire trial process is opaque; zero details about the proceedings are made public until a final ruling is reached.³⁹⁸ Hearings are not announced, and the Ministry will not disclose dates and times of forthcoming hearings.³⁹⁹ Finally, the Ministry claims confidentiality to prevent the disclosure of any information related to the proceedings involving military crimes against civilians.⁴⁰⁰

In response to a report involving the rape of an indigenous woman by the military in 2002, 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.⁴⁰¹ A sixteen year old indigenous

393. *Id.* at 17.

394. *Id.* at 18.

395. *Id.*

396. "In cases in which civilian victims have challenged the use of military jurisdiction to investigate these cases, federal courts have thrown out their cases, arguing they have no standing." *Id.* at 18, n. 44.

397. *Id.* at 19.

398. *Id.* at 19–20.

399. *Id.* at 20–21.

400. *Id.*

401. *Id.* at 31–32. 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. Application to the Inter-American Court of Human Rights in the case of Ortega v. United Mexican States, Inter-Am. Ct. H.R. No. 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

woman was also raped by two soldiers in 2002, while six other soldiers watched.⁴⁰² Without telling anyone, the military ended its investigation in 2004, again citing a lack of evidence against the soldiers.⁴⁰³

In 2007, several unknown people attacked and killed five soldiers.⁴⁰⁴ In response, a few hundred soldiers, while searching for the perpetrators, arbitrarily detained thirty-six people for more than three days.⁴⁰⁵ During this detention, the detainees were repeatedly beaten, burned, and water boarded, and several of those held captive were girls under age eighteen who described being sexually abused and raped by the soldiers to compel information about drug traffickers.⁴⁰⁶ As of 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.⁴⁰⁷

It is for this reason that the Office of the Prosecutor for the ICC has a convincing case that the Mexican military and civilian justice systems are unwilling to honestly investigate and punish these acts, and should take the lead in bringing these soldiers to justice. As a fallback, the Rome Statute gives the ICC jurisdiction with respect to the same conduct tried by a domestic court if the proceedings in the domestic court were merely for the purpose of shielding the person concerned from criminal responsibility, or if the proceedings were not conducted independently, impartially, or with an intent to bring the person concerned to justice.⁴⁰⁸

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

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.

402. UNIFORM IMPUNITY, *supra* note 106, at 34

403. *Id.* at 35.

404. *Id.* at 38.

405. *Id.*

406. *Id.*

407. *Id.* at 39.

408. Rome Statute, *supra* note 383, art. 20(3).

committed.”⁴⁰⁹ In making this finding, the Prosecutor is allowed to rely on “information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate.”⁴¹⁰ Once the Prosecutor has this belief, he must submit the case to the Pre-Trial Chamber for further determination.⁴¹¹

There are two other ways for prosecutions to reach the Trial Chamber, but are more politically treacherous. The Prosecutor is the ideal candidate to begin investigations in the ICC. State parties to the ICC can refer cases, as well as the United Nations Security Council under a Chapter VII determination that there has been a breach or threat to the peace, or an act of aggression.⁴¹² States, however, are reluctant to refer each other to the ICC,⁴¹³ either because they are more concerned with maintaining good relations or fear reprisal. In addition, any action by the Security Council is subject to a veto by any of the permanent members.⁴¹⁴ 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.⁴¹⁵ These acts largely mirror the obligations under Common Article 3. The statute states that:

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

409. *Id.* art. 53.

410. *Id.* art. 15(2)

411. *Id.* art. 15(3).

412. U.N. Charter ch. VII; Rome Statute, *supra* note 383, art. 13(b).

413. 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).

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

415. Rome Statute, *supra* note 383, art. 8(2)(c),(e).

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.⁴¹⁶

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”⁴¹⁷ 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] [A]rticle 3.”⁴¹⁸ The ongoing violence, torture, and taking of hostages being carried out by both sides in Mexico meets the threshold 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. Article 12(2)(a) states that so long as the case is not referred to the ICC by the Security Council, all that is required to gain jurisdiction over the person is that the State where the alleged crime took place is a party to the Rome Statute.⁴¹⁹

416. *Id.* art. 8(2)(c).

417. *Id.* art. 8(2)(e)(i).

418. *Id.* art. 8(2)(e)(vi).

419. Rome Statute, *supra* note 383, art. 12(2)(a); 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).

Mexico's ratification of the Rome Statute on October 28, 2005 means that any war crimes committed by *anyone* within the confines of Mexico can be subject to the jurisdiction of the International Criminal Court.⁴²⁰

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. A referral to the Pre-Trial Chamber will send a message to the Mexican Government and the DTOs that they are not safe from international humanitarian law and that non-compliance will not be tolerated by the international community. History has proven that trials of top officials for violations of the Geneva Conventions in armed conflicts can serve to mobilize international condemnation.⁴²¹

V. CONCLUSION

Drug-related violence is a daily part of life for citizens of Mexico. The conflict between the DTOs and the Mexican government is not based on a political ideology, but rather the greed, profits, and violence that are an inevitable byproduct of drug trafficking. Mexican DTOs are unique in that, despite being labeled as merely organized crime, the protracted armed violence happening between them and the Mexican armed forces rises to the level of an armed conflict under the Geneva Conventions.

International humanitarian law applies only to 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

420. Rome Statute, *supra* note 383 and accompanying text.

421. Theodor Meron, *Centennial Essay: Reflections On The Prosecution Of War Crimes By International Tribunals*, 100 AM. J. INT'L L. 551, 563 (2006). "Just as important, trials of those who orchestrate atrocities help to disseminate international condemnation of the crimes and yield vindication for substantial numbers of victims." *Id.*

Prosecutor v. Tadic and its ICTY and ICTR progeny means applying a nebulous set of factors to determine a threshold question devoid of an actual threshold. This article has argued that the Supreme Court's test for finding a non-international armed conflict is the correct methodology. Simply put, if there are hostilities between a State and a non-state dissident group involving protracted armed violence, a non-international armed conflict exists, and the State must comply with its international legal obligations under Common Article 3.

In Mexico, the use of armed forces, grenades, rifles, and rocket launchers by both Mexico and the DTOs means that a non-international armed conflict is currently ongoing. As such, Mexico is legally obligated to comply with all of the protections outlined in Common Article 3, including humane treatment and protection of civilians. Mexican forces have been committing egregious violations of international humanitarian law through the torture, rape, kidnapping and indiscriminate killing of its own citizens; while the DTOs 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 ability of the United States to withhold funding to Mexico based on violations of international humanitarian law would be 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. 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 unwilling to effectively and meaningfully prosecute military officers for violations of Common Article 3 in domestic courts, this conflict is ripe for referral to the International Criminal Court by the Office of the Prosecutor. Because the civilians of Mexico who are caught in between the two factions can do very little to protect themselves, the Prosecutor must act. It is for these reasons that something must be done and can be done using already existing

international legal mechanisms to ensure compliance with the mandates of international humanitarian law during this non-international armed conflict in Mexico.