

Note

Mexico's Drug "War": Drawing a Line Between Rhetoric and Reality

Andrea Nill Sánchez†

I.	INTRODUCTION	467
II.	UNDERSTANDING MEXICO'S "WAR"	470
	A. The History of Mexico's Drug Cartels	470
	B. The Adoption of a Militarized Approach.....	471
	C. The Rhetoric of Mexico at War	474
III.	DEFINING A WAR	478
	A. Applicable Law	479
	B. Intensity of Violence	481
	C. Level of Organization	484
	D. The Academic Case for War	489
IV.	THE LEGAL CONSEQUENCES OF "WAR"	492
	A. The Use of Force.....	492
	B. Detention.....	494
	C. Prosecution.....	497
V.	DIAGNOSING THE PROBLEM	501
	A. Drug Cartels and Organized Crime.....	501
	B. Confronting Drug Cartels	504
VI.	CONCLUSION.....	508

The first, the supreme, the most far-reaching act of judgment that the statesman and commander have to make is to establish . . . the kind of war on which they are embarking; neither mistaking it for, nor trying to turn it into, something that is alien to its nature.

—Carl von Clausewitz¹

I. INTRODUCTION

In August 2011, gunmen burst through the doors of a casino located in Monterrey, Mexico, doused the premises with gasoline and set it on fire.² Five

† Yale Law School, J.D. expected 2014; Cornell University, B.A. 2006. The author wishes to thank Professor Oona Hathaway for her invaluable assistance and encouragement; along with Kate Hadley and John Lewis for their patient and thoughtful editing.

1. CARL VON CLAUSEWITZ, ON WAR 88-89 (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1989) (1832).

2. José de Córdoba & Nicholas Casey, *At Least 53 Killed in Mexico Casino*, WALL ST. J., Aug. 26, 2011, <http://online.wsj.com/article/SB10001424053111904875404576531150085042280.html>.

members of the Zetas drug cartel³ were arrested in connection with the incident, which killed fifty-two Mexicans.⁴ Although Mexican officials have traditionally rejected using terrorist or insurgency terminology to describe drug cartels,⁵ former Mexican President Felipe Calderón responded to the mass killing by condemning the “aberrant act of terror and barbarity.”⁶ Later, he also asserted that, “it is evident that we are not faced with ordinary delinquents but by actual terrorists who know no boundaries.”⁷ Calderón’s description of the violent act initially appeared indicative of a new way of thinking.⁸ Although Calderón promptly “backed off” of the terrorism label,⁹ his remarks reenergized a vigorous debate concerning the status of the Mexican government’s confrontation with the region’s violent drug cartels. Across the border, lawmakers and public officials in the United States are increasingly confronted with a loaded question:¹⁰ is Mexico’s metaphorical drug war transforming into a verifiable armed conflict under the laws of war?

This Note argues that the answer is no. Although the current approach is largely inadequate,¹¹ applying a law-of-war framework is not legally appropriate, nor would it provide the appropriate remedies. The worsening violence in Mexico has rightfully motivated many people to reassess the current anti-cartel strategy. Nevertheless, redefining the situation in Mexico as an armed conflict and recasting drug cartels as terrorists or insurgents would misapprehend the drug cartels’ true nature. Further, applying the law of armed conflict framework would trigger a military approach and accompanying legal regime that are ill suited to meet the challenges that drug cartels pose.

Part II of this Note contextualizes this argument by providing a historical overview of drug trafficking and organized crime in Mexico and a description

3. This Note uses the term “cartel,” which is commonly used to refer to these groups. However, the official term is “drug trafficking organization” (DTO), which accounts for the “unprecedented competition between the DTOs, where collusive behavior appears to last only temporarily and to rapidly evaporate[.]” In effect, Mexico’s drug “cartels” “are not necessarily engaged in price-fixing and other forms of collusive economic activity ascribed to cartels.” JUNE S. BEITTEL, CONG. RESEARCH SERV., R41576, MEXICO’S DRUG TRAFFICKING ORGANIZATIONS: SOURCE AND SCOPE OF THE RISING VIOLENCE 1 n.1 (2011).

4. William Booth, *Five Zeta Gangsters Arrested in Mexico Casino Firebombing, Police Say*, WASH. POST, Aug. 29, 2011, http://www.washingtonpost.com/world/americas/five-zeta-gangsters-arrested-in-mexico-casino-firebombing-police-say/2011/08/29/gIQAzKqwnJ_story.html.

5. Córdoba & Casey, *supra* note 2.

6. *Id.*

7. Jennifer Gonzales, *Mexico Offers Reward for Casino Killers*, ASSOCIATED FOREIGN PRESS, Aug. 26, 2011, <http://www.google.com/hostednews/afp/article/ALeqM5iJELSKVoOJcJ-GLzAo-fFp7k6gnw?docId=CNG.beb28d59410269b2326ae5ba2e5f2575.2f1>.

8. Julian Miglierini, *Monterrey Attack: Game-Changer in Mexico’s Drugs War?*, BBC NEWS, Sept. 1, 2011, <http://www.bbc.co.uk/news/world-latin-america-14758661>.

9. Nick Miroff & William Booth, *Calderón Gives State of Union Address*, WASH. POST, Sept. 2, 2011, http://www.washingtonpost.com/world/americas/Calderón-gives-state-of-union-address/2011/09/02/gQAftsxJ_story.html (noting that Calderón “backed off from branding last week’s casino firebombing in Monterrey an act of drug cartel ‘terrorism’”).

10. See, e.g., Tim Johnson, *Is Mexico at War? Conflict Prompts Linguistic Debate*, MCCLATCHY NEWS, Feb. 3, 2011, <http://www.mcclatchydc.com/2011/02/03/108056/is-mexico-at-war-conflict-prompts.html>.

11. See Mariano Castillo, *Is Mexico’s Drug War Strategy Working?*, CNN, Feb. 16, 2012, <http://www.cnn.com/2012/02/16/world/americas/mexico-drug-war-strategy/index.html>.

of how Mexico and the United States are confronting drug cartels today. It ends by introducing the rhetorical shift occurring among many public officials, who now use the metaphorical drug "war" to signify an armed conflict. Although political posturing may partly explain this transformation, increased militarization strongly suggests that Mexico, with the support of the United States, is relying more on its armed forces to solve the drug cartel problem. Part III refutes the contention that what is happening in Mexico qualifies as an armed conflict under the criteria set forth by the relevant legal instruments and judicial decisions. This section concludes that, although drug cartels are brutally violent and sophisticated in their operations, the character and scale of their organization and violence meet some, but not enough, requirements necessary to designate them as parties to an armed conflict. It concludes by directly responding to the legal arguments in favor of applying an armed conflict designation. Part IV analyzes the potential consequences of applying the laws of war by specifically examining the implications of international humanitarian law (IHL) for the lawful use of force, detention, and prosecution. It determines that the laws of war would unduly restrict basic civil liberties and inappropriately allow for the use of force in a manner that would greatly exacerbate many of the problems Mexico is facing. Part V asserts that Mexico continues to deal with a criminal problem, albeit one of great proportions. While a new approach to drug cartels is needed, it should be focused on fighting organized crime at the transnational level, empowering law enforcement, reforming Mexico's institutions, and strengthening the rule of law rather than on further militarizing the anti-cartel strategy.

This Note does not intend to downplay the severity of the drug cartel problem that Mexico faces or the suffering many Mexicans have endured. Instead, it aims to use the law to fend off a misguided approach that would only compound the very serious challenge Mexico is facing. Indeed, the level of insecurity that plagues Mexico is unacceptable. Many Mexicans feel that they are being terrorized in their own cities and homes, while the hardest-hit Mexican communities bear the type of emotional and physical scars one might expect to see in a war. That is all the more reason why great care should be taken to thoroughly understand the complex nature of drug cartel activities and apply the legal paradigm that is most likely to bring peace and justice. For the people on the ground, the line between reality and the rhetoric of war may seem dim, yet for those tasked with defining the legal nature of the problem and crafting a strategy in response, it is a line that can and should be illuminated by the rules of international law.

II. UNDERSTANDING MEXICO'S "WAR"

A. *The History of Mexico's Drug Cartels*

Drug cartels have been present in Mexico since the early half of the twentieth century.¹² During the 1980s, Mexican President Miguel de la Madrid announced that drug trafficking was a national security problem.¹³ By the next decade, the proportion of the cocaine entering the United States that passed through Mexico had risen from thirty to fifty percent.¹⁴ This was largely because the United States Coast Guard succeeded in shutting down the drug trafficking route that extended from the Caribbean up to Florida.¹⁵ As a result, Colombian cartels began moving their illicit goods through Mexico and into either Southern California or Texas.¹⁶ Then, once the United States and Colombia stemmed the activity of the Colombian cartels, Mexican cartels filled the power vacuum and took over the drug trade.¹⁷ From the early 1990s through the early 2000s, Mexico focused on illicit crop eradication, which also began to alter the balance of power amongst drug cartels and "set the stage" for the explosion of violence in recent years.¹⁸

In spite of the long history of drug trafficking in Mexico, for decades, violence was mitigated by the fact that the ruling Institutional Revolutionary Party (PRI) in Mexico maintained a cozy "patron-client relationship" with drug cartels, while also "grant[ing] monopolies to private-sector supporters, pa[ying] off labor leaders, and dol[ing] out thousands of public-sector jobs" in an effort to quell opposition by "incorporating important social groups."¹⁹ The PRI's relationship with the drug cartels did not just limit the overall level of violence; it also ensured that cartel members were never subjected to court investigations and it defined the rules of the game for traffickers.²⁰ The election of President Vicente Fox of the National Action Party (PAN) in 2000 allowed drug cartels to assert their autonomy from the government.²¹ One reporter writes that, after seventy-one years of the PRI ruling with the drug cartels as its "tacit partner," "[w]hen Calderón's National Action Party toppled the PRI in 2000, the cartels

12. See Shannon K. O'Neil, *The Real War in Mexico: How Democracy Can Defeat the Drug Cartels*, FOREIGN AFF., July-Aug. 2009, <http://www.foreignaffairs.com/articles/65175/shannon-k-oneil/the-real-war-in-mexico>.

13. Cory Molzahn et al., *Drug Violence in Mexico: Data and Analysis Through 2011*, UNIV. SAN DIEGO TRANS-BORDER INST. 21 (Mar. 2012), <http://justiceinmexico.files.wordpress.com/2012/03/2012-tbi-drugviolence.pdf>.

14. *Id.*

15. See William Dean, *Current Situation in Mexico*, in Nat'l Sec. Student Policy Grp., *The War on Mexican Cartels: Options for U.S. and Mexican Policy Makers*, HARVARD UNIV. INST. OF POLITICS 7, 7-8 (Sept. 2012), http://www.iop.harvard.edu/sites/default/files_new/research-policy-papers/TheWarOnMexicanCartels.pdf.

16. *Id.*

17. *Id.*

18. *Id.*

19. O'Neil, *supra* note 12, at 65.

20. Tim Padgett, *Day of the Dead*, TIME, June 30, 2011, <http://www.time.com/time/printout/0,8816,2080608,00.html>.

21. *Id.*

splintered and embarked on an orgy of violence that spawned soulless killing machines.”²² Mexican democratization essentially helped usher in a new era in which highly profitable and powerful Mexican drug cartels now use bribes and coercion, rather than government compacts, to ensure the successful transit of their goods.²³

B. *The Adoption of a Militarized Approach*

Soon after taking office in 2006, former President Felipe Calderón deployed what has grown to approximately 45,000 troops to regions of Mexico that had been hardest hit by trafficking-related violence.²⁴ In effect, he “militarized and intensified a conflict that had been managed by his predecessors through an opaque strategy of accommodation, payoffs, assigned trafficking routes, and periodic takedowns of uncooperative capos.”²⁵ Shortly thereafter, the Mexican Constitution was amended to allow for a detainee facing organized crime allegations to be held without any formal arrest or criminal charges for up to eighty days with explicit judicial approval.²⁶ Although drug cartel members are still prosecuted in civilian courts, until recently, alleged abuses by members of the military (who are supposedly serving a civil law enforcement function) were pursued in secret military tribunals.²⁷ While use of force by the military is now only allowed when it is “strictly inevitable” or “indispensable” to the fulfillment of an assigned mission aimed at supporting civil authorities or enforcing Mexico’s Federal Law of Firearms and Explosives,²⁸ Mexican citizens have long complained of torture, disappearances, extrajudicial executions, and excessive use of force at the hands of the army and navy.²⁹

In July 2012, the PRI returned to power following the election of its candidate, Enrique Peña Nieto. Initially, there were concerns that the PRI’s victory would “turn the clock back to an era of cozy deals with drug cartels and

22. *Id.*

23. *Id.*

24. See Lisa Haugaard et al., *A Cautionary Tale: Plan Colombia’s Lessons for U.S. Policy Toward Mexico and Beyond*, WASH. OFFICE ON LAT. AMERICA 1 (Nov. 2011), http://www.wola.org/sites/default/files/downloadable/Cautionary_Tale.pdf.

25. Steve Coll, *Whose Drug War?*, NEW YORKER DAILY COMMENT (Nov. 10, 2011), <http://www.newyorker.com/online/blogs/comment/2011/11/mexico-drug-war.html>.

26. Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Diario Oficial de la Federación [DO], art. 16, 5 de Febrero de 1917 (Mex.) (current as of March 2013); see *Arraigo Made in Mexico: A Violation to Human Rights*, COMISIÓN MEXICANA DE DEFENSA Y PROMOCIÓN DE LOS DERECHOS HUMANOS ET AL. 3 (Oct. 2012), http://www2.ohchr.org/english/bodies/cat/docs/ngos/CMDPDH_OMCT_Mexico_CAT49_en.pdf.

27. William Booth, *Mexico Moves Away from Secret Military Tribunals*, WASH. POST, Nov. 12, 2012, http://www.washingtonpost.com/world/the_americas/mexico-moves-away-from-secret-military-tribunals/2012/11/11/12bfb088-2497-11e2-92f8-7f9c4daf276a_story.html.

28. Doris Gómora & Silvia Otero, *Regulan el Uso de la Fuerza Pública*, EL UNIVERSAL, Apr. 24, 2012, <http://www.eluniversal.com.mx/primera/39312.html>.

29. *Amnesty Annual Report 2012: The State of the World’s Human Rights*, AMNESTY INT’L, 234 (2012), <http://www.amnestyusa.org/sites/default/files/air12-report-english.pdf>.

fraught relations with the gringos.”³⁰ Yet currently it does not appear that Mexico’s drug cartel strategy is going to undergo any dramatic changes. Although Peña Nieto has expressed interest in phasing out the role of the Mexican military, the centerpiece of his crime-reduction strategy is the creation of a 10,000 person national gendarmerie, described as a “paramilitary police force,”³¹ which will consist mostly of members of the Mexican military.³² Although some analysts have predicted that it might help fill the “security gap” where neither police nor military are ideal,³³ more skeptical experts have pointed out that it will consist of the “same number of soldiers, in the same places, doing more or less the same, with basically the same tactics, leadership and equipment it has had up until now, but with a different uniform.”³⁴

On the other side of the border, the United States, under President George W. Bush, agreed in 2007 to a \$1.4 billion, three-year package of U.S. assistance, now known as the “Mérida Initiative.”³⁵ The stated objective of the plan was to “maximize the effectiveness of our efforts to fight criminal organizations.”³⁶ The program has continued under the Obama Administration, which requested \$234.0 million in assistance for Mexico for fiscal year 2013.³⁷ The Mérida Initiative “focuses on four pillars:” “(1) disrupting organized criminal groups, (2) institutionalizing the rule of law, (3) building a 21st century border, and (4) building strong and resilient communities.”³⁸ A closer analysis of overall spending numbers suggests that the United States was actually “plac[ing] more emphasis on rule of law” aid in 2010, including judicial assistance.³⁹ However, in 2011, nonmilitary assistance underwent several cuts, “shifting the balance back towards the military side of the scale while reducing overall amounts.”⁴⁰

Apart from the Mérida Initiative, the Pentagon has also escalated its involvement in Mexico over the years. Some reports estimate that the U.S.

30. Rory Carroll, *US Concerned Mexico’s New President May Go Easy on Drug Cartels*, GUARDIAN (London), July 1, 2012, <http://www.guardian.co.uk/world/2012/jul/02/usa-mexico-president-drugs-cartels>.

31. Jordan Fabian, *Mexican President Enrique Peña Nieto Outlines New Drug War Plan*, ABC NEWS, Dec. 18, 2012, http://abcnews.go.com/ABC_Univision/News/mexico-president-enrique-pena-nieto-charts-drug-war/story?id=18007154#UVCgVlvFQx0.

32. Barnard R. Thompson, *The ‘National Gendarmerie’ and Mexico’s Crime Fighting Plans*, MEXIDATA, Dec. 24, 2012, <http://mexidata.info/id3526.html>.

33. John Sullivan, *The Benefits of a Paramilitary Force in Mexico*, HOUS. CHRON.: BAKER INST. BLOG (Jan. 4, 2013), <http://blog.chron.com/bakerblog/2013/01/the-benefits-of-a-paramilitary-force-in-mexico>.

34. Alejandro Hope, *Is it Worth Creating a Gendarmerie in Mexico?*, INSIGHT CRIME, Dec. 10, 2012, <http://www.insightcrime.org/news-analysis/worth-creating-gendarmerie-in-mexico>.

35. See Haugaard et al., *supra* note 24, at 3. United States assistance was initially called “Plan Mexico,” referring to the mostly military-police Colombian counter-narcotic assistance package, “Plan Colombia.”

36. JUNE S. BEITTEL, CONG. RESEARCH SERV., R40582, MEXICO’S DRUG RELATED VIOLENCE 15 (2009).

37. CLARE RIBANDO SEELKE & KRISTIN M. FINKLEA, CONG. RESEARCH SERV., R41349, U.S.-MEXICAN SECURITY COOPERATION: THE MÉRIDA INITIATIVE AND BEYOND 8 (2013).

38. *See id.* at 7.

39. *See* Haugaard et al., *supra* note 24, at 5.

40. *Id.*

Department of Defense's (DOD) counter-narcotics support to Mexico started at approximately \$34.2 million in 2009.⁴¹ It rose to \$89.7 million in 2010 and fell slightly in 2011 to \$84.7 million.⁴² In September 2012, the Congressional Research Service estimated that DOD support to Mexico would exceed \$100.4 million in 2012.⁴³ Mexico additionally receives military training programs funded through the State Department's International Military Education and Training program.⁴⁴ Meanwhile, there were reports that Mexico is "at the top" of the U.S. military's Joint Special Operations Command's "wish list."⁴⁵ Most recently, it has been reported that, "according to documents and interviews with multiple U.S. officials," the Pentagon is creating "a new U.S.-based special operations headquarters to teach Mexican security forces how to hunt drug cartels in the same way special operations teams hunt al-Qaida."⁴⁶ There is also security spending that is harder to trace, such as the deployment of new Central Intelligence Agency operatives and retired military personnel to Mexico and the potential deployment of private security contractors.⁴⁷ Former Deputy Assistant Secretary of Defense Frank O. Mora testified before Congress that "U.S.-Mexico defense cooperation has reached unprecedented levels as of late."⁴⁸ Department of Homeland Security (DHS) Secretary Janet Napolitano conceded that, "in certain limited ways," the U.S. military has been working with the Mexican military to combat drug cartels.⁴⁹ She also pointed to the fact that former Defense Secretary Robert Gates and former Joint Chiefs of Staff Admiral Michael Mullen were part of a U.S. delegation that visited Mexico, adding, "[Y]ou can deduce from that that there are discussions about the proper role for our military."⁵⁰

In spite of all of these efforts, the Washington Office on Latin America declared in 2011 that, over the past several years, "meaningful improvements in public security have not been achieved."⁵¹ Violence has become more generalized and the number of organized crime groups has increased from six

41. SEELKE & FINKLEA, *supra* note 37, at 31.

42. *Id.* at 31-32.

43. *Id.* at 32.

44. *Id.* at 37.

45. See Dana Priest & William M. Arkin, 'Top Secret America': A Look at the Military's Joint Special Operations Command, WASH. POST, Sept. 2, 2011, http://www.washingtonpost.com/world/national-security/top-secret-america-a-look-at-the-militarys-joint-special-operations-command/2011/08/30/gIQAvYuAxJ_story_4.html.

46. Kimberly Dozier, *New US Special Operations Headquarters To Help Mexican Forces To Fight Drug Gangs*, ASSOCIATED PRESS, Jan. 17, 2013, http://www.elpasotimes.com/ci_22392813/us-commandos-boost-numbers-train-mexican-forces.

47. See Ginger Thompson, *U.S. Widens Role in Battle Against Mexico's Drug Cartels*, N.Y. TIMES, Aug. 6, 2011, <http://www.nytimes.com/2011/08/07/world/07drugs.html?pagewanted=all>.

48. *The U.S. Homeland Security Role in the Mexican War Against Drug Cartels: Hearing Before the Subcomm. on Oversight, Investigations, and Mgmt. of the H. Comm. on Homeland Sec.*, 112th Cong. 20 (2011) (statement of Deputy Assistant Sec'y of Def. Frank O. Mora).

49. Mark Memmott, *U.S. Military Doing 'Limited' Drug War Work in Mexico*, Napolitano Says, NPR: TWO-WAY (Mar. 24, 2010, 1:08 PM), http://www.npr.org/blogs/thetwo-way/2010/03/mexico_us_military_drug_war_na.html.

50. *Id.*

51. Haugaard et al., *supra* note 24, at 3.

to twelve.⁵² As of November 2012, an estimated 57,449 people have been killed in drug-related violence since Calderón deployed the military in 2006.⁵³ Furthermore, drug-related killings have increased eleven percent since 2010.⁵⁴ Meanwhile, approximately ninety-five percent of all cocaine in the United States continues to enter through Mexico or its territorial waters.⁵⁵ Mexico is also a primary producer and supplier of the heroin, methamphetamines, and marijuana that ultimately reaches the United States.⁵⁶ As the situation in Mexico has worsened, concern within the United States has grown. The 111th Congress held more than twenty hearings on Mexico and associated border security issues.⁵⁷

C. *The Rhetoric of Mexico at War*

This section focuses on demonstrating the extent to which war rhetoric has pervaded both U.S. and Mexican political discourse surrounding initiatives to combat Mexico's drug cartels, motivating some public figures to push for transforming a metaphorical war into a literal armed conflict. "Rhetoric has long been employed to persuade, even goad, people to action," Susan Stuart wrote in her piece on the effect of militaristic rhetoric on the United States' domestic "war" on drugs.⁵⁸ "[T]oday's increasing use of militaristic rhetoric by politicians and pundits goes beyond its metaphorical use as a war against an abstraction. Instead, use of such language is becoming literal, and that rhetorical shift matters," Stuart wrote.⁵⁹ While Stuart's research posits that war rhetoric has "identif[ied] fellow [United States] citizens as enemies in a literal war,"⁶⁰ her observations translate internationally as well. Another legal scholar has observed that the language of war "has a profound impact on how the law's intervention is shaped, or how the laws governing the transnational use of force are interpreted to accommodate a 'war.'"⁶¹ He posited that war and its rhetoric create legal norms and that the meaning of law is formed at the intersection of

52. *Id.*

53. *Mexican Daily: Nearly 60,000 Drug War Deaths Under Calderon*, FOX NEWS LATINO, Nov. 1, 2012, <http://latino.foxnews.com/latino/news/2012/11/01/mexican-daily-nearly-60000-drug-war-deaths-under-calderon/#ixzz2IJ3IMtfY>. In fact, the death toll may be much higher than the Mexican government estimates. See Damien Cave, *Mexico Updates Death Toll in Drug War to 47,515, but Critics Dispute the Data*, N.Y. TIMES, Jan. 11, 2012, <http://www.nytimes.com/2012/01/12/world/americas/mexico-updates-drug-war-death-toll-but-critics-dispute-data.html>.

54. See Cave, *supra* note 53.

55. See CLARE RIBANDO SEELKE ET AL., CONG. RESEARCH SERV., R41215, LATIN AMERICA AND THE CARIBBEAN: ILLICIT DRUG TRAFFICKING AND U.S. COUNTERDRUG PROGRAM 2 (2011).

56. See *id.* at 14.

57. See BEITTEL, *supra* note 3, at 1.

58. Susan Stuart, *War as Metaphor and the Rule of Law in Crisis: The Lessons We Should Have Learned from the War on Drugs*, 36 S. ILL. U. L.J. 1, 1 (2011).

59. *Id.* at 2-3.

60. *Id.* at 3.

61. Tawia Ansah, *War: Rhetoric & Norm-Creation in Response to Terror*, 43 VA. J. INT'L L. 797, 799 (2003).

language and politics.⁶² Put simply, "the language of war shapes and creates the international legal norms governing the use of force."⁶³

Outside of legal academia, the late Wayne C. Booth—who dedicated his life to analyzing rhetoric—similarly pointed out that war rhetoric is essentially the most influential form of political rhetoric that "makes (and destroys) our realities."⁶⁴ This is because political rhetoric is inherently aimed at changing present circumstances.⁶⁵ Linguist George Lakoff and philosopher Mark Johnson have maintained that our conceptual system itself is metaphorical and that metaphors thus "structure how we perceive, how we think, and what we do."⁶⁶ Citing the rhetorical use of the term "war," they note that the very acceptance of the war metaphor leads to certain inferences and also clears the way for political action.⁶⁷ Thus, the examples that follow in this section should not be merely dismissed as insignificant rhetorical flourishes. As Lackoff and Johnson warn,

Metaphors may create realities for us, especially social realities. A metaphor may thus be a guide for future action. Such actions, will of course, fit the metaphor. This will, in turn, reinforce the power of the metaphor to make experience coherent. In this sense metaphors can be self-fulfilling prophecies.⁶⁸

Although the Mexican government has explicitly rejected an armed conflict designation, the rhetoric of war is nonetheless often employed within its borders. Mexican legal scholar Pedro Salazar Ugarte has criticized what he refers to as the "logic of war" that pervades Mexico.⁶⁹ According to Salazar Ugarte, Mexican officials have invoked a "vocabulary" of war, emergency, urgency, necessity, and power, and have imposed corresponding restrictions to create an impression of extraordinary circumstances that demand an exceptional reaction by the State.⁷⁰ Examples of this logic include former President Calderón reminding Mexican citizens that the "war" against the drug cartels will be costly, both economically and in terms of human lives.⁷¹ Even when rejecting comparisons to the United States' war in Iraq, Calderón could not stop himself from using the rhetoric of war, stating:

This is not a war where we are liberating a foreigner, looking for a resource that is not our own, oil or whatever. Nor are we attempting to liberate another nation. Confronting delinquency and organized crime is a fight in which the security and the tranquility of our Mexican families, homes, and cities are in play.⁷²

62. *Id.* at 800.

63. *Id.* at 851.

64. Wayne C. Booth, *War Rhetoric, Defensible and Indefensible*, 25 J. RHETORIC, CULTURE & POL. 221, 223 (2005).

65. *Id.*

66. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 4 (1980).

67. *Id.* at 156.

68. *Id.*

69. PEDRO SALAZAR UGARTE, *CRÍTICA DE LA MANO DURA: CÓMO ENFRENTAR LA VIOLENCIA* 51 (2012).

70. *Id.* at 55.

71. *Id.*

72. *Id.* at 53.

He has also pointed out that, although the drug cartels that Mexico faces today are very different from the insurgents it faced in 1810 during the Mexican War of Independence, Mexico is still engaged in a fight against delinquency that requires all Mexicans to declare war against their enemies.⁷³ Calderón's predecessor, former Mexican President Vicente Fox, has been more outspoken, telling reporters, "Everybody's trying to deny that we're going through a war, but that's what it is."⁷⁴

Mexican writer Carlos Bravo Regidor traced the transformation of the former administration's rhetoric and how it was used to define the term "war."⁷⁵ He observed that during the first year of the Calderón administration, the word "war" was used to describe a battle that could be decisively won with the support, participation, and sacrifices of the Mexican people.⁷⁶ In late 2007 through 2009, however, the term "war" took on a different color. It became an issue of national security that required technology, intelligence, and preventative measures.⁷⁷ Then, around the middle of 2009, Calderón ceased using the term "war" altogether.⁷⁸ Aside from vowing to restore peace, Mexico's new President Peña Nieto's silence on the issue of drug violence during his first months in office leaves his own rhetorical approach unclear.⁷⁹ Within civil society, however, the rhetoric of war endures. In a recent article, influential Mexican historian Enrique Krauze stated, "The violence we are seeing today is neither political nor revolutionary, but it is also not merely criminal. We are witnessing a complex civil war . . . between members of organized crime and the government."⁸⁰

The rhetoric of Mexico at war has long been prevalent in the United States. However, recent developments have signaled that some public officials are beginning to take the metaphor more seriously. In March 2011, Representative Michael McCaul introduced legislation that would require the Secretary of State to place six drug cartels on the Foreign Terrorist Organization (FTO) list.⁸¹ Ultimately, consideration of the FTO label is more than a politically charged semantics debate. Not only does it push the debate down a slippery slope, it also shapes whether drug cartels are confronted as a law enforcement problem, military threat, or state building challenge.⁸²

73. See Carlos Bravo Regidor, *Una Ayudadita de Memoria para Felipe Calderon*, BLOG DE LA RADACCION (Jan. 28, 2011), <http://redaccion.nexos.com.mx/?p=2571>.

74. See Jim Myers et al., *Vicente Fox: Mexico at 'War,' Obama's Approach a Failure*, NEWSMAX, Mar. 22, 2011, <http://www.newsmax.com/Headline/VicenteFox-Mexico-DrugWar-Cartels/2011/03/22/id/390385#ixzz1pmFct0rE>.

75. See Carlos Bravo Regidor, *La "Guerra" en el Discurso Presidencial*, LA RAZÓN, Jan. 31, 2011, http://www.razon.com.mx/spip.php?page=columnista&id_article=63169.

76. *Id.*

77. *Id.*

78. *Id.*

79. E. Eduardo Castillo, *Mexico's New President Mostly Mum on Drug Violence*, YAHOO! NEWS, Jan. 29, 2013, <http://news.yahoo.com/mexicos-president-mostly-mum-drug-violence-175459347.html>.

80. Enrique Krauze, *México: La Tormenta Perfecta*, LETRAS LIBRES (Oct. 2012), <http://www.letraslibres.com/revista/dossier/mexico-la-tormenta-perfecta>.

81. H.R. 1270, 112th Cong. (1st Sess. 2011).

82. See Haugaard et al., *supra* note 24, at 17.

Although an FTO designation does not itself trigger IHL, McCaul and his colleagues seemed to be leaning in that direction. First, McCaul argued that Mexican drug cartels operate like al Qaeda, the Taliban, or Hezbollah.⁸³ "There is a real war happening along our border and the enemy is covertly infiltrating our cities," reasoned McCaul.⁸⁴ Former Chairwoman of the House Foreign Affairs Committee Ileana Ros-Lehtinen agreed. "We must stop looking at the drug cartels today solely from a law enforcement perspective and consider designating these narco-trafficking networks as Foreign Terrorist Organizations," she proclaimed at a full-committee hearing on emerging hemispheric threats.⁸⁵

Other officials went a step further, contending that Mexico is not just facing a terrorist threat; it is facing an insurgency. McCaul's bill, which never made it out of Committee, was followed by legislation introduced by then-Chairman of the Western Hemisphere Subcommittee, former Representative Connie Mack. Mack's proposal would have instructed the Department of State to establish a counterinsurgency strategy "to combat the terrorist insurgency in Mexico."⁸⁶ During his time on the Senate Foreign Relations Committee, former Senator Richard "Dick" Lugar similarly called what is happening in Mexico a "narco-insurgency" and suggested that the United States consider "further steps" that could be taken by the United States military and intelligence community to combat Mexican drug cartels.⁸⁷ Meanwhile, while the Bush Administration never sent troops into Mexico, it was prepared to. It put a contingency plan into place before leaving office, in case Mexico's violence spilled across the border.⁸⁸ This "surge" plan reportedly involved DHS agents assisting local authorities and allowed for the possibility of military assistance from the DOD, including aircraft, armored vehicles, and special teams.⁸⁹ The announcement of this strategy came just a year after the U.S. Joint Forces Command released a report that put Mexico in the same category as Pakistan, naming the two nations as facing the risk of "rapid and sudden collapse."⁹⁰

83. Press Release, Congressman Michael McCaul, McCaul Seeks To Classify Mexican Drug Cartels as Terrorists (Mar. 30, 2011), <http://mccaull.house.gov/index.cfm?sectionid=29&parentid=7§iontree=7&itemid=1161> [hereinafter McCaul Press Release].

84. Stewart Powell, *Rep. Michael McCaul Presses Efforts To Designate Mexican Drug Cartels "Foreign Terrorist Organizations,"* HOUS. CHRON.: TEXAS ON THE POTOMAC (Oct. 4, 2011), <http://blog.chron.com/txpotomac/2011/10/rep-michael-mccaull-r-austin-presses-efforts-to-designate-mexican-drug-cartels-foreign-terrorist-organizations>.

85. *Emerging Threats and Security in the Western Hemisphere: Hearing Before the H. Comm. on Foreign Affairs*, 112th Cong. 1 (2011) (statement of Rep. Ileana Ros-Lehtinen, Chairwoman, Comm. on Foreign Affairs).

86. H.R. 3401, 112th Cong. (1st Sess. 2011).

87. Senator Richard Lugar, Speech to Rule of Law Training Conference for Mexican Prosecutors (Sept. 27, 2010), available at <https://votesmart.org/public-statement/558502/lugar-speech-to-rule-of-law-training-conference-for-mexican-prosecutors#.UdlOLz7EqKw>.

88. *Feds Plan 'Surge' if Mexico Drug War Spills Over*, NBCNEWS.COM, Jan. 10, 2009, http://www.nbcnews.com/id/28589917/ns/us_news-security/t/feds-plan-surge-if-mexico-drug-war-spills-over/#.UTu34tHEpyj.

89. *Id.*

90. *Joint Operating Environment: Challenges and Implications for the Future Joint Force*, UNITED STATES JOINT FORCES COMMAND 36 (Nov. 25, 2008), <http://www.jfcom.mil/newslink/storyarchive/2008/JOE2008.pdf>.

Democrats have espoused militaristic rhetoric as well. Former Secretary of State Hillary Clinton remarked that Mexican drug cartels “are showing more and more indices of insurgencies,” noting that, in some cases, they are “morphing into or making common cause with what we would consider an insurgency in Mexico and in Central America.”⁹¹ Undersecretary of the Army Joseph Westphal also referred to the situation in Mexico as an insurgency and suggested that the United States might need to send in troops.⁹² National Intelligence Director James Clapper drew parallels between Mexico and Colombia,⁹³ which most experts concede is engaged in an armed conflict under international law against guerilla forces.⁹⁴ It should be noted, however, that Clinton’s remarks were immediately revised by White House officials and rejected by President Barack Obama himself.⁹⁵ Similarly, Westphal later backed away from his comments, clarifying that his statements “were not and have never been the policy of the Department of Defense or the U.S. Government toward Latin America.”⁹⁶

As will be discussed in Part III of this Note, academics have also jumped into the debate over the status of Mexico’s counterdrug initiatives. A few have argued that what is happening in Mexico more closely resembles an insurgency and have actively advocated for the application of an armed-conflict legal paradigm.⁹⁷

III. DEFINING A WAR

The term “war” is often used loosely and imprecisely to describe the violent confrontation that is taking place between Mexico and the drug cartels. However, international humanitarian law (IHL), or the law of armed conflict, demands that words be chosen more carefully when they take on a legal character. There are two types of conflict recognized by IHL. The first, international armed conflict (IAC), requires the participation of two or more

91. Kim Ghattas, *Clinton Says Mexico Drug Crime Like an Insurgency*, BBC NEWS, Sept. 9, 2010, <http://www.bbc.co.uk/news/world-us-canada-11234058>.

92. Matthew Laplante, *Army Official Suggests U.S. Troops Might Be Needed in Mexico*, SALT LAKE TRIB., Feb. 7, 2011, <http://www.sltrib.com/sltrib/home/51207681-76/mexico-westphal-drug-insurgency.html.csp>.

93. *See U.S. Intel Chief: Mexico Drug Violence Poses Security Threat*, FOX NEWS LATINO, Mar. 11, 2011, <http://latino.foxnews.mobi/quickPage.html?page=30414&content=49281889&pageNum=-1>.

94. *See Colombia: Applicable International Law*, GENEVA ACAD. INT’L HUMANITARIAN LAW & HUMAN RTS. (Feb. 28, 2012), http://www.adh-geneva.ch/RULAC/applicable_international_law.php?id_state=47; Interview by ICRC with Christophe Beney, Outgoing Head of Colombia Delegation, INT’L COMM. RED CROSS, Aug. 29, 2011, <http://www.icrc.org/eng/resources/documents/interview/2011/colombia-interview-2011-09-29.htm>.

95. *See Frank James, Obama Rejects Hillary Clinton Mexico-Colombia Comparison*, NPR: TWO-WAY (Sept. 9, 2010, 8:39 PM), <http://www.npr.org/blogs/thetwo-way/2010/09/09/129760276/obama-rejects-hillary-clinton-mexico-colombia-comparison>.

96. *Army Undersecretary Backs Off Comments About Mexico ‘Insurgency’*, CNN, Feb. 8, 2011, http://articles.cnn.com/2011-02-08/us/us.mexico.military_1_drug-cartels-fight-drug-gangs-insurgency?_s=PM:US.

97. *See infra* Section III.D.

States.⁹⁸ Given the fact that Mexico is not involved in an armed confrontation against another State, the situation in Mexico does not meet the defining characteristic of an IAC. Non-international armed conflicts (NIACs), the second type of conflict, are intra-state and involve the participation of at least one non-state actor.⁹⁹ The case against calling Mexico's strife a NIAC requires a careful examination of the criteria set forth by Common Article 3 of the 1949 Geneva Conventions, Additional Protocol II, and the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY).¹⁰⁰

A. *Applicable Law*

Common Article 3 and Additional Protocol II are the two principal treaties that regulate NIACs under international law.¹⁰¹ Common Article 3 is the main body of law that governs NIACs and is so widely accepted that the International Court of Justice has interpreted it to represent a codification of customary international law.¹⁰² It applies to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties [the contracting States]."¹⁰³ Unlike Additional Protocol II, it encompasses conflicts that occur *solely* between non-state armed groups. While the Article itself does not provide a definition of a NIAC or the conditions that determine its application,¹⁰⁴ its drafting history and commentary, however, do deliver some indications of several factors that might merit the application of IHL.¹⁰⁵ Although the commentary is not binding, it is a helpful illustration of the factors articulated during diplomatic negotiations as distinguishing a genuine armed conflict from "a mere act of banditry or an unorganized and short-lived insurrection."¹⁰⁶ Consequently, this Note uses the commentary to help interpret an otherwise vague provision.

Additional Protocol II applies to NIACs that "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces *or* other organized armed groups."¹⁰⁷ Thus Additional Protocol II does not encompass confrontations between non-state actors and, compared to Common

98. INT'L COMM. RED CROSS, HOW IS THE TERM "ARMED CONFLICT" DEFINED IN INTERNATIONAL HUMANITARIAN LAW 1 (2008), <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> [hereinafter ICRC Armed Conflict Definition].

99. *Id.*

100. *Id.* at 3-4.

101. *Id.* at 3.

102. See Anthony Cullen, *The Parameters of Internal Armed Conflict in International Humanitarian Law*, 12 U. MIAMI INT'L & COMP. L. REV. 189, 193 (2004) (citing Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 114 (June 27, 1986)).

103. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

104. Cullen, *supra* note 102, at 194.

105. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary, 49 (1952) [hereinafter Geneva Convention Commentary].

106. *Id.*

107. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict art.1(2), June 8, 1977, 1125 U.N.T.S. 609, 611 (emphasis added) [hereinafter Additional Protocol II].

Article 3, is generally interpreted as requiring a higher threshold of violence before a conflict qualifies as a NIAC.¹⁰⁸ The Protocol explicitly states that it does not apply to internal disturbances and tensions,¹⁰⁹ which have been broadly defined by the International Committee of the Red Cross as “acts of public disorder accompanied by acts of violence.”¹¹⁰ Some have interpreted the Protocol as only dealing with “situations at or near the level of a full-scale civil war.”¹¹¹ One legal expert noted that conflicts that meet the Additional Protocol II standard are much less frequent than Common Article 3 conflicts.¹¹² Nonetheless, she observed that, in practice, States themselves do not clearly distinguish between the two types of conflict.¹¹³

The jurisprudence of the ICTY further clarifies the ambiguity associated with identifying an armed conflict. Mostly notably, in *Prosecutor v. Tadić*, the ICTY embraced a definition of armed conflict much broader than that envisioned by Additional Protocol II,¹¹⁴ asserting that one 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.”¹¹⁵ The court further elaborated the test for whether an armed conflict exists as being contingent on the intensity of the violence, which speaks to the existence of “protracted” violence and the organization of the parties, which determines whether the forces confronting one another may be considered “organized armed groups.”¹¹⁶ Administering the test requires a “case-specific analysis of the facts.”¹¹⁷ The ICTY essentially helped fill the definitional gap left by international legal instruments, and its interpretation has since arguably become “the most authoritative formulation of the threshold associated with Common Article 3.”¹¹⁸

108. Sylvain Vite, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT’L REV. RED CROSS 69, 76 (2009).

109. Additional Protocol II, *supra* note 107, art. 1(2).

110. *Violence and the Use of Force*, INT’L COMM. RED CROSS 19 (July 2011), http://www.icrc.org/eng/assets/files/other/icrc_002_0943.pdf.

111. ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 199 (2010).

112. Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 INT’L REV. RED CROSS 1, 2 (2011).

113. *Id.* at 3.

114. See CULLEN, *supra* note 111, at 119.

115. *Prosecutor v. Tadić*, Case No. IT-91-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (emphasis added).

116. *Id.* at ¶ 562 (emphasis added); see also *Prosecutor v. Tadić*, Case No. IT-91-1, Opinion and Judgment, ¶ 562 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) (“The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict.”).

117. CULLEN, *supra* note 111, at 123.

118. *Id.* at 122.

B. *Intensity of Violence*

The situation in Mexico does not fit the definition of a NIAC established in Additional Protocol II because the majority of the conflict does not involve the "High Contracting Party," the Mexican government, but is instead taking place *between* drug cartels. Ninety percent of all drug-related homicides in Mexico consist of one cartel member killing the member of another cartel.¹¹⁹ Less than ten percent of cartel-related deaths in Mexico have been agents of the State¹²⁰ and some estimates suggest that the proportion of Mexican security forces that have been killed is as low as seven percent.¹²¹ In contrast, Common Article 3 does not require the involvement of a "High Contracting Party," and thus provides the only viable basis under which what is happening in Mexico could be construed as classifying as an armed conflict. Unlike in the case of Additional Protocol II, the large number of violent non-governmental inter-cartel confrontations could qualify as evidence of a Common Article 3 armed conflict. Yet, for the reasons set forth below, it would still ultimately prove insufficient to establish that drug cartels are engaged in a NIAC against either the Mexican state or one another, even under this lower threshold.

Although the high degree of violence present in Mexico is the factor that weighs most strongly in favor of an armed conflict designation under Common Article 3, the ICTY's application of the intensity criterion undermines the case for designation. The drug cartels may be heavily armed with sophisticated weapons, but the ICTY asserts that "far more complex considerations are needed to determine whether the intensity criterion . . . is satisfied."¹²² In *Prosecutor v. Ramush Haradinaj*, the ICTY stated that a range of other indicative factors should be examined, including "the number of persons and type of forces partaking in the fighting."¹²³ The number of Mexican soldiers involved may seem impressive,¹²⁴ but they are tasked with serving a law enforcement function: arresting traffickers, establishing checkpoints, burning marijuana and opium fields, and interdicting drug shipments along the Mexican coasts.¹²⁵ The size of the drug cartel forces is largely unknown. It is roughly estimated that the largest drug cartel is made up of 11,000 members and the smallest 3,500.¹²⁶ These figures are less alarming after reducing them by the number of members who are incarcerated,¹²⁷ and considering that many of

119. Robert C. Bonner, *The New Cocaine Cowboys: How To Defeat Mexico's Drug Cartels*, 89 FOREIGN AFF. 35, 41 (July-Aug. 2010).

120. Paul Rexton Kan, *What We're Getting Wrong About Mexico*, 41 PARAMETERS 37, 39 (2011), <http://www.carlisle.army.mil/usawc/parameters/Articles/2011summer/Kan.pdf>.

121. BEITTEL, *supra* note 3, at 20.

122. Pierre Hauck & Sven Peterke, *Organized Crime and Gang Violence in National and International Law*, 92 INT'L REV. RED CROSS 407, 430 (2010).

123. *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgment, ¶ 49 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

124. BEITTEL, *supra* note 3, at 3.

125. *Id.*

126. J. Fernandez, *Crimen Organizado*, NOTICIAS JURIDICAS, Oct. 2008, <http://noticias.juridicas.com/articulos/55-Derecho%20Penal/200810-98765412359874.html>.

127. *Id.*

those who are not imprisoned play a variety of roles in the drug cartel business aside from violently defending their organizations' interests. Furthermore, the size of drug cartels alone does not eliminate the possibility that Mexico is merely confronting an organized crime problem, albeit a serious one. Several countries face similar, if not more daunting, numerical challenges when it comes to organized crime while still maintaining a criminal law framework. China is confronting approximately 170,000 organized criminals¹²⁸ and Japan is home to about 100,000 members of organized crime.¹²⁹

The intensity of violence present in the ICTY cases is also of a different nature than the violence taking place in Mexico. In *Tadić*, the tribunal declared the presence of an armed conflict, and cited as evidence a two-day artillery bombardment that resulted in the death of 800 inhabitants,¹³⁰ military occupation, the armed seizure of power, significant destruction of certain parts of the Bosnian town of Prijedor and the expulsion by force of arms of non-Serb inhabitants.¹³¹ The ICTY also noted that “[t]he intensity of the conflict has ensured the continuous involvement of the Security Council since the outbreak of fighting.”¹³² In *Haradinaj*, the ICTY established that an armed conflict existed between the Kosovo Liberation Army (KLA) and Serbian forces given “the frequent shelling in Dečani/Deçan municipality, the flight of civilians from the countryside, the daily clashes between the KLA and the Serbian forces, and the unprecedented scale of deployment of VJ [Yugoslav Army] forces on the ground and their participation in combat.”¹³³ These “daily” clashes consisted of regular confrontations between the two forces involving prolonged fire for a period of days and the use of anti-aircraft guns, automatic rifles, and mortars.¹³⁴ One witness observed the presence of “heavy guns dug in at strategic positions,” “convoys with lorries full of soldiers,” and “Gazelle helicopters and an Orao (‘Eagle’) jet bomber in the air.”¹³⁵

Overall, the level of violence in Mexico is comparable to the rest of the region. Mexico’s murder rate is lower than many Central American and Caribbean countries.¹³⁶ Its own murder rate was higher during the 1990s than it was in 2009.¹³⁷ Additionally, recent reports showed that “[g]renade attacks, car

128. *Id.*

129. Daisuke Wakabayashi & Jeff Bater, *U.S. Imposes Sanctions on Japan Organized Crime Group*, WALL ST. J., Feb. 23, 2012, <http://online.wsj.com/article/SB10001424052970203918304577241844134189560.html>.

130. Prosecutor v. Tadić, Case No. IT-4-1-T, Judgment and Opinion, ¶ 565 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

131. *Id.* ¶ 570.

132. *Id.* ¶ 567.

133. Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 99 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

134. *Id.* ¶ 98.

135. *Id.*

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

137. Chris Hawley, *Mexico’s Violence Not as Widespread as Seems*, USA TODAY, Aug. 3, 2010, http://www.usatoday.com/news/world/2010-08-03-Mexico-drug-violence_N.htm.

bombs and wild urban gun battles have also become [increasingly] rare.”¹³⁸ The Mexican military reported that attacks on its troops by drug cartels dropped fifty percent last year.¹³⁹ Although it is far too early to say whether this trend represents a permanent change, analysts are speculating that the drug cartels have come to terms with the fact that spectacular acts of violence are bad for business and only put more pressure on them.¹⁴⁰ While there are certainly reports that some drug cartels are acquiring dangerous military weaponry,¹⁴¹ handguns, pistols, and assault rifles that are legally sold to civilians in the United States remain their weapons of choice.¹⁴² Even in the deadliest regions of Mexico, an overwhelming majority of the deaths taking place are more properly characterized as discrete criminal murders, not mass casualties inflicted by the military onslaughts described by the ICTY. During the first nine months of 2011, the Mexican government reported that of the 12,903 homicides “allegedly caused by criminal rivalry,” only 1,652 were a result of clashes between the government and the drug cartels and 311 resulted from confrontations between organized crime groups.¹⁴³ The overwhelming majority of the homicides, 10,200, were a result of numerous but isolated incidents of “delinquent rivalry,” consisting of “bodies of individuals found after abduction, torture, or gunshot wounds, as well as innocent victims that died as a result of wounds from assassins, organized crime associates, and drug traffickers.”¹⁴⁴

Ultimately, the level of violence in Mexico is undeniably intense and provides the most compelling reason for designating it an armed conflict.¹⁴⁵ Mexican authorities have uncovered grenades, dynamites, and even rockets in the drug cartels' arsenals of weapons.¹⁴⁶ Just as other armed conflicts have led to the creation of refugee populations, the Internal Displacement Monitoring Center estimates that 115,000 people have been displaced by Mexico's drug-related violence.¹⁴⁷ Further, there are indeed examples of confrontations of much lower intensity that have been labeled armed conflicts.¹⁴⁸ The effort to

138. Nick Miroff, *A Quieter Drug War in Mexico, But No Less Deadly*, WASH. POST, Feb. 1, 2013, http://articles.washingtonpost.com/2013-02-01/world/36684823_1_criminal-sciences-drug-war-cartels.

139. *Id.*

140. *Id.*

141. Ken Ellingwood & Tracy Wilkinson, *Drug Cartels' New Weaponry Means War*, L.A. TIMES, Mar. 15, 2009, http://www.latimes.com/news/nationworld/world/la-fg-mexico-arms-race15-2009mar15_0,229992.story.

142. Dane Schiller, *ATF: The Favorite Guns of Mexican Drug Cartels*, HOUS. CHRON., Feb. 7, 2012, <http://blog.chron.com/narcoconfidential/2012/02/atf-the-favorite-guns-of-mexican-drug-cartels/2946-2>.

143. Molzahn, et al., *supra* note 13, at 6.

144. *Id.*

145. See William Booth, *In Mexico, 12,000 Killed in Drug Violence in 2011*, WASH. POST, Jan. 2, 2012, http://www.washingtonpost.com/world/in-mexico-12000-killed-in-drug-violence-in-2011/2012/01/02/gIQAcGUdWP_story.html.

146. Colby Wilkason & Mikhaila Fogel, *Cartel Weapons and Their Provenance*, in Nat'l Sec. Student Policy Grp., *supra* note 15, at 29.

147. Mica Rosenberg, *Mexico's Refugees: A Hidden Cost of the Drugs War*, REUTERS, Feb. 17, 2011, <http://www.reuters.com/article/2011/02/18/us-mexico-drugs-idUSTRE71H0EQ20110218>.

148. One example is the 1989 attack on an Argentine military base headed by a guerilla group that left approximately thirty-nine people dead after a thirty-hour battle. Both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights deemed that the incident triggered the laws of war. See Liesbeth Zegveld, *The Inter-American Commission on Human Rights and*

classify the situation in Mexico is further complicated by the fact that the government has been known to withhold data and death statistics in the past.¹⁴⁹ Yet, even if one concedes that the current level of violence is persuasive evidence of a NIAC, this section demonstrates that it is still inconclusive and the following sections will show that the examination should not stop there.

C. *Level of Organization*

Under Additional Protocol II, parties to a NIAC demonstrate three characteristics that are indicative of a certain level of organization: (1) territorial control; (2) responsible military command that can execute “sustained and concerted” military actions; and (3) the ability to implement the Protocol.¹⁵⁰ Similarly, Common Article 3’s commentary suggests that, if drug cartels were capable of being engaged in a NIAC, they would possess “an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.”¹⁵¹ The Final Record of the Diplomatic Conference reveals that many of the drafters of Common Article 3 believed a NIAC exists when the parties “have an organization purporting to have the characteristics of a State,” including a power structure in which the armed forces act under a civil authority that agrees to be bound by the laws of war and the Convention itself.¹⁵²

The ICTY has followed a similar approach, looking not only at whether armed actors are well organized, but also considering whether they are organized as a proper army. Among the factors considered are the possession of a “command structure and disciplinary rules and mechanisms within the group,” the “ability to plan, coordinate and carry out military operations, including troop movements and logistics,” “define a unified military strategy and use military tactics,” and “to speak with one voice and negotiate and conclude agreements.”¹⁵³ When identifying the KLA as a NIAC party, the ICTY cited various characteristics that the following paragraphs will show that the drug cartels do not possess, most notably a governing body which controlled “the appointment of zone commanders, the supply of weapons, the issuance of political statements and communiqués, the distribution of KLA Regulations to units, the authorisation of military action and the assignment of tasks to individuals within the organization.”¹⁵⁴ The KLA governing body also

International Humanitarian Law: A Comment on the Tablada Case, INT’L REV. RED CROSS, Sept. 30, 1998.

149. Tracy Wilkinson, *Mexico Government Sought To Withhold Drug War Death Statistics*, L.A. TIMES, Jan. 11, 2012, <http://articles.latimes.com/2012/jan/11/world/la-fg-mexico-dead-numbers-20120112>.

150. Vite, *supra* note 108, at 79-80.

151. Geneva Convention Commentary, *supra* note 105, at 36.

152. *Id.* at (4)(a)(b).

153. See Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 60 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

154. Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶¶ 46, 94, 96, 98, 100, 101 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

engaged in diplomatic relations with the European community.¹⁵⁵ It disseminated documents containing war conventions to inform KLA soldiers of the international laws by which it believed it was bound.¹⁵⁶ In contrast, like most "clandestine criminal groups," drug cartels are incapable of defining a military strategy and coordinating and carrying out sophisticated military operations.¹⁵⁷ Due to the fact that such groups do not always act identifiably, it makes it difficult to treat drug cartels as groups with international legal personalities that are required to assume duties under international law.¹⁵⁸

The structure of Mexican drug cartels is fundamentally inconsistent with a responsible military command and the implementation of IHL because so many of them outsource their violence to loosely affiliated enforcer organizations.¹⁵⁹ To the extent that drug cartels are organized, they are structured more like businesses than armies, employing contractors "including chemists, pilots, accountants, lawyers, architects, and assassins" to manage different aspects of their enterprise.¹⁶⁰ Even though they may receive money from the cartel and use the same name, "the groups that do the kidnapping and extortion may or may not actually belong to the cartel," explains Director of the Woodrow Wilson Center's Mexico Institute Andrew Selee.¹⁶¹ Another analyst has identified twelve major drug cartels and a host of smaller bands.¹⁶² Drug cartels have not formally added the less sophisticated sub-contracted "enforcer gangs" as permanent members;¹⁶³ rather, their relationship has been described as "fluid and tenuous."¹⁶⁴ Meanwhile, more sophisticated cartel enforcement units often form their own alliances outside of the cartels for which they work.¹⁶⁵ Some have even split from their parent organizations.¹⁶⁶ Although there is evidence that some of the drug cartels, particularly the Zetas, possess relatively organized command structures,¹⁶⁷ even they rely on a "three-tiered"

155. *Limaj*, Case No. IT-03-66-T, ¶ 125.

156. *Haradinaj*, Case No. IT-04-84-T, ¶ 69.

157. Hauck & Peterke, *supra* note 122, at 432.

158. *Id.* at 433.

159. COLLEEN W. COOK, CONG. RESEARCH SERV., RL34215, MEXICO'S DRUG CARTELS 6 (2007), <http://www.fas.org/sgp/crs/row/RL34215.pdf>.

160. Ami C. Carpenter, *Beyond Drug Wars: Transforming Factional Conflict in Mexico*, 27 CONFLICT RESOL. Q. 401, 404 (2010).

161. *Has Mérida Evolved? Part One: The Evolution of Drug Cartels and the Threat to Mexico's Governance: J. Hearing Before the Subcomm. on the Western Hemisphere and the Subcomm. on Oversight and Investigations of the H. Comm. on Foreign Affairs*, 112th Cong. 57 (2011) (statement of Andrew Selee, Director, Mexico Institute, Woodrow Wilson Center for International Scholars), <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg68295/pdf/CHRG-112hhrg68295.pdf>

162. Eduardo Guerrero Gutierrez, *La Raíz de la Violencia*, NEXOS EN LÍNEA, June 1, 2011, <http://www.nexos.com.mx/?P=leerarticulo&Article=2099328>.

163. *Attorney General's Report to Congress on the Growth of Violent Street Gangs in Suburban Areas*, U.S. DEP'T OF JUSTICE (2008), <http://www.justice.gov/ndic/pubs27/27612/index.htm>.

164. *Id.*

165. Scott Stewart, *Mexico: The Struggle for Balance*, STRATFOR (Apr. 8, 2010, 8:54 AM), http://www.stratfor.com/weekly/20100407_mexico_struggle_balance.

166. *Id.*

167. COOK, *supra* note 159, at 8.

structure where leaders and middlemen coordinate contracts with “petty criminals to carry out street work.”¹⁶⁸

Some experts have gone further in arguing that the drug cartels are purposefully “adapting and transforming themselves from hierarchal and vertical organizations to becoming more multi-nodal and horizontal in structure.”¹⁶⁹ One author has suggested that they “appear to be headless, bereft of any leadership or led by thugs who have no allegiance” and are operating in a state of anarchy.¹⁷⁰ The situation has even been described as a “criminal free-for-all,”¹⁷¹ characterized by “loose criminal networks of people.”¹⁷² This has led some scholars to argue that cartel leadership does not control much of the violence.¹⁷³ Instead, the lower levels retain a high degree of autonomy and independence that can “take on its own momentum—and, at times, feed back into, and intensify, the strategic competition.”¹⁷⁴ Violence in Mexico, according to this theory, involves “multiple incidents of micro-violence at local levels rather than macro-violence at the strategic level.”¹⁷⁵

The unstable outsourcing environment also fractures the chain of command and contributes to the chaotic and extreme violence that is currently plaguing Mexico. For example, the murder of an American jet-skier was reportedly a “mistake” committed by low-level members of an enforcer gang associated with the Zetas drug cartel who were immediately placed on the cartel’s own “hit list” following the attack.¹⁷⁶ Similarly, the man charged with directly ordering eighty percent of the approximately 2,000 killings in Ciudad Juárez¹⁷⁷ (including the murder of United States consulate officials) was not himself a cartel leader. Rather, he headed the Los Aztecas gang that carries out enforcement activities for the Juárez drug cartel.¹⁷⁸ Recent reports indicate that Omar Martin Estrada Luna, the low-level Zetas cartel member who was arrested in connection with the murder of over 200 people in San Fernando, Tamaulipas, disobeyed a general order from Zeta leadership to reduce violence

168. *Id.*

169. BEITTEL, *supra* note 3, at 18.

170. Fernando Celaya Pacheco, *Narcofearance: How Has Narcoterrorism Settled in Mexico?*, 32 STUDIES IN CONFLICT & TERRORISM 1021, 1031 (2009).

171. Patrick Corcoran, *A Survey of Mexico’s Trafficking Networks*, INSIGHT CRIME, June 27, 2011, <http://www.insightcrime.org/news-analysis/a-survey-of-mexicos-trafficking-networks>.

172. *Has Mérida Evolved? Part One: The Evolution of Drug Cartels and the Threat to Mexico’s Governance: Hearing Before the H. Subcomm. on the W. Hemisphere of the H. Comm. of Foreign Affairs*, 112th Cong. 57 (2011) (statement of Andrew Selee, Director, Mexico Institute, Woodrow Wilson Center for International Scholars), <http://foreignaffairs.house.gov/112/68295.pdf>.

173. Phil Williams, *The Terrorism Debate over Mexican Drug Trafficking Violence*, 24 TERRORISM & POL. VIOLENCE 259, 270 (2012).

174. *Id.* at 269.

175. *Id.*

176. David Lohr, *Was Falcon Lake Killing a Case of Mistaken Identity?*, AOLNEWS.COM (Oct. 14, 2010), <http://www.aolnews.com/2010/10/14/falcon-lake-killing-may-have-been-case-of-mistaken-identity>.

177. Mariano Castillo, *Juarez Gang Leader Admits Killings*, CNN, Nov. 29, 2010, <http://www.cnn.com/2010/WORLD/americas/11/29/mexico.violence/index.html>.

178. Elisabeth Malkin, *Mexican Drug Gang Leader Confesses to Killings*, N.Y. TIMES, Nov. 28, 2010, <http://www.nytimes.com/2010/11/29/world/americas/29mexico.html>.

in the region.¹⁷⁹ The recent arrest of Sinaloa drug cartel-enforcer Jose Antonio Torres Marrufo exposed an even more convoluted structure. Torres Marrufo took care of the armed operations of the Sinaloa Cartel as head of a separate group called Gente Nueva.¹⁸⁰ Gente Nueva then contracted with other local gangs, such as the group Artistas Asesinos.¹⁸¹ It is estimated that these semi-independent street gangs will soon replace drug cartels as the drivers of Mexico's violence.¹⁸²

This set-up makes it impossible for the drug cartels to "speak with one voice," let alone conclude agreements as the ICTY contemplates. Unlike the KLA, which the ICTY identified as issuing political statements and disseminating propaganda,¹⁸³ it is difficult to imagine a sufficient degree of unity existing within or among the drug cartels to engage in such concerted actions. This is largely because, while the KLA was motivated by a shared desire to "prepar[e] the citizens of Kosovo for a liberation war,"¹⁸⁴ the Mexican drug cartels are driven by individual profit motives that are inherently in tension with one another. While some members within Mexican society have suggested negotiating a truce with the drug cartels, such a proposal is infeasible. The abundance of disconnected actors makes a "peace deal" almost impossible to enforce. "If one gang defies the truce, its competitors will likely follow suit, kicking off a chain reaction of violence that would obliterate the agreement," writes one journalist.¹⁸⁵ "This downward spiral becomes far more likely with the addition of each extra group."¹⁸⁶

As mentioned in the beginning of this section, both Common Article 3 and Additional Protocol II suggest that NIAC parties typically exert some type of territorial control. In *Prosecutor v. Milošević*, the ICTY determined that although territorial control is not a requirement for the existence of an armed conflict, the fact that the KLA controlled fifty percent of Kosovo's territory was highly relevant.¹⁸⁷ While the court did not define what it meant by "territorial control," the KLA controlled significantly more territory than any one Mexican drug cartel does, even under the broadest terms. To the extent that drug cartels can be said to exert territorial control, it is limited to isolated, rural

179. Aurora Vega, *El Kilo "Desobedeció" la Orden de Reducir la Violencia*, EXCELSIOR, Apr. 18, 2011, http://www.excelsior.com.mx/index.php?m=nota&id_notas=730642.

180. Tracy Wilkinson, *Mexico Arrests Sinaloa Drug Cartel's Reputed Enforcer*, L.A. TIMES, Feb. 8, 2012, at A4.

181. *Id.*

182. Patrick Corcoran, *Street Gangs To Replace Cartels as Drivers of Mexico's Violence*, INSIGHT CRIME, Jan. 18, 2012, <http://insightcrime.org/news-analysis/street-gangs-to-replace-cartels-as-drivers-of-mexicos-violence>.

183. *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Judgment, ¶ 88 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

184. *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, ¶ 45 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

185. Patrick Corcoran, *Street Gangs To Replace Cartels as Drivers of Mexico's Violence*, INSIGHT CRIME, Jan. 18, 2012, <http://insightcrime.org/news-analysis/street-gangs-to-replace-cartels-as-drivers-of-mexicos-violence>.

186. *Id.*

187. *Prosecutor v. Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶¶ 36-37 (Int'l Crim. Trib. for the Former Yugoslavia June 16, 2004).

areas.¹⁸⁸ Furthermore, as one study posits, “organized crime groups are not primarily concerned with capturing territory.”¹⁸⁹ Rather, they “can function quite well—and, indeed, perhaps most effectively—in spaces where state capacity is strongest.”¹⁹⁰ That is why Mexico’s drug cartels have “flourished for many years in the country’s largest, most productive cities, and will likely continue to do so.”¹⁹¹ In fact, Mexico would probably be significantly less violent if the drug cartels exercised more territorial control.¹⁹²

Common Article 3’s commentary further states that the insurgent force must be “in possession of a part of the national territory” and exercise “de facto authority over persons within a determinate territory.”¹⁹³ Similarly, in *Tadić*, the ICTY noted that the Serbs assumed “exclusive administrative power in Serb-dominated areas” through military “takeovers.”¹⁹⁴ Yet, the drug cartels in Mexico do not exert administrative control over their territory, and furthermore, unlike the Serb forces in *Tadić*, they do not aim to. Drug cartels do not strive to control the State and assume governance responsibilities, rather they seek to “preserve the illicit power structure set up alongside the state.”¹⁹⁵ Specifically, they are vying for control of smuggling routes, sources, markets and alliances, not government institutions.¹⁹⁶ Although they often corrupt and control politicians to ensure that their illicit business activities run smoothly, this represents only a slice of what the government does. Not only are drug cartels uninterested in acquiring administrative territorial control, they are “not known for providing large scale humanitarian services or making it a priority to win over the local population.”¹⁹⁷ Rather, drug cartels seek to subvert, not defeat, the State through intimidation and bribes so that they can operate “undisturbed.”¹⁹⁸ Common Article 3’s commentary further suggests that NIAC parties tend to demonstrate “an organization purporting to have the characteristics of a State.”¹⁹⁹ At times, drug cartels have indeed “lavish[ed] charity on their hometowns or bases of operation.”²⁰⁰ However, one scholar notes that their actions are better explained as an attempt to feed their egos and

188. Molzahn et al., *supra* note 13, at 25.

189. *Id.*

190. *Id.*

191. *Id.*

192. Jo Tuckman, *Mexican Drug Cartel Massacres Have Method in Their Brutal Madness*, GUARDIAN (London), May 14, 2012, <http://www.guardian.co.uk/world/2012/may/14/mexico-drug-cartel-massacres-analysis> (“The [drug cartels] are fighting to defend their reputation for brutality and the image of control in the territories they claim.”).

193. Geneva Convention Commentary, *supra* note 105, at 36.

194. Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment and Opinion, ¶ 125 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

195. Carpenter, *supra* note 160, at 407.

196. *Id.* at 405.

197. Paul Rexton Kan & Phil Williams, *Afterword: Criminal Violence in Mexico—A Dissenting Analysis*, 21 SMALL WARS & INSURGENCIES 218, 222 (2010).

198. BEITTEL, *supra* note 36, at 11.

199. Geneva Convention Commentary, *supra* note 105, at 36.

200. Freden, *supra* note 136.

protect their flanks just as Al Capone or Pablo Escobar did.²⁰¹ They do not amount to the usurpation of the comprehensive role of government.

One scholar who has called for the application of IHL in Mexico has highlighted the similarities between the organizational structure of the drug cartels and al Qaeda to make the case that if al Qaeda is organized enough to be a party to an armed conflict, the drug cartels are as well.²⁰² To a certain extent, the groups have some factors in common. Al Qaeda consists largely of franchises or semi-autonomous local entities that are directly managed by the organization's leadership.²⁰³ In other words, much like the drug cartels, "Al Qaeda today is not a traditional hierarchical terrorist organization, with a pyramid-style organizational structure, and it does not exercise full command and control over its branch and franchises."²⁰⁴

Yet, there are important ways in which the structural organization of al Qaeda and the drug cartels differ. Although al Qaeda allows its franchises to maintain their local agenda, it exerts control over "external operations," requiring its subsidiaries to "seek approval before conducting attacks outside their assigned regions and . . . before assisting other militant groups with external operations."²⁰⁵ Furthermore, franchises are expected to "undertake some attacks against Western interests" and their leaders must be "willing to present a united front, stay on message, and be seen to fall under al Qaeda's authority."²⁰⁶ Meanwhile, not only does al Qaeda impose significant restrictions on the groups that fall under its umbrella, unlike the drug cartel's enforcer gangs, Al Qaeda's branches and franchises "appear to follow these stipulations."²⁰⁷ Finally, even the United States' top legal adviser in the Pentagon has tepidly acknowledged that it is approaching a "tipping point" at which Al Qaeda will no longer be organized enough for it to be considered a party to an armed conflict.²⁰⁸

D. *The Academic Case for War*

Ultimately, those who advocate adopting an armed conflict framework can certainly point to a high level of violence in Mexico that exceeds that of many wars. Not only has the scale of the violence grown, its character has changed as well. Mutilated bodies,²⁰⁹ decapitations,²¹⁰ and torture²¹¹ have

201. *Id.*

202. Craig A. Bloom, *Square Pegs and Round Holes: Mexico, Drugs, and International Law*, 34 HOUS. J. INT'L L. 345, 383 (2012).

203. See Leah Farrall, *How al Qaeda Works: What the Organization's Subsidiaries Say About Its Strengths*, FOREIGN AFF., Mar.-Apr. 2011, <http://www.foreignaffairs.com/articles/67467/leah-farrall/how-al-qaeda-works?page=show>.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. Nick Hopkins, *US Heading for Point When 'Military Pursuit of al-Qaida Should End'*, GUARDIAN (London), Nov. 30, 2012, <http://www.guardian.co.uk/world/2012/nov/30/us-war-against-al-qaeda>.

209. See *Mexico Police Find 18 Mutilated Bodies in Jalisco State*, BBC NEWS, May 10, 2012, <http://www.bbc.co.uk/news/world-latin-america-18014646>.

become the hallmarks of the drug cartels' reign of fear, echoing the tactics often used by terrorists.²¹² Furthermore, some drug cartels have evolved into organizations with sophisticated, albeit intentionally disjointed, structures consisting of leaders, middlemen, and contracted workers.²¹³ The competition amongst drug cartels for drug routes and access points is commonly mistaken for an insurgent struggle for absolute control over vast swaths of territory.²¹⁴ Meanwhile, Mexico's law enforcement has proved to be both corrupt and inept.²¹⁵ Its judicial system similarly has been mired by corruption and injustice.²¹⁶ All of this makes labeling what is happening in Mexico an armed conflict all the more attractive. Shifting the military's role from a law enforcement support function to the war-making entity it was trained to be would allow it to confront the drug cartels with greater force and deadly weaponry. It might also mean transferring the prosecution of drug cartel members out of the incompetent hands of the Mexican judicial system.²¹⁷

Carina Bergal applies all of the same legal instruments explored in this Note but reaches the opposite conclusion: the "Mexican drug war displays all of the indispensable characteristics of a NIAC."²¹⁸ According to Bergal, applying the "proper legal classification" to the situation in Mexico would allow it to employ the laws of war to "protect innocent civilians from enduring further harm" and prevent Mexico from becoming a failed state.²¹⁹ Bergal, however, fails to provide significant detail as to which provisions of IHL justify her conclusion.²²⁰ Callin Kerr makes a virtually identical argument in a similar Comment.²²¹ Yet, both authors mistakenly take the drug cartels' level of organization and intensity of violence at face value, without exploring the nature of the violence, the loose network of actors responsible for waging it, or the type of control they exert over parts of Mexico.

210. See Tim Johnson, *Why Are Beheadings So Popular with Mexico's Drug Gangs?*, MCCLATCHEY NEWS, Apr. 1, 2010, <http://www.mcclatchydc.com/2010/04/01/91481/beheadings-become-signature-of.html>.

211. See Jo Tuckman, *Mexico Journalists Tortured and Killed by Drug Cartels*, GUARDIAN (London), May 4, 2012, <http://www.guardian.co.uk/world/2012/may/04/mexico-journalists-killed-drug-cartels>.

212. See David Luhnnow & Jose de Cordoba, *The Perilous State of Mexico*, WALL ST. J., Feb. 21, 2009, <http://online.wsj.com/article/SB123518102536038463.html>.

213. COOK, *supra* note 159, at 8.

214. Carina Bergal, *The Mexican Drug War: The Case for A Non-International Armed Conflict Classification*, 34 FORDHAM INT'L L.J. 1042, 1070 (2011).

215. David Luhnnow, *Mexico Widens Police Corruption Probe*, WALL ST. J., July 21, 2011, <http://online.wsj.com/article/SB10001424053111904233404576458312223960484.html>.

216. William Booth, *Mexico Hobbled in Drug War by Arrests that Lead Nowhere*, WASH. POST, Apr. 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/25/AR2010042503358.html>.

217. Bergal, *supra* note 214, at 1087.

218. *Id.*

219. *Id.* at 1088.

220. Bergal suggests that "[w]ithout the categorization and acknowledgement of an armed conflict, the Mexican military is unable to engage in the method of warfare that will maximize its odds of disabling the drug cartels." *Id.* However, she does not detail the legal principles that define a "method of warfare" under international humanitarian law. *Id.*

221. Callin Kerr, *Mexico's Drug War: Is It Really a War?*, 54 S. TEX. L. REV. 193 (2012).

Craig Bloom reached a similar conclusion, arguing that "the violence in Mexico rises to the level of an 'armed conflict' within the meaning of international law."²²² Unlike Bergal, Bloom at least concedes that there are "a plethora of factors that the DTOs [drug trafficking organizations] do not meet, but are suggested by the ICTY and ICTR [International Criminal Tribunal for Rwanda]."²²³ Nonetheless, he dismisses these differences, reasoning that the "entire exercise of trying to make these factors fit a specific conflict will always be illusory."²²⁴ Instead, he argues that, since the Mexican drug cartels and al Qaeda are "indistinguishable" as far as means and methods go, a NIAC exists in Mexico just as it does between the United States and al Qaeda.²²⁵ As this section has noted, however, al Qaeda and the drug cartels are qualitatively different. Additionally, in spite of its shortcomings, ICTY jurisprudence cannot be so easily discarded. It has and will continue to define what constitutes an armed conflict under IHL before international tribunals, largely irrespective of what domestic courts have to say about the matter.

This Note does not argue that the drug cartels could never pose a terrorist, insurgent, or armed-conflict threat to Mexico. They certainly have the resources to organize themselves more like an army and less like a business, and to escalate the violence waged directly against the State. If their profit-driven motives were coupled with an ideological agenda, there would be a much stronger case for applying the terrorist or insurgent labels to drug cartels. Yet all of these developments are highly improbable unless and until they line up with the drug cartel's bottom line: profits. For now, that does not appear to be the scenario that Mexico is confronting. This section has shown that the NIAC legal criteria do not correspond to what is happening in Mexico. Put simply, the aforementioned scholars in this subsection who advocate for a shift away from the criminal law paradigm have erred in glossing over the following details: violence alone does not constitute an armed conflict, sophisticated organizational structures are not synonymous with an organized military command, and controlling drug trafficking routes is not the same as the administrative control of territory. Finally, while those in favor of an armed-conflict paradigm may point to some compelling reasons that support their position, the following section will show that a law of war framework would come at a severe cost in terms of human life and dignity.

222. Bloom, *supra* note 202, at 348.

223. *Id.* at 377.

224. *Id.*

225. *Id.* at 383. Bloom also draws parallels between Mexico, Somalia, and Yemen, stating "Somalia, Yemen, and Mexico are all in varying degrees of economic decline, but the pattern is clear: the more impoverished the citizens are, the more likely they are to become radicalized." *Id.* at 393-94. Yet, besides missing the fact that the Mexican economy is "booming," Bloom confuses barbarism for radicalization by pointing to the gruesome crimes committed by drug cartels as the only evidence to support his claim. See Nathan Vardi, *The Mexican Miracle: Despite Drug War, Economy Is Booming*, FORBES, Oct. 15, 2012, <http://www.forbes.com/sites/nathanvardi/2012/10/15/the-mexican-miracle>.

IV. THE LEGAL CONSEQUENCES OF “WAR”

Whether the situation in Mexico qualifies as an armed conflict by meeting the criteria cited in the previous section is important because of the legal consequences that flow from such a designation. If drug cartels were understood as formally waging war in Mexico under international law, it would dramatically alter the legal framework in which they operate. Thus far, proponents of the armed conflict paradigm have largely tip-toed around the fact that triggering the application of IHL would alter the rules of detention, the administration of justice, and the use of force in ways that could prove to be seriously counterproductive.

A. *The Use of Force*

The question of which body of law governs during armed conflict is hotly debated.²²⁶ However, nearly all of the paradigms acknowledge that IHL applies to some degree during an armed conflict, effectively modifying, supplementing, or even replacing the legal framework that guides the use of force during peacetime.²²⁷ The main difference between the use of force in armed conflict under IHL and the use of force in law enforcement operations governed by international human rights law (IHRL) is the principles guiding it. IHRL strictly prohibits the arbitrary deprivation of a person’s life.²²⁸ During peacetime, law enforcement operates under IHRL,²²⁹ which focuses on “protect[ing] [the] civilian populace, provid[ing] interim policing and crowd control, and secur[ing] critical infrastructure.”²³⁰ Under the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, law enforcement officers can only use lethal force “when strictly unavoidable in order to protect life.”²³¹ Effectively, if an individual does not pose a direct threat at the specific moment during which force is used, “then lethal force might well be considered disproportionate.”²³² This calculus drastically changes under the laws of war. If the person being targeted is considered a combatant, the proportionality assessment only takes into account surrounding civilians and objects, rather than the individual combatant.²³³ Furthermore,

226. See Oona Hathaway et al., *Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law*, 96 MINN. L. REV. 1883, 1894-96 (2012).

227. See *id.*

228. See American Convention on Human Rights art. 4(1), Nov. 22, 1969, 1144 U.N.T.S. 123; International Covenant on Civil and Political Rights art. 6(1), Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171.

229. U.N. HIGH COMM’R FOR HUMAN RIGHTS, HUMAN RIGHTS AND LAW ENFORCEMENT: A TRAINER’S GUIDE ON HUMAN RIGHTS FOR THE POLICE 15, U.N. Sales No. E.03.XIV.I (2002).

230. Dale Stevens, *Military Involvement in Law Enforcement*, 92 INT’L REV. RED CROSS 453, 453-54 (2010).

231. Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, Aug. 27-Sept. 7, 1990, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* ¶ 9, <http://www.unrol.org/files/basicp~3.pdf>.

232. Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 INT’L REV. RED CROSS 737, 746 (2005).

233. See *id.* at 744-45.

while IHL seeks to limit civilian casualties, it does not prohibit them altogether. Chief International Criminal Court Prosecutor Luis Moreno-Ocampo has previously explained, "[U]nder international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime."²³⁴ Although civilians cannot be directly targeted,²³⁵ the use of force against combatants and the potential civilian casualties that occur as a result are not only balanced against the need to save human lives; rather, they are weighed against military necessity.²³⁶

The IHL framework is irreconcilable with the goals of Mexico's efforts against drug cartels. The primary aim of IHL has often been described as minimizing the suffering resulting from armed conflict.²³⁷ More specifically, IHL takes the existence of human suffering during an armed conflict to be likely, if not inevitable, and seeks to limit it to the extent possible. Yet, Mexico's military strategy has been directed at maximizing public safety, not minimizing harm. Calderón's government was trying to improve public welfare, telling the press in 2010, "[M]y goal is to transform Mexico to a safe place where people and children could be really free."²³⁸ Mexico's former Secretary of Defense Guillermo Galum noted that the government's aim is to "provide the level of security that can make viable citizen's life."²³⁹ IHL, on the other hand, allows for a proportionality test that may lead to the loss of many Mexican civilian lives if their deaths weigh considerably less than the importance of the military target being pursued. There is also the danger that the collateral loss of civilian lives associated with the pursuit of military objectives could actually turn the populace against the government, as it has in areas of Afghanistan²⁴⁰ and Pakistan.²⁴¹ While this Note maintains that Mexico is not in a state of armed conflict, the use of force under the laws of war could foreseeably breed enough civil unrest to dramatically alter the character of Mexico's violence and create a bona-fide armed conflict.

Ultimately, the militarized strategy developed by former President Calderón has exposed many of the problems associated with deploying the Mexican army to combat drug cartels, even though they are exercising a law

234. Letter from Luis Moreno-Ocampo, Chief Prosecutor, Int'l Crim. Ct. (Feb. 9, 2006), http://www.iccnw.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

235. See The Distinction Between Military Objectives and Non-military Objectives in General and Particularly the Problems Associated with Weapons of Mass Destruction, Resolution Adopted by the Inst. of Int'l Law (Sept. 9, 1969), <http://www.icrc.org/ihl.nsf/FULL/445?OpenDocument>.

236. Protocol Additional to the Geneva Conventions, *supra* note 109, art. 51.

237. *International Humanitarian Law and Human Rights*, AM. RED CROSS 1 (2011), http://www.redcross.org/images/MEDIA_CustomProductCatalog/m4640079_IHL_HumanRights.pdf.

238. Lally Weymouth, *Mexican President Felipe Calderon, Interviewed by Lally Weymouth*, WASH. POST, Feb. 7, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/02/05/AR2010020501443.html>.

239. Castillo, *supra* note 11.

240. Deb Riechmann, *Afghan Civilian Deaths Unleash Anti-American Sentiment*, AUSTIN AMERICAN-STATESMAN, Jan. 7, 2010, <http://www.statesman.com/news/world/afghan-civilian-deaths-unleash-anti-american-sentiment-168562.html>.

241. Liam Stack, *Fresh Drone Attacks in Pakistan Reignite Debate*, CHRISTIAN SCI. MONITOR, July 8, 2009, <http://www.csmonitor.com/World/terrorism-security/2009/0708/p99s01-duts.html>.

enforcement function. Human Rights Watch claims that the Mexican military has committed serious human rights violations, including murder, torture, and disappearances.²⁴² Other groups have accused the military of engaging in unauthorized searches and seizures as well as adopting improper rules of engagement.²⁴³ The Mexican Human Rights Commission received complaints of nearly 5,800 human rights violations committed by the military between 2007 and 2011.²⁴⁴ Despite rulings by the Inter-American Court of Human Rights and Mexico's Supreme Court, the suspected violations have largely been prosecuted under military jurisdiction.²⁴⁵ Although the Military Prosecutor's Office has opened 3,671 investigations into military human rights abuses between 2007 and 2011, only fifteen officers were convicted during that period.²⁴⁶ While some proponents of the NIAC model argue that it would help "bring[] those responsible for committing unspeakable human rights atrocities to justice before international tribunals,"²⁴⁷ it may also exacerbate civilian suffering at the hands of the Mexican military by expanding the scope of the permissible use of force and, consequently, expanding government impunity. The best way to limit military abuses is to retain the IHRL framework and prosecute violations in civilian courts, not adopt IHL and effectively broaden the scope of sanctioned behavior.²⁴⁸

B. *Detention*

Although IHL imposes various restraints on the use of force, it provides much less guidance on the detention and prosecution of combatants in NIACs. Common Article 3 and Additional Protocol II appear to contemplate the detention of combatants, but they are largely silent as to what the limits of authorized detention are.²⁴⁹ In effect, "[T]he Geneva Conventions are premised on a world in which combatants generally qualify for prisoner-of-war status and in which civilians do not regularly engage in hostilities."²⁵⁰ Yet, while the majority of provisions contained in these international legal instruments are meant to only apply to international armed conflicts, they are often referenced more generally because they help establish "an outer boundary of permissive

242. *Country Summary: Mexico*, HUM. RTS. WATCH 1 (Jan. 2012), http://www.hrw.org/sites/default/files/related_material/mexico_2012.pdf.

243. See Stephen Meiners & Fred Burton, *The Role of the Mexican Military in the Cartel War*, STRATFOR, July 29, 2009, http://www.stratfor.com/weekly/20090729_role_mexican_military_cartel_war.

244. *Country Summary: Mexico*, *supra* note 242, at 1.

245. *Id.* at 2.

246. *Id.*

247. Bergal, *supra* note 214, at 1087.

248. See *Neither Rights Nor Security: Killings, Torture, and Disappearances in Mexico's "War on Drugs"*, HUMAN RIGHTS WATCH 17-18 (Nov. 2011), http://www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf.

249. John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 204 (2011).

250. *Id.* at 214.

action.”²⁵¹ In the United States, the D.C. district court stated that even though the Geneva Conventions are silent on a state's authority to detain individuals engaged in a NIAC, the Conventions presuppose that detention will occur in both IACs and NIACs and seek to regulate the conditions of that detention.²⁵² As the remainder of this section will demonstrate, however, any attempt to apply the standards governing the detention of combatants as conceived by the Geneva Conventions to drug cartels would lead to absurd results. Additionally, allowing Mexico to fill in the gaps of Common Article 3 and Additional Protocol II as it sees fit would provide little added benefit over the current criminal detention system and could even be detrimental.

The first problem that arises is the question of who may be detained and for what reasons. Article 4 of the Third Geneva Convention provides specific guidance on the issue of detention in IACs, defining those who qualify as prisoners of war (POW) status as consisting of troops that (1) are “commanded by a person responsible for his subordinates;” (2) wear a “fixed distinctive sign recognizable at a distance;” (3) carry arms openly; and (4) conduct “their operations in accordance with the laws and customs of war.”²⁵³ Organized crime in Mexico simply does not display these characteristics. Even if it did, Mexican society might be uncomfortable with the fact that, unlike criminal law, detention under the law of armed conflict does not inherently serve a punitive function.²⁵⁴ Under the third Geneva Convention, POWs may not be prosecuted for their participation in the hostilities.²⁵⁵ As explained by the U.S. Supreme Court, “the purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.”²⁵⁶ This reasoning is based on the presumption that an enemy soldier poses an inherent threat that must be suppressed. Not only might some be troubled by the non-punitive detention of drug cartel operatives who have committed horrific crimes, such a detention model would be misapplied to drug cartel operatives who are willing to *resort* to violence to protect their illicit profits. As evidenced by their relative passivity throughout Mexico's PRI rule, drug cartels are not committed to waging violence and may actually behave quite peacefully when doing so coincides with their profit motives.²⁵⁷ Thus, as abhorrent as their acts of violence may be, drug cartels do not pose a continuous security threat in the same way that a traditional combatant does.

251. Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48, 50 (2009).

252. *Gherebi v. Obama*, 609 F. Supp. 2d 43, 60 (D.D.C. 2009).

253. Geneva Convention Relative to the Treatment of Prisoners of War art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

254. See David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1, 36 (2011).

255. Geneva Convention III, *supra* note 253, art. 99.

256. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004).

257. See Benjamin Lessing, *The Logic of Violence in Criminal War: Cartel-State Conflict in Mexico, Colombia, and Brazil* 13 (Oct. 13, 2011) (unpublished Ph.D. dissertation, U.C. Berkeley), available at <http://smallwarsjournal.com/blog/the-logic-of-violence-in-criminal-war>.

Second, the temporal scope of detention during an armed conflict would also pose another challenge for Mexico. Scholars note that “[t]he traditional international armed conflict paradigm, featuring prisoners of war detained until the end of hostilities, breaks down in a conflict of indefinite, and potentially unending, duration, with actors not entitled to combatant status under international law.”²⁵⁸ Much like the “War on Terror,” a war on drug cartels would likely amount to a conflict with no clear, definitive end.²⁵⁹ Nonetheless, this caveat did not stop the U.S. Supreme Court from concluding that detention of al Qaeda members and associated forces “for the duration of the particular conflict in which they were captured” is a “fundamental and accepted . . . incident to war.”²⁶⁰ If applied to the situation in Mexico, this policy would essentially imply that most drug cartel members would ultimately be subject to the same fate: detention for the duration of the hostilities, or, more realistically, indefinite detention. But it is difficult to formulate a conception of justice in which every wrongful act committed by drug cartel operatives, from drug peddling to beheading, merits the same punishment. The civilian criminal detention system accounts for these differences by requiring a showing of specific criminal conduct.²⁶¹ Military detention, however, would only blur the wide array of activities that drug cartels are involved in and merely look to group membership.²⁶² In the absence of military uniforms and openly carried weapons, even determining group membership and correspondingly drawing a distinction between civilians and combatants is extremely difficult in almost any circumstance.²⁶³ In Mexico in particular, the cartels’ division of labor and sub-contracting practices would further complicate establishing drug cartel membership and distinguishing between participation in hostilities justifying the indefinite detention of civilians²⁶⁴ and the general criminal violence committed by enforcer gangs who do not always act on behalf of the drug cartels who contract them.

Mexico would probably not want to treat drug cartel members as POWs under the traditional detention standards prescribed by IHL. The danger, as two scholars have warned, is that “there is a real risk that states and nonstate actors will abuse holes in the law when they are identified as such.”²⁶⁵ Beyond that, it is difficult to predict how Mexico would fill the gaps of IHL. The fact that the Mexican state is already being accused of abusing its detention authority under its criminal law system suggests that it would not adopt a restrained approach. It could choose to follow the example of the United States during the Bush era

258. Bellinger & Padmanabhan, *supra* note 249, at 202.

259. See George Laikoff, *War on Terror, Rest in Peace*, ALTERNET (Aug. 1, 2005), <http://www.alternet.org/story/23810>.

260. *Hamdi*, 542 U.S. at 518.

261. See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1081 (2008).

262. See *id.*

263. See Bellinger & Padmanabhan, *supra* note 249, at 209.

264. See Faiza Patel, *Who Can Be Detained in the “War on Terror”? The Emerging Answer*, 13 AM. SOC’Y INT’L L. INSIGHTS, Oct. 20, 2009.

265. Bellinger & Padmanabhan, *supra* note 249, at 204.

and resolve the detention issue by recognizing a second category of combatant, the unprivileged, unlawful, or "enemy" combatant who is not entitled to prisoner-of-war status due to the fact that his use of force violates the laws of war.²⁶⁶ Like POWs, unlawful combatants may also be detained without trial, but they do not enjoy immunity from prosecution for their participation in armed conflict as lawful combatants do.²⁶⁷ Yet one of the primary critiques of the United States detention model is that alleged terrorists are often placed in military custody and are held indeterminably without charge.²⁶⁸ In part, this is because detention has also been partly understood as serving a preventative function.²⁶⁹ The indefinite detention of drug cartel members would be neither appropriate nor effective. Given that there are several thousand drug cartel members, indefinite detention might be unfeasible as well.²⁷⁰

One final alternative would be to detain drug cartel members under Mexico's criminal detention system, which is the interpretation of international law that the ICRC advocates for in the terrorism context.²⁷¹ However, if part of the justification for applying the NIAC designation to Mexico's drug cartels is to discard the currently ineffective legal regime, then this option does nothing to further that purpose.

C. Prosecution

There are even more gaps to fill when it comes to regulation of the prosecution of combatants under IHL. Additional Protocol II states that "[n]o sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality."²⁷² Common Article 3 similarly prohibits "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees that are recognized as indispensable by civilized peoples."²⁷³ What types of protections fall under "essential guarantees of independence and impartiality" and what constitutes the judicial guarantees of "civilized people" was left undefined. This approach would leave Mexico with a troubling degree of flexibility in its interpretation of these instruments.

Mexico already denies organized crime suspects many of the rights that the rest of its citizens enjoy. For example, those suspected of engaging in

266. See EMILY CRAWFORD, *THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT* 56-57 (2010).

267. See *id.* at 55.

268. See Laurie R. Blank, *A Square Peg in a Round Hole: Stretching Law of War Detention Too Far*, 63 RUTGERS L. REV. 1169, 170-71 (2011).

269. See Matthew C. Waxman, *Administrative Detention: The Integration of Strategy and Legal Process* 11 (Brookings Inst., Georgetown Univ. Law. Ctr., Hoover Inst. Working Paper, 2008).

270. Fernandez, *supra* note 126.

271. *The Relevance of IHL in the Context of Terrorism*, INT'L COMM. RED CROSS (Jan. 1, 2011), <http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm>.

272. Additional Protocol II, *supra* note 107, at art. 6.

273. Geneva Convention III, *supra* note 253, at art. 3(d).

organized crime can be detained in solitary confinement cells in special detention centers up to eighty days without criminal charges.²⁷⁴ During that time, they are not entitled to legal representation.²⁷⁵ Human Rights Watch notes that torture is a serious problem during the period in between arbitrary detention and the handing over to prosecutors.²⁷⁶ In effect, Mexico has a “parallel system” of justice²⁷⁷ for organized crime that has been denounced by the international human rights community²⁷⁸ because the rights of “normal” criminals are suspended for anyone suspected of cartel involvement. If this is how Mexico conceives of a civilized justice system during times of peace, its interpretation of its obligations under Additional Protocol II and Common Article 3 might be even looser.

There is also a danger that Mexico would seek to expand the jurisdiction of military tribunals to drug cartel members themselves, as the United States did in the case of terrorists. Many scholars have argued that the United States’ “war on terror” has stretched the boundaries of military justice.²⁷⁹ This is largely due to the inherent differences that exist between United States military commissions in which terrorists have been tried and federal criminal courts.²⁸⁰ While the procedural safeguards provided by the criminal system are part of “a systematic commitment to minimizing the rate of wrongful conviction,”²⁸¹ many of them are discarded by the military justice system,²⁸² which aims to “wag[e] successful war” by ensuring the offenses of the law of war are punished and deterred.²⁸³ The goals of criminal justice additionally span from deterrence, condemnation, and punishment²⁸⁴ to public safety,²⁸⁵ protecting the innocent,²⁸⁶ and, in some instances, rehabilitating the guilty.²⁸⁷ To that effect, the early practices of the United States in its war on terror may serve as a cautionary tale. One scholar described the immediate post-9/11 administration

274. See David A. Shirk, *Criminal Justice Reform in Mexico: An Overview*, 3 MEX. L. REV. 189, 217 (2008), <http://info8.juridicas.unam.mx/pdf/mlawrns/cont/6/arc/arc1.pdf>.

275. *Id.* at 218.

276. *Country Summary: Mexico*, *supra* note 242, at 2.

277. Gillian Reed Horton, *Cartels in the Court Room: Criminal Justice Reform and its Role in the Mexican Drug War*, 3 MEX. L. REV. 229, 257 (2008).

278. See *Country Summary: Mexico*, *supra* note 242, at 2.

279. See, e.g., Anthony F. Renzo, *A Call To Protect Civilian Justice: Beware the Creep of Military Tribunals*, AM. CONSTITUTION SOC’Y FOR LAW & POLICY (Feb. 2008), http://www.acslaw.org/sites/default/files/Renzo%20Issue%20Brief_Final.pdf.

280. See generally JENNIFER K. ELSEA, CONG. RESEARCH SERV., R40932, COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT (2013), <http://www.fas.org/sgp/crs/natsec/R40932.pdf> (comparing the rules and procedural safeguards in military commissions and federal criminal courts).

281. Chesney & Goldsmith, *supra* note 261, at 1088.

282. *Id.*

283. ELSEA, *supra* note 280, at 9.

284. Chesney & Goldsmith, *supra* note 261, at 1082.

285. Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 628 (2005).

286. Chesney & Goldsmith, *supra* note 261, at 1088.

287. *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (“The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.”).

of military justice in the United States as creating "the impression of kangaroo courts."²⁸⁸ As critics of trying suspected terrorists in military tribunals have pointed out, the absence of these goals in the administration of military justice has a hugely detrimental effect.²⁸⁹

For example, in a recent case, United States military prosecutors insisted that they could continue to detain a suspect even after the defendant is acquitted.²⁹⁰ Leaked intelligence further reveals that, of the 780 people who have been detained at Guantánamo Bay Naval Base, at least 150 individuals have been innocent civilians.²⁹¹ Although it is unclear how Mexico might choose to prosecute drug cartel members under the laws of war, the fact that it has chosen to model its criminal justice system after the United States²⁹² strongly suggests that it may also follow the United States' model for detaining and prosecuting individuals during an armed conflict. Meanwhile, the recent ruling issued by the Mexican Supreme Court striking down the use of military tribunals may not serve as much of a deterrent. It was based on a section of the Mexican Constitution that prevents military jurisdiction over civilians.²⁹³ It is unclear what the Constitution's applicability would be if drug cartel members no longer fit the civilian category.

If the drug cartel members were detained and prosecuted under a broad interpretation of the laws of war, it could undermine the positive judicial reforms that Mexico has implemented and exacerbate the enduring defects of the Mexican system of justice. In 2008, Mexico's Constitution was amended in a way that moved its criminal justice system closer to that of the United States.²⁹⁴ Before 2008, Mexico lacked many of the rights and protections guaranteed by other civil judicial systems.²⁹⁵ During that time, crime was perceived as being committed against the State and justice was served in response to the injury committed against the institution of government, not the victim.²⁹⁶ The criminal process lacked basic transparency, with judges making decisions without any of the affected parties making an appearance and frequently using coerced confessions.²⁹⁷ Public prosecutors had "unfettered

288. Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337, 341 (2002).

289. See Laura Pitter, *Guantanamo's System of Injustice*, SALON, Jan. 19, 2012, http://www.salon.com/2012/01/19/guantanamos_system_of_injustice.

290. See Josh Gerstein, *Military Won't Promise To Release Cole Suspect if Acquitted*, POLITICO: UNDER THE RADAR (Nov. 2, 2011, 11:58 AM), http://www.politico.com/blogs/joshgerstein/1111/Military_wont_promise_to_release_Cole_suspect_if_acquitted.html.

291. Christopher Hope et al., *WikiLeaks: Guantanamo Bay Terrorist Secrets Revealed*, TELEGRAPH, Apr. 25, 2011, <http://www.telegraph.co.uk/news/worldnews/wikileaks/8471907/WikiLeaks-Guantanamo-Bay-terrorist-secrets-revealed.html>.

292. See Horton, *supra* note 277, at 229.

293. Richard Fausset, *Mexico Closer To Banning Military Trials of Human Rights Abuse*, L.A. TIMES, Aug. 23, 2012, <http://articles.latimes.com/2012/aug/23/world/la-fg-mexico-military-courts-20120823>; see Constitución Política de los Estados Unidos Mexicanos [C.P.], *as amended*, Diario Oficial de la Federación [DO], 5 de febrero de 1917, art. 13 (Mex.).

294. Horton, *supra* note 277, at 229.

295. *Id.* at 241.

296. *Id.* at 249.

297. *Id.* at 243.

access” to obtaining convictions and the prolonged detention of defendants without access to a judge or counsel was widespread.²⁹⁸ The reforms adopted in 2008 were “designed to improve the efficient administration of justice, increase transparency, protect rights, stamp out impunity and reign in corruption.”²⁹⁹

To its credit, Mexico has made some strides in moving away from its widely condemned practice of prosecuting human rights abuses committed by the armed forces in secret military tribunals. However, it is difficult to imagine that that trend would continue if the military ceased serving a law enforcement function and began fighting a legally recognized war. First, the progress that has been made so far is tentative. Although Mexico’s Supreme Court recently declared unconstitutional a section of Mexican military law which required alleged human rights abuses by members of the armed forces to be tried in military tribunals, the Supreme Court must issue a similar ruling in at least two further cases before its decision is considered binding precedent under the Mexican judicial system.³⁰⁰ Meanwhile, beyond the example of the United States, it is not uncommon for countries that are engaged in NIACs to expand the administration of military justice.³⁰¹ Human rights activists have already seriously challenged the Mexican military’s ability to effectively administer justice. As one scholar pointed out, “Mexico needs the army, but the army ultimately needs the Rule of Law, and for the Rule of Law to flourish, it must enjoy the protection of effective criminal justice mechanisms.”³⁰²

The Mexican Constitution already prohibits intimidation and torture, unnecessary preventative detention, and prevents a judge from taking more than seventy-two hours from the time a formal accusation is made to resolve the defendant’s legal situation and decide whether to move forward with the case.³⁰³ It also requires speedier trials by guaranteeing a hearing before a judge within forty-eight hours of apprehension, the provision of all facts that may pertain to a defense, and an opportunity to respond to allegations before a judge.³⁰⁴ The burden of proof has been shifted to prosecutors who now have to show a heightened level of “certainty” to obtain a conviction.³⁰⁵ Defendants are guaranteed the right to be presumed innocent until proven guilty and most also have the right to a public hearing.³⁰⁶ Although the proper administration of

298. *Id.* at 243-44.

299. *Id.* at 234.

300. *Mexico: Supreme Court Limit on Military Jurisdiction Must Become Binding Precedent*, AMNESTY INT’L, Aug. 22, 2012, <http://www.amnesty.org/en/news/mexico-supreme-court-limit-military-jurisdiction-must-become-binding-precedent-all-courts-2012->.

301. For example, Colombia recently passed a controversial law that grants military jurisdiction over some human rights abuses. See Luis Jaime Acosta & Jack Kimball, *Colombia’s Congress Passes Controversial Military Justice Reform*, REUTERS, Dec. 11, 2012, <http://www.reuters.com/article/2012/12/12/us-colombia-military-reform-idUSBRE8BB05R20121212>.

302. Horton, *supra* note 277, at 232.

303. *Id.* at 241; see Carlos F. Natarén, *Notes on Criminal Process and Constitutional Reform in Mexico Today*, 1 MEX. L. REV. 99, 110-11 (2011).

304. *See id.*

305. *See id.* at 250.

306. *See id.*

justice is still far from guaranteed,³⁰⁷ ongoing judicial reform has been identified as being critical to both bolstering democratic governance and ultimately solving some of the root causes of Mexico's security crisis.³⁰⁸

Finally, some legal scholars have posited that an armed conflict designation would allow serious crimes to be more effectively prosecuted by the ICC.³⁰⁹ However, the presence of an armed conflict is not necessary for the ICC to exercise its jurisdiction.³¹⁰ Yet, since its jurisdiction is limited to "crimes against humanity,"³¹¹ it would only be able to prosecute the most egregious offenses committed in Mexico. So far, at least one claim has been formally brought against former President Calderón in the ICC.³¹² However, one scholar argues that the administration of justice via the ICC may not be the best way to pursue justice in Mexico.³¹³

V. DIAGNOSING THE PROBLEM

The increasing brutality of the violence taking place in Mexico is largely what is motivating some analysts and policymakers to argue that the situation has transformed into an armed conflict that requires a new legal approach. The current approach is glaringly inadequate, and even the most drastic legal consequences of an armed conflict designation may seem tolerable to those who wish to eradicate the problem through a more aggressive use of force. Yet in spite of the disturbing character of Mexico's violence, the drug cartels still display the qualities of organized crime. The strategy to combat them has not failed because the criminal law framework lacks the tools to address the drug cartel problem. Rather, there are various structural deficiencies that prevent those tools from being effectively employed in Mexico.

A. *Drug Cartels and Organized Crime*

The "highly dynamic and heterogeneous nature" of drug gangs has made it difficult to deal with them in legal terms.³¹⁴ However, an overview of the criteria used to define insurgencies, terrorism, and organized crime reveals that the Mexican drug cartels fall within the latter category. The U.N. Convention

307. JUDICIAL AND POLICE REFORMS IN MEXICO: ESSENTIAL BUILDING BLOCKS FOR A LAWFUL SOCIETY, S. DOC. NO. 112-36, at 9-11 (2012).

308. See DAVID A. SHIRK, COUNCIL ON FOREIGN RELATIONS, THE DRUG WAR IN MEXICO: CONFRONTING A SHARED THREAT 10-12 (2011), <http://www.cfr.org/mexico/drug-war-mexico/p24262>.

309. See Bloom, *supra* note 202, at 406-12; see also Bergal, *supra* note 214, at 1087.

310. See Carey Shenkman, Note, *Catalyzing National Judicial Capacity: The ICC's First Crimes Against Humanity Outside Armed Conflict*, 87 N.Y.U. L. REV. 1210 (2012).

311. Rome Statute of the International Criminal Court art. 7, July 17, 1998, 2187 U.N.T.S. 9.

312. See Sara Webb & Manuel Rueda, *Mexican Group Asks ICC To Probe President, Officials*, REUTERS, Nov. 25, 2011, <http://www.reuters.com/article/2011/11/26/us-mexico-icc-idUSTRE7AO0TA20111126>; see also Yemeli Ortega Luyando, *México: Expresidente Calderón Acusado por Imponer "Estado de Excepción"*, EL UNIVERSAL, Dec. 19, 2012, <http://www.eluniversal.com.co/cartagena/internacional/mexico-expresidente-calderon-acusado-por-imponer-estado-de-excepcion-102408>.

313. Spencer Thomas, *A Complementarity Conundrum: International Criminal Enforcement in the Mexican Drug War*, 45 VAND. J. TRANSNAT'L L. 599, 631 (2012).

314. Hauck & Peterke, *supra* note 122, at 407.

Against Transnational Organized Crime states that an “organized criminal group” is a “structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.”³¹⁵ It defines a “structured group” as a group “that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.”³¹⁶ Although the definitions provided by the convention are admittedly and perhaps purposefully vague, Mexico’s drug cartels appropriately fit under this broad terminology. The Convention captures their non-ideological, profit-driven motives and fluid organizational structure detailed in Section III of this Note.

Unfortunately, organized crime is indeed a “pithy term” that is “often applied without a clear reference point and is, in fact, highly indeterminate and vague.”³¹⁷ However, the fact that there are many parallels between what is happening in Mexico today and the organized crime that other countries have previously confronted helps to define the nature of Mexico’s challenge. Mexico’s drug cartels share profound similarities with the criminal organizations that operate in Russia, Italy, and Albania.³¹⁸ In Russia, criminal organizations similarly “targeted rivals, anyone who posed a threat (this ranged from reformist politicians to investigative journalists and honest policemen), and those who were obstacles to efforts to seize control of particular businesses ranging from banks to hotels and gasoline stations.”³¹⁹ Russian criminal organizations also operated in a State that was undergoing rapid political transitions.³²⁰ Thus, some scholars argue that Mexico actually represents a “classic case of organized crime.”³²¹

Alternatively, Mexican drug cartels can also be defined by virtue of what they are not: terrorists or insurgents. Organized crime, terrorists, and insurgents share several common features.³²² However, although all insurgents and terrorists might be considered criminals, not all criminals are insurgents or terrorists.³²³ Organized criminals, terrorists, and insurgents can also be distinguished from each other by the violence they wage. As the Mexican drug cartels have demonstrated, organized criminals are often more violent than terrorists or insurgents.³²⁴ Additionally, almost every definition of insurgency

315. United Nations Convention Against Transnational Organized Crime art. 2(a), Nov. 15, 2000, S. TREATY DOC. NO. 108-16 (2004), 40 I.L.M. 335 [hereinafter U.N. Organized Crime Convention].

316. *Id.* art 2(c).

317. Hauck & Peterke, *supra* note 122, at 408.

318. Kan & Williams, *supra* note 197, at 219.

319. *Id.* at 223.

320. *Id.*

321. Rodger Baker, *The Big Business of Organized Crime in Mexico*, STRATFOR GLOBAL INTELLIGENCE (Feb. 13, 2008), <http://www.stratfor.com/weekly/big-business-organized-crime-mexico>.

322. Kan, *supra* note 120, at 37.

323. *Id.* at 40.

324. *Id.*

employed by countries around the world requires that the insurgent force possess a political agenda.³²⁵ Although there is no legal consensus concerning the international definition of "terrorism," most nations contemplate the use of violence to achieve political aims.³²⁶

Given the drug cartel's relative political apathy, they do not easily qualify as either terrorists or insurgents as the two terms are commonly conceived. While it is true that some of the drug cartel violence is politically motivated in the sense that it is meant to broadcast the government's inability to stop them, the point of even bothering to send such a message is profit-oriented, not ideological.³²⁷ The drug cartels have a vested interest in showing the public that the government's efforts to control them are futile and that Mexico would be better off if they are permitted to conduct their business undisturbed.³²⁸ Drug cartels are fundamentally driven by profits and control of the market, not political ideology.³²⁹ While two drug cartels, La Familia Michoacana and Los Caballeros Templarios, do appear to practice a form of religious mysticism, it is not what galvanizes them.³³⁰ Drug cartels, as distinguished from terrorists or insurgents, have no interest in fully controlling the state apparatus.³³¹ Violence is simply a means of doing business that is used to "discipline, enforce transactions, limit the entry of competitors, and coerce."³³² On the occasions that drug cartel violence has deviated from this principle and indiscriminately targeted civilians, the drug cartels have often rectified such "errors" by harshly punishing those who commit them.³³³ As previously noted, the majority of the deadly violence does not even involve the Mexican government. Meanwhile, a lot of the government-targeted violence that does occur is directed at government officials who work for rival cartels.³³⁴ "[T]he Mexican traffickers do not seek to replace the government and provide services, but they are committed to manipulating it with bribery and violence to continue their illegal activities without interference," explained a recent congressional report.³³⁵ Profit maximization is the ultimate goal; intimidation and violence are the means to an apolitical end.

325. Memorandum from John M. Paganini, Director, U.S. Army Counterinsurgency Ctr. (Jan. 20, 2012), <http://usacac.army.mil/cac2/coin/repository/FM3-24%20Revision%20IP%201%20Definitions.pdf>.

326. Sudha Setty, *What's in a Name? How Nations Define Terrorism Ten Years After 9/11*, 33 U. PA. J. INT'L L. 1, 42 (2011).

327. William Booth, *Mexico Drug Cartels Send Message of Chaos, Death*, WASH. POST, Dec. 4, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/03/AR2008120303953.html>.

328. *Id.* ("Authorities also say the cartels are killing so graphically in order to sap public confidence in the government, perhaps hoping Calderon will allow the cartels to return to business as usual, when the smuggling organizations operated with the tacit support of corrupt officials.").

329. Carpenter, *supra* note 160, at 405.

330. Freden, *supra* note 136. For the drug cartels that do possess a religious ideology, "[r]eligious beliefs, rituals and even sacrifices are a form of protection, not a *casus belli*." *Id.*

331. BEITTEL, *supra* note 3, at 25.

332. *Id.* at 4.

333. *Cárteles No Son Terroristas, Dice Stratfor*, EL GOLFO, Apr. 16, 2011, <http://www.elgolfo.info/elgolfo/nota/64820-carteles-no-son-terroristas-dice-stratfor> (author's translation).

334. *Id.*

335. BEITTEL, *supra* note 3, at 26.

B. *Confronting Drug Cartels*

The laws of war have been shaped to fit the threat presented by al Qaeda primarily because the organization has transcended the bounds of conventional warfare and challenged the international community to find answers in a body of law that did not originally contemplate the terrorist organization's existence. Drug cartels, on the other hand, do not inherently pose a new or unique threat. Correspondingly, the tools to fight organized crime already exist, although they are not necessarily being effectively used.

The U.N. Convention Against Transnational Organized Crime (UNTOC) aims "to eliminate differences among national legal systems that have in the past blocked mutual assistance efforts between countries, and to set standards to render domestic laws more effective for combating international organized crime."³³⁶ More specifically, it contains provisions that make crimes committed under it extraditable offenses and require signatories to take measures to criminalize corruption and corporate offenses;³³⁷ crack down on money laundering and seizing crime proceeds;³³⁸ protect testifying witnesses;³³⁹ and boost investigative, prosecutorial, and judicial cooperation.³⁴⁰ Both Mexico and the United States are signatories to the treaty.³⁴¹ However, the UNTOC suffers some critical deficiencies that make it difficult to track its progress. First, it was designed as a legal instrument aimed at "improv[ing] international legislation and enabl[ing] cooperation between countries" and is "not . . . an operational agreement which directs specific crime-fighting activities."³⁴² Secondly, the UNTOC lacks a governing body that can conduct evaluations.³⁴³ Third, member countries are reluctant to divulge information on their performance.³⁴⁴ Nonetheless, the treaty should be treated as many states intended it: a starting point that requires additional measures to realize its ambitious goals.³⁴⁵

Along the lines of additional measures, the United States and Mexico are also signatories to the 1996 Inter-American Convention Against Corruption (IACAC), which was promulgated by the Organization of American States (OAS) in effort to "promote, facilitate and regulate cooperation among the States Parties to ensure the effectiveness of measures and actions to prevent, detect, punish and eradicate corruption in the performance of public functions

336. Luz Estella Nagle, *The Challenges of Fighting Global Organized Crime in Latin America*, 26 FORDHAM INT'L L.J. 1649, 1666 (2003).

337. U.N. Organized Crime Convention, *supra* note 315, art. 9(2).

338. *Id.* arts. 6, 7.

339. *Id.* arts. 24, 25.

340. *Id.* arts. 18, 26-29.

341. *Id.* art. 18.

342. Andre Standing, *Transnational Organized Crime and the Palermo Convention: A Reality Check*, INT'L PEACE INST. 10 (Dec. 2010), http://www.humansecuritygateway.com/documents/IPI_TransnationalOrganizedCrimeandthePalermoConvention_ARealityCheck.pdf.

343. *Id.*

344. *Id.*

345. *Id.* at 1.

and acts of corruption specifically related to such performance.”³⁴⁶ The Preamble states that the convention recognizes that “corruption is often a tool used by organized crime for the accomplishment of its purposes.”³⁴⁷ Yet, although the “IACAC has become a fundamental multilateral foundation upon which Latin American Nations have endeavored to attack organized crime in the hemisphere,” the situation in Mexico is just one example of how Latin American states have been unwilling to take steps to implement its principles.³⁴⁸ As one scholar notes, “it is one thing to tell the world that one’s Nation is participating in an international convention, and another matter altogether to actually live up to the convention itself.”³⁴⁹

The experiences of the United States, Italy, Germany and France, which are often held up as “‘model’ national experiences in the fight against organized crime and public sector corruption,”³⁵⁰ can provide additional guidance to Mexico. Over the years, the United States in particular has refined a relatively effective legal apparatus to deal with organized crime.³⁵¹ This includes the Racketeer Influenced and Corrupt Organizations (RICO) Act,³⁵² which was enacted as part of the Organized Crime Control Act of 1970 with the purpose of combating organized crime.³⁵³ United States courts are already effectively using RICO to prosecute Mexican drug cartel members who fall under their jurisdiction.³⁵⁴ One of the most significant limits of RICO, however, is that it does not apply extra-territorially.³⁵⁵ Nonetheless, although RICO itself cannot be exported, the United States has been involved in several judicial and prosecutor trainings and state-to-state exchanges in an effort to export its institutional knowledge and strengthen the Mexican judicial system.³⁵⁶ The Justice Department’s Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) has provided direct technical assistance to

346. Inter-American Convention Against Corruption art. II, *opened for signature* Mar. 29, 1996, S. TREATY DOC. 105-39, 35 I.L.M. 724 (1996) [hereinafter IACAC].

347. *Id.* p.mbl.

348. Luz Estella Nagle, *The Challenges of Fighting Global Organized Crime in Latin America*, 26 FORDHAM INT’L L.J. 1649, 1678 (2003).

349. *Id.*

350. EDGARDO BUSCAGLIA ET AL., UNDERMINING THE FOUNDATIONS OF ORGANIZED CRIME AND PUBLIC SECTOR CORRUPTION: AN ESSAY ON BEST INTERNATIONAL PRACTICES 20 (2005), http://media.hoover.org/sites/default/files/documents/epp_114.pdf.

351. Jacqueline Armendariz, *U.S. Teaches Mexico About Criminal Justice System*, BROWNSVILLE HERALD, Apr. 1, 2012, <http://pvangels.com/news-mexico/523/us-teaches-mexico-about-criminal-justice-system>.

352. 18 U.S.C. §§ 1961-68 (2006).

353. Pub. L. No. 91452, 84 Stat. 922 (1970).

354. See Richard Marosi, *Former Drug Kingpin Pleads Guilty to Racketeering, Conspiracy*, L.A. TIMES, Jan. 5, 2012, <http://articles.latimes.com/2012/jan/05/local/la-me-0105-drug-kingpin-20120105>.

355. See *Cedeno v. Castillo*, 457 F. App’x 35, 37 (2d Cir. 2012).

356. Robert Donnelly, *Report From the Field: Judicial and Prosecutor Training*, WOODROW WILSON CTR. MEXICO INST. (Dec. 3, 2010), <http://mexicoinstitute.wordpress.com/2010/12/03/report-from-the-field-judicial-and-prosecutor-training>.

Mexican prosecutors and law enforcement officers investigating complex crimes.³⁵⁷

In broader terms, other measures taken by nations that have effectively battled organized crime include adopting advanced intelligence gathering and analysis capabilities,³⁵⁸ creating cross-administrative anti-organized crime teams,³⁵⁹ directing more funds to police, judges, and prosecutors,³⁶⁰ gaining public confidence and buy-in by ensuring that leaders of the judiciary and law enforcement set a good ethical example and by building bridges between the public sector and civil society,³⁶¹ and enhancing judicial independence and accountability.³⁶² Analysts have already acknowledged that Mexico “desperately needs” the Mexican equivalent of the United States Federal Bureau of Investigations.³⁶³ It also would benefit from “real anticorruption and internal-affairs investigative capacity that can gain credibility through publicized prosecutions.”³⁶⁴ Police and judicial reforms would additionally go a long way toward empowering the criminal justice system to reassert control over organized crime.³⁶⁵ Finally, the lessons from these countries suggest that Mexico should attempt to leverage its impressive rate of economic growth by taking proactive steps to improve the distribution of the huge amount of wealth present in the country. These could include reducing poverty and raising the salaries of public employees to mitigate corruption.³⁶⁶ Notably absent from these model initiatives is the adoption of a militarized approach to the drug cartel problem.

While there is certainly a need for Mexico to undertake a number of reforms, the ultimate success of any policy is largely tied to the consumption of drugs and supply of guns in the United States. As Secretary Clinton pointed out, the United States needs to curtail its “insatiable demand for illegal drugs.”³⁶⁷ The Washington Office on Latin America has suggested that the United States invest in drug prevention and treatment to reduce the domestic demand.³⁶⁸ Across Latin America, leaders have even begun to call for a

357. *DOJ/OPDAT Latin America and the Caribbean Programs*, DEP’T OF JUSTICE, <http://www.justice.gov/criminal/opdat/worldact-programs/latin-caribbean.html> (last visited Mar. 12, 2013).

358. BUSCAGLIA ET AL., *supra* note 350, at 23.

359. *Id.* at 24.

360. *Id.* at 25.

361. *Id.* at 27-28.

362. *Id.* at 28-30.

363. Bonner, *supra* note 119, at 45.

364. *Id.*

365. See MAUREEN MEYER & ROGER ATWOOD, *Reforming the Ranks: Drug-Related Violence and the Need for Police Reform in Mexico*, WASH. OFFICE LATIN AM. (2007), <http://www.wola.org/sites/default/files/downloadable/Drug%20Policy/past/Drug%20violence%20and%20police%20reform%20report.pdf>; see also Nacha Cattan, *Why Hillary Clinton Flagged Judicial Reform As ‘Essential’ to Mexico’s Drug War*, CHRISTIAN SCI. MONITOR, Jan. 25, 2011, <http://www.csmonitor.com/World/Americas/2011/0125/Why-Hillary-Clinton-flagged-judicial-reform-as-essential-to-Mexico-s-drug-war> (discussing the importance of judicial reform).

366. See BUSCAGLIA ET AL., *supra* note 350, at 30-31.

367. Mark Landler, *Clinton Says U.S. Feeds Mexico Drug Trade*, N.Y. TIMES, Mar. 25, 2009, <http://www.nytimes.com/2009/03/26/world/americas/26mexico.html>.

368. Haugaard et al., *supra* note 24, at 2.

dramatic shift in drug policy, bringing drugs out of the violent black market through decriminalization and regulation.³⁶⁹ As president, Felipe Calderón also pleaded with the United States to revive its ban on assault weapons.³⁷⁰ While Mexico has some of the toughest gun control laws in the world,³⁷¹ lax United States gun laws and a porous border counteract its tough policies.³⁷² Even President Obama has acknowledged that it "is a two-way street" and that the United States must "do our part in reducing the flow of cash and guns south."³⁷³ Another problem is that laundered drug cartel money is often sent back and saved in United States bank accounts.³⁷⁴ Experts believe that targeting these illicit funds is one of the most effective ways of dealing with drug trafficking.³⁷⁵ Besides stemming the illegal flow of firearms and acting aggressively against money laundering, the advocacy community has also urged the United States to pass comprehensive immigration reform to address the lucrative human trafficking business with which the drug cartels are also engaged.³⁷⁶

Mexico's former Secretary of Foreign Affairs Jorge Castañeda has suggested rethinking the militarized strategy altogether. In an article, Castañeda warned that "unless [Mexico] abandons the false narrative of the war as the necessary defense of a desperate land besieged by bad guys, it will be in serious danger of becoming one."³⁷⁷ Several experts agree. They argue that Calderón's strategy fragmented the drug cartels and "unleashed vicious murderous cycles and a geographical dispersion of violence as emerging organizations vie for control of new routes."³⁷⁸ Mexico's military campaign "is looking less like the inevitable price of success against organized crime and more like the symptom of a strategy in dire need of revamping," writes one author.³⁷⁹ "Rather than bludgeoning organized crime into submission through military means, the government should prioritize the revitalization of the federal and local institutions that have been ineffective or, worse, penetrated by the very criminal

369. See Robert Valencia, *From Montevideo to Washington: A New Dawn for Drug Policy*, WORLD POL'Y BLOG (Jan. 16, 2013, 1:29 PM), <http://www.worldpolicy.org/blog/2013/01/16/montevideo-washington-new-dawn-drug-policy>.

370. See Kathleen Hennessey, *Mexican President Calderon Calls for an Assault Weapon Ban in U.S.*, L.A. TIMES, Apr. 2, 2012, <http://articles.latimes.com/2012/apr/02/news/la-pn-mexican-president-Calderon-calls-for-assault-weapon-ban-in-us-20120402>.

371. See Chris Hawley, *Mexico: Gun Controls Undermined by U.S.*, USA TODAY, Apr. 1, 2009, http://www.usatoday.com/news/world/2009-03-31-mexicoguns_N.htm (quoting Lt. Col. Raúl Manzano Vélez, director of the Mexican military's civilian gun sales).

372. See Editorial, *Lax U.S. Gun Laws Enable Killing in Mexico*, WASH. POST, Feb. 4, 2012, http://www.washingtonpost.com/opinions/lax-us-gun-laws-enable-killing-in-mexico/2012/02/02/gIQAWb9CqQ_story.html.

373. Hawley, *supra* note 371.

374. See O'Neil, *supra* note 12, at 70.

375. See *id.*

376. See, e.g., Haugaard et al., *supra* note 24, at 2.

377. Jorge G. Castañeda, *What's Spanish for Quagmire?*, FOREIGN POL'Y, Jan./Feb. 2010, http://www.foreignpolicy.com/articles/2010/01/04/whats_spanish_for_quagmire.

378. Kevin Casas-Zamora, *Mexico's Forever War*, FOREIGN POL'Y, Dec. 22, 2010, http://www.foreignpolicy.com/articles/2010/12/22/mexico_s_forever_war.

379. *Id.*

elements they were designed to combat,” he suggests.³⁸⁰ In this sense, the case of Colombia serves as a useful comparison. The Colombian National Police, not the Colombian military, played a decisive role in the defeat of the Cali and Medellín Colombian drug cartels.³⁸¹ Finally, it is also likely that aggressive military offenses will only push distribution networks across borders.³⁸² In fact, they have already shifted drug cartel operations from Colombia to Mexico and into the Guatemalan highlands.³⁸³

Mexico also needs to shift its focus from security measures to fostering Mexico’s democracy and growing middle class.³⁸⁴ Calderón’s government has made some adjustments in response to these criticisms. After the massacre of fifteen civilians in Ciudad Juárez, the Calderón administration consulted with local and state officials to change the government’s military-led strategy for the city.³⁸⁵ The new strategy, “We Are All Juárez,” involves heavy federal government investment in education, job training, and community development programs to help address some of the fundamental factors that contribute to violence in the city.³⁸⁶ Since then, violence in what was known as the country’s murder capital has dropped, and as of mid-2012 was at its lowest rate since the drug war exploded in 2007.³⁸⁷

VI. CONCLUSION

Since the end of the Cold War, the international community has had to re-conceptualize what constitutes an armed conflict. The body of laws that were written to address situations in which two sovereigns met each other on a battlefield simply do not capture many of the violent confrontations that exist today. However, as the meaning of war is adapted to fit the new security challenges facing the twenty-first century, we should be wary about stretching the concept too thin.

This Note may only capture a snapshot in time, as the legal status of what is happening in Mexico is not impervious to change. However, its lessons are transferable to a variety of contexts that may be mischaracterized as war. Even if the particularized conclusions of this piece are ultimately rendered moot, the legal qualification of violent confrontations around the world will continue to be a hot topic of debate. Currently, the international community is grappling with how to classify everything from Somali piracy³⁸⁸ and cyber-attacks³⁸⁹ to

380. *Id.*

381. Bonner, *supra* note 119, at 44.

382. Carpenter, *supra* note 160, at 417.

383. *Id.*

384. O’Neil, *supra* note 12, at 69-70.

385. SEELKE & FINKLEA, *supra* note 37, at 23.

386. *Id.* at 23-24.

387. William Booth, *In Mexico’s Murder City, the War Appears Over*, WASH. POST, Aug. 20, 2012, http://articles.washingtonpost.com/2012-08-20/world/35492884_1_hector-murguia-cartels-ciudad-juarez.

388. See Douglas Guilfoyle, *The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?*, 11 MELBOURNE J. INT’L L. 1 (2010).

389. See Oona A. Hathaway et al., *The Law of Cyber-Attack*, 100 CALIF. L. REV. 817 (2012).

the evolving "War on Terror."³⁹⁰ More than providing a mode of analysis for identifying the nature of these problems, this Note emphasizes the heavy consequences of a misdiagnosis.

Ultimately, perhaps the most compelling point is simply a practical one: wars have winners and losers. The fight against Mexico's drug cartels should not. Any scenario where the drug cartels might triumph over the Mexican state is clearly unacceptable. Meanwhile, the notion that drug cartels will be eradicated through hard fought military battles is highly implausible. As long as there is a market of illegal drug consumers, suppliers will find a way to be a part of it. The armed-conflict narrative simply distracts from the necessary institutional change that is needed throughout Latin America and the responsibility drug-consuming nations have to stem demand. Ultimately, the proverbial "war" on drugs should be limited to metaphors. The real struggle in Mexico is for responsible governance, economic opportunities, and justice—and it will not be won with tanks and guns.

390. Jonathan Hafetz, *Military Detention in the "War on Terrorism": Normalizing the Exceptional After 9/11*, 112 COLUM. L. REV. SIDEBAR 31 (2012), http://www.columbia-lawreview.org/wp-content/uploads/2012/03/31_Hafetz.pdf.