REMARKS AND COMMENTS

POLITICS IN CONFLICT: WHY THE INTERESTS OF STATES INESCAPABLY INFUSE INTERNATIONAL HUMANITARIAN LAW, THE CASE OF MEXICO'S DRUG WAR

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Abstract

International law, like all legal regimes, resides in a political world. In instances of armed conflict, the injection of politics into presumptively legal debates about how to classify violence can have a critical impact on the future culpability of perpetrators and the international community's response to human suffering. Using the Mexican drug war as a case study, this Article will examine why the international community chooses to acknowledge some situations as conflicts and not others. Much has been written about cartel violence in Mexico to date, including concerns about U.S. national security policy, the impact of the drug war on migration flows, and the impunity of the Mexican government. Significantly, far less has been explored on the nature of the violence as a conflict under international humanitarian law (IHL). Based on the premise that the violence in Mexico constitutes a non-international armed conflict (NIAC), this Article will explore what such a designation would mean for Mexico and U.N. Member States and how these implications will sway States away from acknowledging the violence as a NIAC. It will then build from the situation in Mexico to understand how this case is paradigmatic of all instances of potential NIACs. By doing so, this Article will help frame our understanding of the unique intersection between international law and politics in the realm of armed conflict.

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INTRODUCTION

International law, like all legal regimes, resides in a political world. As such, though it proposes particular treaties, conventions, and covenants for ratification, its application is frequently rooted in geopolitics and policy. Most recently, this interplay was manifested in the international community's response to the so-called Arab Spring.[1] While the violence in Libya—with under a year of fighting and fewer than 5,000 dead[2]—benefited from U.N. Security Council-sanctioned humanitarian intervention, the Syrian conflict—ongoing since 2011

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[1] *Syria Regional Refugee Response: Inter-Agency Information Sharing Portal*, U.N. HIGH COMMISSIONER FOR REFUGEES, http://data.unhcr.org/syrianrefugees/regional.php (last visited Feb. 17, 2015) [hereinafter *Syria Regional Refugee Response*]; *see also About 2 Million People Killed and Wounded in 47 Months, and It is Still Not Enough . . .* , SYRIAN OBSERVATORY FOR HUM. RTS. (Feb. 7, 2015), http://syriahr.com/en/2015/02/about-2-millions-killed-and-wounded-in-47-months-and-it-is-still-not-enough/ (noting that the Syrian Observatory for Human Rights had documented the deaths of 210,060 individuals in Syria since March 18, 2011).

[2] *See* Emelie Ejnarsson, The Classification of the Conflict in Libya and Syria: A Critique of the Organization Requirement (2013) (unpublished thesis, Lund University) (on file with the Faculty of Law, Lund University); Ian Black, *Libyan Revolution Casualties Lower than Expected, Says New Government*, THE GUARDIAN (Jan. 8, 2013, 11:26 AM), http://www.theguardian.com/world/2013/jan/08/libyan-revolution-casualties-lower-expected-government.

with an estimated death toll exceeding 250,000—has not.[3] Though legally, Syria qualifies as an armed conflict under international law, it is the politics surrounding this conflict that prevent the international community from responding in accordance with these laws.[4] Politics, rather than law, prevail.

Since 2006, Mexico's campaign against drug cartels has resulted in massive casualties, regional instability, and a flood of desperate asylum-seekers to the U.S. border.[5] It has spurred the involvement of U.S. law enforcement and national security apparatuses.[6] And it has at times spilled beyond Mexico's borders into the United States and Central American countries.[7] Yet, despite its duration, organization, and intensity, it remains unacknowledged as an armed conflict under international law.[8] This lack of designation raises several critical questions. Why has there been so little discussion amongst international bodies about the designation of a situation that, according to some estimates, has taken the lives of over 100,000 people since 2006?[9] What would acknowledgement of armed conflict mean for Mexico and the United Nations? How might geopolitics and policy implications for Mexico and U.N. Security Council members—including the United States—be influencing analysis of international law?

Using the Mexican drug war as a case study, this Article will examine why the international community chooses to characterize some

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[3] 'Almost Quarter of a Million People' Dead in Syria War, Aljazeera (Aug. 7, 2015), http://www.aljazeera.com/news/2015/08/quarter-million-people-dead-syria-war-150807093941704.html; *see also Syria Regional Refugee Response*, *supra* note 1.

[4] *See* Roy Allison, *Russia and Syria: Explaining Alignment with a Regime in Crisis*, 89 Int'l Aff. 795 (2013); *see also Syria: Applicable International Law*, Rule of L. in Armed Conflicts Project (July 13, 2012), http://www.geneva-academy.ch/RULAC/applicable_international_law.php?id_state=21.

[5] *See* Hum. Rts. Watch, Neither Rights nor Security: Killings, Torture, and Disappearances in Mexico's "War on Drugs" 4 (2011), www.hrw.org/sites/default/files/reports/mexico1111webwcover_0.pdf [hereinafter Neither Rights nor Security]; U.N. High Comm'r for Refugees, Children on the Run 4 (2014), http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf [hereinafter Children on the Run].

[6] *See* Colleen W. Cook et al., Cong. Res. Serv., Merida Initiative: Proposed U.S. Anticrime and Counterdrug Assistance for Mexico and Central America 1 (2008), research.policyarchive.org/20135.pdf.

[7] *See generally* Children on the Run, *supra* note 5.

[8] *See* Emily Crawford, Identifying the Enemy: Civilian Participation in Armed Conflict 187 (2015).

[9] Katy Watson, *Missing Students: Mexico's Violent Reality*, BBC News (Sept. 30 2015), http://www.bbc.com/news/world-latin-america-34377805.

situations as armed conflicts and not others. To do so, Part I will explore the current violence in Mexico, the rules for designating conflict under international humanitarian law, and the arguments both for and against designating the Mexican drug war as a non-international armed conflict (hereinafter "NIAC"). Part II will detail implications of such a legal designation for Mexico and the United Nations. Part III will use the implications from Part II to examine how politics, rather than law, determine why the violence in Mexico will likely never be designated as a NIAC and how this paradigm—of not acknowledging internal violence as NIACs—applies to conflicts throughout the world. Finally, Part IV concludes that conflict designation, though sometimes politically unpalatable, may be necessary to promote accountability and national healing.

I. The "Drug War" as an Armed Conflict Under International Law

Despite its lack of designation as an armed conflict, drug-related violence in Mexico has plagued the state for nearly a decade.[10] This Part will provide the background necessary to support the analysis conducted in Parts II and III. As such, Part I.A. will develop a history of the Mexican drug war, presenting the major parties to the conflict and the nature of the conflict in Mexico as it relates to specific crimes, targets, and death toll. Part I.B. will then turn to the criteria for conflict designation under international humanitarian law, enumerating how violence between parties is designated as an international armed conflict (hereinafter "IAC") or NIAC. Finally, Part I.C. will explore recent views both for and against designating the violence in Mexico as a NIAC. Part I will conclude with a discussion supporting this designation.

A. *Background to the Violence*

The drug war between the Mexican government and various organized drug cartels began on December 11, 2006, with the initiation of Operation Michoacán.[11] Though drug cartels have existed and operated within Mexico for decades, prior presidents historically managed these organizations "through an opaque strategy of

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[10] *See* Ioan Grillo, *Mexico Cracks Down on Violence*, Seattle Post-Intelligencer (Dec. 11, 2006), http://www.seattlepi.com/national/article/Mexico-cracks-down-on-violence-1222154.php.

[11] *Id.*

accommodation, payoffs, assigned trafficking routes, and periodic takedowns of uncooperative capos [bosses]."[12] Rather than continuing this trend, newly elected President Felipe Calderón "militarized and intensified [the] conflict" by deploying 6,500 federal troops to Michoacán State in an effort to stem drug violence.[13] By 2010, there were 45,000 Mexican troops spread across Mexico[14] battling cartels estimated to deploy over 100,000 of their own "soldiers."[15] By the end of 2011, there were an estimated 60,000 dead as a result of the violence.[16]

The current deadly violence is rooted in the widespread presence and power of Mexican drug cartels. The fracturing of the Guadalajara cartel—one of the first Mexican cartels to work with Colombian cocaine traffickers[17]—in the late 1980s transformed the narco-landscape of Mexico from a largely single-operator enterprise to a splintered network of geographically compact organizations.[18] This "Balkanization" spawned a collection of powerful, weaponized cartels that are both territorially competitive and increasingly violent.[19] Though reports differ about the exact presence and makeup of these groups, they typically include the Sinaloa Federation, Los Zetas, the Gulf Cartel, Cartel de Jalisco Nueva Generacion, La Familia Michoacán, and the Beltran Leyva Organization.[20]

Since 2006, these cartels have conducted campaigns of violence intended to both terrorize and undermine the authority of the Mexican government.[21] Human Rights Watch has described the cartels' ac-

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[12] Steve Coll, *Whose Drug War?*, New Yorker (Nov. 9, 2011), http://www.newyorker.com/news/daily-comment/whose-drug-war.

[13] *Id.*; Grillo, *supra* note 10.

[14] Robert C. Bonner, *The New Cocaine Cowboys: How to Defeat Mexico's Drug Cartels*, 89 Foreign Aff. 35, 40 (2010).

[15] *100,000 Foot Soldiers in Mexican Cartels*, Wash. Times (Mar. 3, 2009), http://www.washingtontimes.com/news/2009/mar/03/100000-foot-soldiers-in-cartels/?page=all.

[16] Watson, *supra* note 9.

[17] Malcolm Beith, The Last Narco: Inside the Hunt for El Chapo, the World's Most Wanted Drug Lord 47 (2010).

[18] *Mexico's Drug War: Balkanization Leads to Regional Challenges*, Stratfor Global Intelligence (Apr. 18, 2013, 9:11 AM), http://www.stratfor.com/weekly/mexicos-drug-war-balkanization-leads-regional-challenges#axzz3FnGS24or. Prior to this fracture, the Guadalajara cartel was responsible for the movement of drugs, including those from Colombia, into the United States. *Id.* Its operations and operating territory covered most of Mexico. *Id.*

[19] *Id.*; *see also* June S. Beittel, Cong. Res. Serv., Mexico's Drug Trafficking Organizations: Source and Scope of the Rising Violence 6–7 (2011).

[20] Beittel, *supra* note 19, at 6–7.

[21] Neither Rights nor Security, *supra* note 5, at 4.

tivities as affecting "virtually every sphere of public life, from extortions of small businesses to blockades of major highways; from closures of schools to nighttime curfews; from mass kidnappings to assassinations of public officials."[22] Horrific forms of violence and terror have characterized the unrest, with cartels using "public displays of violence," including placing severed heads in town squares and dangling mutilated bodies from overpasses, in order to "sow terror, not only among their rivals, but also within the general population."[23] This assessment is reinforced by research conducted by the University of San Diego's Trans-Border Institute based on analyzed data collected between 2006 and 2011. According to this research, cartel-related violence has increasingly targeted government authorities, journalists, and vulnerable populations consisting of women and children.[24] More disturbingly, by 2011, these victims were typically subjected to torture and mutilation prior to their deaths, such that every day of 2011, cartels killed an average of forty-seven persons.[25] Of these forty-seven, an average of three were likely to be tortured and one decapitated, and two were likely to be women while ten were likely to be youths.[26]

While much of the brutality has been directed at members of rival cartels,[27] increasingly, cartels are focusing their efforts on government officials and law enforcement.[28] In 2011, cartels executed 547 police officers and 44 soldiers (an increase from 168 and 17, respectively, in 2010).[29] From 2010 to 2011, cartels assassinated twenty-one Mexican mayors.[30] Notably, in 2010, cartel assassins also killed the leading candidate for the Institutional Revolutionary Party, ("IRP"), which was one of the highest profile assassinations in recent decades and the first time cartels had targeted an electoral candidate.[31] Given its timing, it was seen as a direct effort by cartels to influence Mexican elections,

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[22] *Id.*

[23] *Id.*

[24] Cory Molzahn et al., Trans-Border Inst., Univ. San Diego, Drug Violence in Mexico: Data and Analysis Through 201117–20 (2012), https://justiceinmexico.org/wp-content/uploads/2014/09/2012_DVM.pdf.

[25] *Id.* at 20.

[26] *Id.*

[27] *Mexico's Drug War: Persisting Violence and a New President*, Stratfor Global Intelligence (Jan. 17, 2013), https://www.stratfor.com/weekly/mexicos-drug-war-persisting-violence-and-new-president.

[28] Molzahn et al., *supra* note 24, at 18.

[29] *Id.*

[30] *Id.*

[31] Nacha Cattan, *Rodolfo Torre Cantu Assassination: Why Are Drug Cartels Killing Mexican Candidates?*, Christian Sci. Monitor (June 28, 2010), http://www.csmonitor.com/

supporting the argument of George Grayson—Professor of Government at the College of William & Mary and senior associate at the Center for Strategic & International Studies—that the cartels, rather than seeking a complete overthrow of the government, instead hope to operate within a "dual sovereignty," in which their power influences or controls, but does not displace, the government.[32]

Alongside the outright murder of police and government officials, cartels have increasingly exerted their presence and undermined the rule of law in Mexico by seizing control of territory and entrenching themselves in local government and law enforcement.[33] Given the enormous wealth generated by drug sales, the Mexican cartels have chosen to spend their profits to "bolster their ranks with an untold number of politicians, judges, prison guards and police officers—so many . . . , in fact, that entire [police] forces . . . across Mexico have been disbanded."[34] As but one example, in 2011, the Public Security Secretary disbanded ninety-five percent of Guadalupe's police force after discovering that Los Zetas operated openly in the city's neighborhoods.[35] In doing so, he noted, "it was incredible when I arrived. Criminals moved around armed. I asked who they were, thinking they were detectives or something, in plain clothes with guns, and they told me, 'no', they are Zetas. How is this possible?"[36] By controlling territory and operating openly, cartels undermine societal trust in the government and can thus step into this uncertainty and exert further power and influence.

Much of the cartels' efficiency and lethality stems from their organizational structures. Though these vary between groups, the cartels have typically operated like corporations, with a central command and control and the ability to contract work—from accounting to assassina-

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World/Americas/2010/0628/Rodolfo-Torre-Cantu-assassination-Why-are-drug-cartels-killing-Mexican-candidates.

[32] *Id.*; *see also* George W. Grayson & Samuel Logan, The Executioner's Men: Los Zetas, Rogue Soldiers, Criminal Entrepreneurs, and the Shadow State They Created 67 (2012).

[33] *See* Marc Lacey, *In Drug War, Mexico Fights Cartel and Itself*, N.Y. Times, Mar. 30, 2009, at A1.

[34] *Id.*

[35] *Peña Nieto's Challenge: Criminal Cartels and Rule of Law in Mexico*, Latin Am. Rep. N°48, Int'l Crisis Group 23 (Mar. 19, 2013), http://www.crisisgroup.org/~/media/Files/latin-america/mexico/048-pena-nietos-challenge-criminal-cartels-and-rule-of-law-in-mexico.pdf.

[36] *Id.*

tions—to various entities.[37] This structure ensures that bosses at the top are aware of, and in control of, the cartels' operations. Nevertheless, some differences do exist. For example, the Zetas—a splinter group of the Gulf Cartel populated by former Mexican Special Forces—exercise a horizontal, decentralized structure.[38] Trained by the Mexican military, the Zetas demonstrate "extensive compartmentalized networking, pervasive intelligence and counter-intelligence capabilities, amassing of advanced weaponry, brutal tactics, top level military and police training, and the ability to undermine State governments and control large swaths of territory."[39] The group is able to conduct such activities by virtue of its horizontal organization, in which individual cells are empowered to exploit opportunities in their respective locales.[40] Similarly, the Sinaloa cartel has maintained a decentralized structure of loosely affiliated organizations, enabling it to adapt and operate in unstable environments.[41] Overall, though the cartels have suffered from loss of leadership, internal and external threats, and fractionalization over the years, they nevertheless continue to operate effectively against Mexican forces.[42] As recently as May 2015, New Generation Jalisco members downed a Mexican Army helicopter using a rocket-propelled grenade, resulting in the deaths of six Mexican soldiers.[43]

Taken as a whole, the violence in Mexico since 2006 has destabilized society, disrupted governance, and infused distrust among a populace that has borne witness to cartel brutality and to police impunity, kidnappings, disappearances, and torture.[44] The recent disappearance of forty-three students in October 2014—a small percentage of the 22,000 persons disappeared since 2006—and the live tweeting of a local journalist's murder at the hands of cartels on her own twitter ac-

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[37] Ami C. Carpenter, *Beyond Drug Wars: Transforming Factional Conflict in Mexico*, 27 Conflict Resol. Q. 401, 404 (2010).

[38] Lisa J. Campbell, *Los Zetas: Operational Assessment*, 21 Small Wars & Insurgencies 55, 55 (2010).

[39] *Id.*

[40] Dwight Dyer & Daniel Sachs, *Los Zetas' Spawn: The Long Afterlife of Mexico's Most Ruthless Drug Gang*, Foreign Aff. (Aug. 5, 2013), http://www.foreignaffairs.com/articles/139626/dwight-dyer-and-daniel-sachs/los-zetas-spawn.

[41] Beittel, *supra* note 19, at 6.

[42] *Mexico's Drug War: Persisting Violence and a New President*, *supra* note 27.

[43] Jo Tuckman, *Mexico Declares All-Out War after Rising Drug Cartel Downs Military Helicopter*, Guardian (May 4, 2015), http://www.theguardian.com/world/2015/may/04/mexico-declares-war-rising-drug-cartel-downs-military-helicopter.

[44] Neither Rights nor Security, *supra* note 5, at 4–6, 9.

count further help to underscore the continued specter of violence, impunity, and loss of rule of law in Mexico.[45] Further still, beyond Mexico's borders, the conflict has spilled into the United States and Central American countries.[46] What began in 2006 has not yet come to an end.

B. *Defining Conflicts Under International Law*

While the violence in Mexico is alarming, not all unrest constitutes a conflict under international law. Significantly, hostilities do not rise to the level of armed conflict if they are considered mere "banditry, unorganized and short-lived insurrections, or terrorist activities."[47] Based on the description of the violence above, on its face, the situation in Mexico seems to rise to a level beyond mere banditry. At the same time, the Mexican government is not fighting another *state*, but a collection of revenue-generating cartel members. Given the particularities of this situation, to determine whether the violence qualifies as an armed conflict under international humanitarian law, it is first necessary to explore what this term legally entails.

The concept of "armed conflict" was first used as a legal expression by the drafters of the Geneva Conventions.[48] The word choice was intentional, selected over "war" as a means of ensuring that states did not attempt to eschew applicability of the law—and responsibility under it—by arguing that unrest within their territories was simply a police action.[49] Under international humanitarian law (hereinafter "IHL"), once violence reaches above a particular threshold, two types of armed conflict can arise: an IAC or a NIAC.[50] In the former, two or

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[45] Dolia Estevez, *Abduction of 43 Students Exposes Mexico's Narco Corruption*, Forbes (Nov. 4, 2014), http://www.forbes.com/sites/doliaestevez/2014/11/03/abduction-of-43-students-exposes-mexicos-narco-corruption-2/; Harriet Alexander, *Mexican Citizen Journalist Has her Own Murder Posted on her Twitter Account*, The Telegraph (Oct. 23, 2014, 8:40 PM), http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/mexico/11183720/Mexican-citizen-journalist-has-her-own-murder-posted-on-her-Twitter-account.html.

[46] George W. Grayson, *Los Zetas: The Ruthless Army Spawned by a Mexican Drug Cartel*, Foreign Pol'y Res. Inst. (May 2008).

[47] Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

[48] 1 Jean S. Pictet et al., The Geneva Conventions of 12 August 1949: Commentary 32 (1952).

[49] *Id.*

[50] Int'l Comm. of the Red Cross, How is the Term "Armed Conflict" Defined in International Humanitarian Law? 3 (2008), https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf.

more state parties are involved in the fighting.[51] In the latter, NIACs are distinguished from IACs by the involvement of one non-state actor in a domestic conflict with at least one other non-state actor, or with the state.[52]

Historically, NIACs were not acknowledged by states, which wished to maintain sovereignty over domestic clashes and were unwilling to legitimize rebels, terrorists, or other armed groups.[53] This resistance was largely overcome by international recognition that "[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife."[54] Nevertheless, due in part to states' apprehension, and in part to the asymmetry of these conflicts—inherent when considering the relative capabilities of most non-state actors and state militaries—defining what exactly constitutes a NIAC has evolved over time. Currently, the standards by which violence meets the level of a NIAC is articulated in two key treaties: Common Article 3 of the Geneva Conventions and Additional Protocol II of the Geneva Conventions (hereinafter "APII"), and are later expanded in the International Criminal Tribunal for the Former Yugoslavia's (hereinafter "ICTY") oft referenced *Tadić* decision.[55] In the case of

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[51] *Id.*

[52] *Id.*

[53] *See* Eric David, *Internal (Non-International) Armed Conflict*, *in* Oxford Handbook of International Law in Armed Conflict 353–54 (Andrew Clapham & Paola Gaeta eds., 2014).

[54] Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 119 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

[55] The 1949 Geneva Conventions were drafted in the aftermath of World War II with the aim to "fill the gaps" in the law of war that were exposed by Nazi concentration camps and overall brutality. Philip Spoerri, Int'l Comm. of the Red Cross Director of Int'l Law, Address at the Ceremony to Celebrate the 60th Anniversary of the Geneva Conventions (Dec. 8, 2009), https://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-120809.htm. They are considered the foundational texts for modern IHL. In total, the Geneva Conventions are comprised of four conventions and three additional protocols. *Id.* Geneva Convention I addresses the "Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;" Geneva Convention II addresses the "Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea;" Geneva Convention III addresses the "Treatment of Prisoners of War;" and Geneva Convention IV relates to the "Protection of Civilian Persons in Time of War." *Id.* The Additional Protocols respond to changes in modern warfare, such as guerrilla warfare and the increase in civilian suffering due to developments in weapons technology. *Id.*

Mexico, the state has ratified the Geneva Conventions, but has not ratified APII, such that it is not bound by the latter's provisions.[56]

Although it does not provide an exact definition of a NIAC, Common Article 3 specifies that it applies to "armed conflict[s] not of an international character occurring in the territory of one of the High Contracting Parties [states]."[57] By specifying what it is *not*, the drafters suggest—and the commentary elucidates—that NIACs include conflicts in which one or more armed, non-state actor is participating and does not need to include any state actors, though states may be involved in such conflicts.[58] Additionally, while distinguishing this category of conflict from those of an "international character," the decision of the drafters to apply the legal term "armed conflict" to this new category suggests that the conflicts feature similar characteristics. The universal ratification of the Geneva Conventions further cements NIACs as a legal concept.[59]

In contrast, APII adopts a more restrictive interpretation of what constitutes a NIAC, significantly narrowing the scope to those that approach the level of a full-scale conflict.[60] APII defines as armed conflicts those that "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a party of its territory as to enable them to carry out sustained and concerted military operations."[61] It distinguishes these from "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[62] Given this greater restriction,

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[56] *Treaties and States Parties to Such Treaties: Mexico*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=MX (last visited Dec. 15, 2014). Overall, the fact that Mexico has not ratified APII is of little consequence in the context of its obligations under IHL. So long as the violence in Mexico can be designated an armed conflict under *Tadić*, the obligations associated with Common Article 3 are sufficient.

[57] Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[58] INT'L COMM. OF THE RED CROSS, *supra* note 50, at 4.

[59] *Id.* at 3.

[60] *Id.* at 4.

[61] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art.1, ¶ 2, June 8, 1977, 1125 U.N.T.S. 609, 611.

[62] *Id.*

states are loath to consider internal unrest a NIAC and rarely accept this classification.[63]

Years later, the ICTY[64]—in determining whether violence in the Former Yugoslavia in the early 1990s constituted an armed conflict under IHL—provided a three-part test for designation determinations in its *Tadić* decision. According to the court, a NIAC exists where "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."[65] The ICTY stressed that this test "focuses on two aspects of a conflict: the intensity of the conflict and the organization of the parties," and that these two particular elements "differentiated a non-international armed conflict from internal tensions and disturbances."[66] Taken together, *Tadić* is now understood to mean that designation of a situation as a NIAC is based on three critical factors: (1) whether the conflict is *protracted*; (2) whether the groups in conflict are *organized*; and (3) whether the violence is of sufficient *intensity*.[67]

While *Tadić* in some ways provides an exact definition of a NIAC, it nevertheless leaves open to interpretation the meaning of "duration," "intensity," and "organization." Given the flexibility of these requirements, administration of this test requires a "case-specific analysis of facts,"[68] though some guidelines do exist for interpreting these terms.[69] Specifically, the intensity standard is met not only by an assessment of duration and scale, but through a set of indicia developed by the ICTY and the International Criminal Court (hereinafter "ICC").[70] These indicia include: the number of incidents; the level, length, duration, and geographic spread of the violence; the deaths, injuries, and

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[63] Sandesh Sivakumaran, The Law of Non-International Armed Conflicts 155 (2012).

[64] The ICTY, established by U.N. Security Council Resolution 827, is an ad hoc court created in 1993 to prosecute "serious violations of international humanitarian law" committed during the Yugoslav wars. S.C. Res. 827, ¶ 70 (May 25, 1993).

[65] 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).

[66] Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

[67] Int'l Comm. of the Red Cross, *supra* note 50, at 5.

[68] Anthony Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law 127 (2010).

[69] Sivakumaran, *supra* note 63, at 166–67.

[70] *Id.* at 168.

damage; the mobilization of persons; the distribution of weapons; the types of weapons used; the conclusion of ceasefire or peace agreements; the involvement of third parties; the prosecution of offenses which are only applicable in armed conflicts; the granting of amnesties; any derogations from human rights treaties; and the use of a state's armed forces in lieu of its police force.[71] The variety of indicia suggests that a determination of conflict classification requires balancing factors against a particular situation to assess whether the threshold has been met.[72]

Similarly, the *Tadić* organization standard is not clearly defined, but has been interpreted through the case law of international tribunals. The International Criminal Tribunal for Rwanda (hereinafter "ICTR") has defined organization as armed forces "organized to a greater or lesser extent,"[73] while the ICTY has specified that "some degree of organization by the parties will suffice."[74] These general statements suggest that the threshold for organization is not particularly high. Like intensity, certain indicia help interpret whether a group meets this threshold. These indicia include: an apparent command structure; capacity of the group to conduct organized military operations; logistical ability; implementation of obligations of international law; capacity to speak with a unified voice; maintenance of a headquarters; uniforms; specified roles and responsibilities for members; modes of communication; military training; requiring permits to cross checkpoints; control of territory; ability to recruit new members; ability to procure, transport, and distribute arms; and internal discipline procedure.[75] Like with intensity, not all of these indicia must be met for a group to be considered organized. Rather, they are intended to facilitate the evaluation of whether a group meets the standard as described by the ICTY and ICTR.[76]

As the discussion above demonstrates, conflict classification is far from a black and white enterprise. Nor has it been conducted consist-

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[71] *Id.* at 168–69 (citing the *Tadić*, *Delaliæ*, *Miloševiæ*, *Haradinaj*, *Boškoski*, *Limaj*, and *Tarèulovski* judgments of the ICTY and the *Lubanga* judgment of the International Criminal Court).

[72] *Id.* at 169.

[73] Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Trial Chamber Judgment, ¶ 620 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 2, 1998).

[74] Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 89 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

[75] SIVAKUMARAN, *supra* note 63, at 170–71.

[76] *Id.* at 170.

ently since the drafting of the Geneva Conventions. It is therefore clear that the violence in Mexico must be subject to case-specific analysis if it is to be deemed (or not deemed) a NIAC. Evaluating whether the violence in Mexico qualifies as a NIAC is thus subject to an exploration of the nature of the violence, the actors involved, and whether they meet the *Tadić* standard.

C. *Recent Legal Debates Surrounding the Violence in Mexico*

Given the complexities of the violence in Mexico and the vagaries surrounding conflict classification under IHL, determining whether the unrest is, in fact, a NIAC is no easy task. Scholarship relating to the rising violence in Mexico abounds, focusing on a range of issues from the rise of Los Zetas, to U.S. national security policy, to the impact of the drug war on the flow of immigrants across the Mexican-U.S. land border. As students and scholars acknowledge the deadly and destabilizing impact of this violence on Mexico and the surrounding states, they have begun to write more about how this violence may, or may not, be designated under IHL.

Proponents[77] and opponents[78] of classifying the violence in Mexico as a NIAC debate this issue against the three *Tadić* standards. Overall, the greatest consensus lies with the "protracted" factor in the *Tadić* standards, which all commentators recognize is easily satisfied given the continuance of violence since 2006.[79] In contrast, far more disagreement arises over whether the violence satisfies the intensity and organization factors of *Tadić*, although the latter ultimately proves the most compelling.

In examining intensity, proponents of NIAC designation point to the involvement of Mexico's military, the number of casualties, and the weaponry used by cartels—all of which have undermined Mexican institutions and impacted Mexican and U.S. citizens—as justification for NIAC designation.[80] Since the start of the violence, according to a U.S.

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[77] Carina Bergal, Note, *The Mexican Drug War: The Case for Non-International Armed Conflict Classification*, 34 Fordham Int'l L.J. 1042, 1081 (2011); Callin Kerr, Comment, *Mexico's Drug War: Is It Really a War?*, 54 S. Tex. L. Rev. 193, 207 (2012); Craig A. Bloom, *Square Pegs and Round Holes: Mexico, Drugs, and International Law*, 34 Hous. J. Int'l L. 345, 383 (2012).

[78] Andrea Nill Sánchez, Note, *Mexico's Drug "War": Drawing a Line Between Rhetoric and Reality*, 38 Yale J. Int'l L. 467, 468, 491 (2013).

[79] *Id.* at 480; Bergal, *supra* note 77, at 1084.

[80] Bergal, *supra* note 77, at 1087.

Department of Defense official, the cartels are estimated to have fielded a combined total of over 100,000 "foot soldiers" against the Mexican army's 130,000 soldiers, suggesting that the sheer size of the parties elevates the violence to a higher level of intensity than if the cartels were merely small criminal outfits.[81] Moreover, as has been stated above, the fighting between these cartel members and Mexican soldiers has led to an estimated death toll of 100,000.[82] Combining the numbers of those involved in the unrest and those who are victims of the unrest underscores the magnitude, and thus the intensity, of the violence.

In addition to the scale of the parties and death toll, the weaponry employed by cartels is extensive and highly sophisticated. The cartels' "astounding arsenal of weapons" is equal to, if not exceeding, the weaponry of government forces,[83] and cartel squads have been estimated to have "ten times the ammunition of federal forces."[84] These weapons are not only numerous but complex and military-grade, including: fragmentation grenades, grenade launchers, antitank rockets, high-caliber weapons, small-caliber assault rifles, armor-piercing ammunition, and industrial explosives.[85] With cartels fielding nearly 100,000 "foot soldiers," sophisticated and military-grade weapons, and fomenting elevating levels of violence,[86] the sheer scale of hostilities satisfies several of the indicia for intensity. In addition, although bitter and bloody inter-cartel battles remain commonplace, the ability of cartels to exert absolute control over Mexican territory serves as an indicator of intensity. In 2009, three cartels reportedly maintained control over most of the region between the Mexican-U.S. border, staging armed members at regional checkpoints as a means of asserting continuous control over their territory.[87]

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[81] PETER CHALK, THE LATIN AMERICAN DRUG TRADE: SCOPE, DIMENSIONS, IMPACT, AND RESPONSE 51 (2011) (citing *100,000 Foot Soldiers in Mexican Cartels*, WASH. TIMES, Mar. 3, 2009). Chalk notes that this number may be an exaggeration, and that the number may be closer to 10,000. *Id.* This is a significant difference, but still cannot be discounted as so small as to rule out claims of intensity.

[82] Watson, *supra* note 9.

[83] Bergal, *supra* note 77, at 1072.

[84] *Id.* (citing Tim Johnson, *Mexican Cartels Amass Better Arsenals, Mostly Bought in U.S.*, MCCLATCHY (Nov. 8, 2010), http://www.mcclatchydc.com/2010/11/18/104010/mexicancartels-amass-better-arsenals.html).

[85] *Id.* (citing Ken Ellingwood & Tracy Wilkinson, *Drug Cartels' New Weaponry Means War*, L.A. TIMES, (Mar. 15, 2009), http://www.latimes.com/world/la-fg-mexico-arms-race15-2009mar15-story.html).

[86] *Id.*

[87] Bergal, *supra* note 77, at 1070.

In contrast, though recognizing that the number of dead is compelling, opponents present a more nuanced argument to undermine the notion that the intensity element has been met. Notably, while the high degree of violence seems to meet the description of a NIAC under Common Article 3, opponents argue that the ICTY requires "far more complex considerations."[88] The ICTY's examples of conflict include daily clashes between forces involving prolonged fire and the use of mortars, automatic rifles, and anti-aircraft guns.[89] The violence in Mexico, though shocking, is comparable to other violence in the region. In fact, opponents argue, Mexico posted a lower murder rate than several Central American and Caribbean countries in 2011.[90] Given that the death toll does not exceed that of neighboring countries, opponents claim that the violence in Mexico cannot match the level of violence present during the clashes investigated by the ICTY and thus cannot be considered a NIAC.[91]

Alongside intensity, there is compelling support both for and against the organization factor under *Tadić*. In support of this claim, proponents argue that Mexican cartels have become "increasingly sophisticated, three-tiered organization[s] with leaders and middlemen who coordinate contracts with petty criminals to carry out street work."[92] This command-and-control structure has allowed the cartels to drive the intensity of the conflict, as noted above, including asserting control over regions of Mexico and launching operations against rival cartels and government forces. Additionally, even where cartels, such as Los Zetas and Sinaloa, have featured a more horizontal, decentralized structure, this organization method has proved to the cartels' advantage by rendering them more adaptable and lethal.[93]

Opponents, on the other hand, argue that this decentralization demonstrates a fundamental lack of organization.[94] Moreover, opponents present a critical, and compelling, counterargument: that the nature of cartels, with their profit-driven motives and fluid structure,

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[88] Sánchez, *supra* note 78, at 481.

[89] *Id.* at 482.

[90] *Id.*

[91] *Id.*

[92] Bergal, *supra* note 77, at 1071 (quoting COLLEEN W. COOK ET AL., CONG. RES. SERV., MERIDA INITIATIVE: PROPOSED U.S. ANTICRIME AND COUNTERDRUG ASSISTANCE FOR MEXICO AND CENTRAL AMERICA 1 (2008)).

[93] Dyer & Sachs, *supra* note 40; BEITTEL, *supra* note 19, at 6.

[94] Sánchez, *supra* note 78, at 485 (citing Ami C. Carpenter, *Beyond Drug Wars: Transforming Factional Conflict in Mexico,* 27 CONFLICT RESOL. Q. 401, 404 (2010)).

fits more logically into organized criminal bodies outlined in the U.N. Convention against Transnational Organized Crime (hereinafter "UNTOC").[95] Under this Convention, 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."[96] When considering the profit-seeking—as opposed to ideological or political—behavior of the Mexican cartels, these groups can reasonably be subsumed under an already existing treaty, and thus do not qualify as parties to a *conflict*.

Simultaneously, while measuring the character of drug cartels against the definition of organized criminal groups, opponents define these cartels "by virtue of what they are not," as either insurgents or terrorists.[97] Specifically, the "political apathy" of Mexican cartels distinguishes them from insurgencies and terrorist groups, as they are instead almost exclusively driven by profits and control of the market, rather than by a political ideology.[98] Where the Mexican cartels do engage with the state, their violence is intended as a means of broadcasting to the public the government's inability to prevent the cartels from continuing their work, as well as to demonstrate that the country would be safer if the cartels were permitted to engage in their business without state interference.[99] Absent any political aims, opponents argue that the cartels cannot reasonably be compared to insurgents or terrorist groups and are thus best defined as criminal organizations.[100]

In considering the indicia embedded in the *Tadić* standards, the arguments in favor of NIAC designation are ultimately more successful. The size and scale of the conflict, casualties numbering in the tens of thousands, and the organized efficiency of the cartels themselves seem to satisfy the necessary components of *Tadić*. Notably, there are also several critical flaws with the opposition's view. In regard to inten-

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[95] Sánchez, *supra* note 78, at 502; United Nations Convention Against Transnational Organized Crime and the Protocols Thereto art. 2(a), (c), Nov. 15, 2000, S. TREATY DOC. No. 108-16 (2004), http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf [hereinafter Convention Against Organized Crime].

[96] Convention Against Organized Crime, *supra* note 95, at art. 2(a).

[97] Sánchez, *supra* note 78, at 502.

[98] *Id.* at 503.

[99] *Id.*

[100] *Id.*

sity, though opponents may rightly argue that the death toll is higher in neighboring countries than in Mexico, this is a false logic, as numerous other social factors entirely distinct from the events in Mexico—for example, crime, law enforcement efficacy, or social unrest—may be driving these numbers. It is faulty to compare murder rates of other nations with the death toll in the state in question in order to determine whether a distinct armed conflict is taking place in that state, as more intense violence across borders should not, and does not, automatically rule out the possibility of a NIAC in a supposedly less violent country. Moreover, even if opponents were to argue that there are connections between these numbers, it should be noted that Mexican cartels have been active in Central American nations for years and have recently been driving high murder rates in these countries.[101] The fact that cartels are spilling beyond Mexico's borders and perpetuating violence does not exclude the situation in Mexico from NIAC designation. Conflict classification operates irrespective of events in the region and is, as the opponents themselves argue, a "far more complex consideration[ ]" than simply comparing numbers of dead.[102]

Perhaps the strongest argument from the opposition is related to UNTOC—that the violence can easily be classified within an already existing legal regime. This argument can reasonably be used by those who wish to eschew acknowledging conflict in Mexico, as it provides a solid legal basis for pointing to the activities of cartels as nothing more than organized drug violence. While this is true, and while the argument is compelling, it nevertheless faces problems. Opponents seek to argue that cartels must be organized criminal elements because they are *not* insurgents or terrorists. Again, this is a false logic. Though it is true that cartels are not driven solely by political aims, they need not do so if they are operating under terms other than an insurgency or terrorist group. The indicia for both "intensity" and "organization," enumerated above, make no mention of political aims as criteria for parties to a conflict. Moreover, even if one rejects this indicia argument, as noted by Grayson above, the cartels' motives are not entirely divorced from the functions of the state. Indeed, the cartels hope to create a "dual sovereignty" between themselves and the Mexican gov-

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[101] *Id.* at 482.

[102] *Id.* at 481 (quoting Pierre Hauck & Sven Peterke, *Organized Crime and Gang Violence in National and International Law*, 92 Int'l Rev. Red Cross 407, 430 (2010)).

ernment, such that the cartels exert influence and control over the now-existing government.[103]

Overall, both sides have merit. In evaluating which argument should stand in this case, then, one must examine not only the text of legal standards and treaties, but the object and purpose of these laws. The Geneva Conventions rest on a spirit of humanity and concern for the safety of non-combatants. This concern is rooted in the "principle of humanity," a fundamental principle of the law of armed conflict aimed at ensuring that non-combatants are protected from suffering and are treated humanely at all times.[104] It is intended as a counterbalance to the principle of military necessity and calls upon the need to ensure dignity and humanity in combat.[105] When the Geneva Conventions were drafted, embedded in each Convention was a direct offshoot of the principle of humanity: the Martens Clause.[106] This special clause articulates a provision mandating that in all situations, including hostilities not addressed by the Conventions, parties to the conflict must remain bound by the "laws of humanity" and the "dictates of the public conscience."[107] In particular, Common Article 3, in addressing laws that still apply in a NIAC, provides the fundamental standards of protection to be observed in all NIACs, which are derived from principles of humanity.[108] Supporting this commentary, the International Court of Justice in *Nicaragua v. United States* held that the provisions in Common Article 3 are an emanation of "elementary considerations of humanity" that constitute a "minimum yardstick."[109]

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[103] *Id.* at 488, 503; *see also* Grayson & Logan, *supra* note 32, at 67.

[104] 4 Jean S. Pictet et al., The Geneva Conventions of 12 August 1949: Commentary 331 n.3 (1958).

[105] *See* 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1230 (1950) (reprinting United States v. List ("The Hostage Case"), Case No. 7 (Feb. 19, 1948)).

[106] Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience,* 94 Am. J. Int'l L. 78, 79 (2000).

[107] Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 57, at art. 158.

[108] *See* Pictet et al., *supra* note 104, at 34 ("[Common Article 3] at least ensures the application of the rules of humanity which are recognized as essential by civilized nations.").

[109] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 218 (June 27). Also, see the U.S. Supreme Court's decision in *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006), which held that there is no gap in the law between IACs and NIACs; that the Geneva Conventions apply to all war; and that in the case of NIACs, Common Article 3 applies.

Where the spirit of the law rests on a concern for the wellbeing of civilians and the maintenance of a common humanity, where the law of armed conflict upholds these principles more effectively than a classification of organized crime, where the unrest reasonably satisfies the three *Tadić* standards, and where an otherwise organized criminal organization is inflicting pervasive political instability and civilian strife, then IHL should apply. Though the opponents of NIAC designation for Mexico argue that the cartels' decentralized structures render them unorganized, if this structure allows the groups to maintain operational efficiency and lethality while operating under one umbrella title, it should still reasonably meet the indicia addressed in Part I.B.

Furthermore, the concern surrounding proper designation extends beyond the violence by cartels to include all parties. Proponents note that human rights groups have attacked the effectiveness of deploying the Mexican military to combat the cartels, reasoning that this only inflames the cartels, inciting more violence and harming already war-weary Mexican citizens.[110] Further, the Mexican National Human Rights Commission has claimed that Mexican forces have committed abuses against civilians with impunity while on duty and will likely continue to do so if the military continues its involvement.[111] Under these circumstances, the application of IHL—with its focus on the protection of civilians and the principles of humanity—is not only necessary, but also legally sound.[112]

In sum, this Part has sought to demonstrate that though reasonable counterarguments exist, the ongoing violence in Mexico between drug cartels and the state since 2006 can legally be designated as a NIAC, especially given its satisfaction of the three *Tadić* standards: organization, intensity, and prolonged violence. IHL thus applies to all actors in this conflict, both the Mexican state and the drug cartels, with significant consequences. Detailing the full implications of this will be the task of Part II.

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[110] Bergal, *supra* note 77, at 1074.

[111] *Id.*

[112] Significantly, while international human rights law (IHRL), discussed in further detail below, could arguably afford greater protection to civilians, the existence of IHL as a distinct area of international law suggests that the unique horror of war necessitates a lens that covers all aspects of violence.

II. Implications of Designating the Mexican Drug War a NIAC

If we are to understand the violence in Mexico as a NIAC, IHL must apply, imposing obligations on Mexico, as a party to the conflict, and the United Nations, which may need to respond to threats to international peace and security under the terms of the U.N. Charter. Where Part I detailed the nature of the conflict, Part II will examine the legal implications of a NIAC designation on Mexico and the United Nations. The goal of this Part is to demonstrate the *legal* burdens a NIAC designation imposes on states and international bodies in order to discuss in Part III why politics may prevent NIAC classification of the violence. It should be noted that this discussion is far from exhaustive. It is merely intended to elucidate some issues states and international bodies face if confronted with designated armed conflict. Additionally, as with many issues involving IHL, these exist at the "vanishing point of international law," such that for likely all of the following assertions, states and scholars have offered counterarguments equally rooted in international law.[113]

Before specifically addressing the impact of a NIAC designation, it is first important to establish why conflict designation of any sort has significant influence. Legally, the chief difference lies with the transition from international human rights law (hereinafter "IHRL") to IHL as the main governing framework.[114] IHRL, rooted in the principles of the 1948 Universal Declaration of Human Rights and the U.N. Charter, has been codified in numerous international and regional treaties and serves as a safeguard against state belligerence against all persons.[115] Where IHRL is the default legal regime applied during peace,

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[113] *See* Hersch Lauterpacht, The Problem of the Revision of the Law of War (1937), *reprinted in* 5 International Law: The Collected Papers of Hersch Lauterpacht 605 (E. Lauterpacht ed., 2004).

[114] Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict,* 40 Isr. L. Rev. 310, 310 (2007). For further discussion on this topic, see Theodor Meron, Human Rights and Humanitarian Norms as Customary Law (1989) and Alexander Orakhelashvili, *The Interaction Between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence?*, 19 Eur. J. Int'l L. 161 (2008).

[115] *See* Thomas Buergenthal, *The Evolving International Human Rights System*, 100 Am. J. Int'l L. 783, 787–90 (2006). *See also*, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 240 ¶ 25 (July 8) (holding that the protections offered by the International Covenant of Civil and Political Rights "does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency"); Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36,

parties to IHRL treaties can derogate from some of their obligations during times of emergency, including armed conflict.[116] These derogation clauses, however, do not permit states to suspend these rights wholesale. Rather, derogations are limited to those strictly necessary by the exigencies of a situation and can never involve discrimination purely based on race, sex, color, language, religion, or social origin.[117] Thus, where the application of IHL may sometimes have significant impacts on operational calculus—for example, in determining use of force[118]—at other times, it has little bearing on calculus because the act is universally prohibited—for example, the use of torture or genocide.[119] With this in mind, we can now turn to the discussion of implications.

A. *Implications for Mexico*

As a state party to the conflict, Mexico invariably faces several consequences of a NIAC designation. Though the state remains subject to IHRL,[120] the transition to IHL has several important implications. Chief among them, Mexican officials become vulnerable to charges of war crimes for the state's abusive treatment of cartel members and civilians. Additionally, as a party to the conflict, albeit a NIAC, Mexico must ensure that all other parties to the conflict—in this case the cartels—are treated in accordance with IHL and the principle of humanity. It should be stressed that non-state actors, though not parties to

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1144 U.N.T.S. 123 (acknowledging the rights and freedoms of all persons). Mexico is a State party to the American Convention on Human Rights. *Id.*

[116] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 115, at 240 ¶ 25.

[117] Buergenthal, *supra* note 115, at 783.

[118] Noam Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 Int'l Rev. Red Cross 737, 746 (2005).

[119] Prohibitions on activities like torture, genocide, and slavery are considered *jus cogens* norms, which are non-derogable under any circumstances. *See generally* Ian Brownlie, Principles of Public International Law (5th ed. 1998).

[120] Mexico has ratified the following IHRL treaties: International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Civil and Political Rights; International Covenant on Economic, Social, and Cultural Rights; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; International Convention for the Protection of All Persons from Enforced Disappearance; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; and Convention on the Rights of the Child. *See Status of Ratification Interactive Dashboard*, U.N. Office of the High Commissioner for Hum. Rts., http://indicators.ohchr.org/ (last visited Feb. 19, 2015).

any international conventions, can still be subject to prosecution for war crimes.[121]

A.I. Culpability for War Crimes

If a state is engaged in a NIAC, it can only be subject to provisions outlined in Common Article 3 of the Geneva Conventions, APII, any other ratified IHL or IHRL treaties, and customary international law.[122] Mexico is not a party to APII, though it is bound by those provisions under customary international law,[123] but it is a party to the Geneva Conventions and is thus subject to Common Article 3.[124] As noted in Part I, Common Article 3 was designed to serve as the law of armed conflict for NIACs. As a result, the article specifies that non-parties to the conflict, including those considered *hors de combat*—those above or beyond the conflict—due to "sickness, wounds, or detention, or any other cause" should be treated humanely, in accordance with the principle of humanity.[125] By this, the article specifies that parties are forbidden from inflicting "outrages upon personal dignity, in particular humiliating and degrading treatment."[126] If members of the Mexican government or military sanction such activities, then they are in violation of IHL.

Individual violators of IHL can be punished in a number of ways, among them via the ICC.[127] Mexico, as a state party to the Rome Stat-

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[121] Christine Byron, *Legal Redress for Children on the Front Line: The Invisibility of the Female Child*, in NON-STATE ACTORS, SOFT LAW AND PROTECTIVE REGIMES: FROM THE MARGINS 32, 51 (Cecilia M. Bailliet ed., 2012). In the present case, where Mexican cartels are the non-State actors, the egregious crimes of torture, mutilation, rape, and attacks these actors inflict on civilian populations could render them culpable for such crimes. *See id.* As this Part pertains to State responsibilities, however, it will not delve into the details of the cartels' international obligations.

[122] *Non-International Armed Conflict*, INT'L COMMITTEE OF THE RED CROSS, (May 30, 2012), https://www.icrc.org/casebook/doc/glossary/non-international-armed-conflict-glossary.htm.

[123] *See generally* 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2009), https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf.

[124] *Treaties and States Parties to Such Treaties: Mexico*, *supra* note 56.

[125] 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.

[126] Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 57, at art. 3(1)(c).

[127] See Preface to the Second Edition of WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, at x (2d ed. 2001), https://www.issafrica.org/anicj/uploads/Schabas_Introduction_to_the_ICC.pdf.

ute,[128] is subject to the ICC's jurisdiction in the event that its civil or military leaders have committed one (or more) of the four *jus cogens* crimes since the time of its ratification in 2005: genocide, crimes against humanity, war crimes, or the crime of aggression.[129] These crimes are considered "the most serious" breaches of international obligations and are of essential importance for the protection of humanity.[130] They do not constitute isolated, individual incidents of minor harm. Thus, judgment and punishment by the ICC can only occur in response to the most criminal of acts. While the ICC Prosecutor could have legitimate grounds to investigate and prosecute Mexican officials for crimes against humanity, the violence must be an armed conflict in order for him or her to prosecute for war crimes.[131] Under the Rome Statute, war crimes include, among others: "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment[,] and torture;" "outrages upon personal dignity, in particular humiliating and degrading treatment;" and "rape."[132] It is important to note that IHL does not recognize collective culpability. Rather, responsibility can only rest on individuals, though those persons need not have physically perpetrated the act, so long as he or she "planned, instigated, ordered, committed, or aided and abetted in the planning, preparation[,] or execution of a crime."[133]

In the case of the Mexican violence, Presidents Calderón and Peña have employed a combination of military personnel and law enforcement to combat the cartels.[134] Throughout the history of the drug war, both groups have engaged in behavior that could constitute

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[128] Mexico signed the Rome Statute on September 7, 2000, and ratified it on October 28, 2005. *State Parties to the Rome Statute: Mexico*, Int'l Crim. Ct., http://www.icc-cpi.int/en_menus/asp/states%20parties/latin%20american%20and%20caribbean%20states/Pages/mexico.aspx (last visited Nov. 11, 2014).

[129] Rome Statute of the International Criminal Court art. 5–8, July 17, 1998, 2187 U.N.T.S. 90.

[130] *Id.* at art. 5.

[131] *Id.* at art. 8(2).

[132] *Id.* at art. 8(2)(c)(i)–(ii), (e)(vi).

[133] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia Since 1991, S.C. Res. 827, art. 7(1) (May 25, 1993).

[134] In a NIAC, the law of war is most easily applied to the latter—those in uniform operating on behalf of the Mexican military. Nevertheless, if the violence is an armed conflict, then law enforcement could be considered to be directly participating in hostilities while engaged with cartel members, subjecting them to IHL. *See* Cees de Rover, *Police and Security Forces*, Int'l Committee of the Red Cross (Sept. 30, 1999), https://www.icrc.org/eng/resources/documents/misc/57jq3h.htm; *see also* Cees de Rover, To

"humiliating and degrading treatment" and torture under Common Article 3 and war crimes under the Rome Statute.[135] If sufficiently grievous, these could qualify for ICC investigation.[136]

International human rights organizations, such as Human Rights Watch and the International Crisis Group (hereinafter "ICG"), as well as the National Human Rights Commission of Mexico (hereinafter "CNDH")—a public institution operating independently from the federal government—have recorded numerous and continuous incidents of abuse, murder, torture, and disappearances committed by the Mexican military. According to statistics provided to ICG by the CNDH, in 2008, the commission received 1,230 complaints against the Mexican Army and Marines, a number that rose to 1,800 complaints in 2009 and registered at 1,626 in 2011.[137] In several high-profile cases, respectively: nineteen soldiers were arrested after shooting (and killing) two women and three children who were en route to a funeral; soldiers battling cartel members killed two students and planted weapons on their bodies to mask the crime; and soldiers were accused of detaining ten young men and causing the disappearance of one.[138]

Similarly, Human Rights Watch recorded twenty enforced disappearances by the Mexican Navy during a two-month period from June to July 2011,[139] while documenting thirty-nine such disappearances in a separate study.[140] It likewise recorded over 170 cases of torture by members of the security forces across Mexico, documenting tactics such as "beatings, asphyxiation with plastic bags, waterboarding, electric shocks, sexual torture, and death threats."[141] It further recorded twenty-four cases of extrajudicial killing committed by security forces against civilians who were either executed, killed by torture, shot at

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Serve and to Protect: Human Rights and Humanitarian Law for Police and Security Forces (2d ed. 2014).

[135] *See, e.g.*, *Peña Nieto's Challenge*, *supra* note 35, at 28–30; Neither Rights nor Security, *supra* note 5, at 5–7.

[136] An ICC investigation is initiated in one of three ways: self-referral by a State party, Security Council referral, or by the Prosecutor's own motion. Rome Statute of the International Criminal Court art. 13(a)–(c), July 17, 1998, 2187 U.N.T.S. 90.

[137] *Peña Nieto's Challenge*, *supra* note 35, at 28.

[138] *Id.* at 28–29.

[139] Hum. Rts. Watch, Mexico's Disappeared: The Enduring Cost of a Crisis Ignored 18 (2013), https://www.hrw.org/sites/default/files/reports/mexico0213_ForUpload_0_0_0.pdf.

[140] Neither Rights nor Security, *supra* note 5, at 6.

[141] *Id.* at 5–6.

military checkpoints, or who died during shootouts.[142] In addition to incidents of murder, torture, and disappearance, there have been accusations of rape of women. Human Rights Watch recorded one incident in which soldiers reportedly abducted four teenage girls and took them to the army base where they drugged and repeatedly raped them.[143]

Given these incidents, members of the Mexican government and military—including the most senior members—could be accused of committing war crimes, subjecting themselves to trial by the ICC. Pursuant to the Rome Statute, the Court can impose any of the following penalties on persons convicted of these crimes: imprisonment not to exceed thirty years, life imprisonment, fines, or a forfeiture of assets derived from the crime.[144] Of note, in November 2011, a Mexican lawyer petitioned the Office of the Prosecutor at the ICC, requesting an investigation into Calderón, other officials, and cartel bosses for war crimes and crimes against humanity.[145] Twenty-three thousand Mexicans signed the petition.[146] Though the ICC Prosecutor declined to open a preliminary investigation at the time, citing a lack of evidence that war crimes had occurred, the mounting allegations against the state since 2011 suggest that a renewed petition may not meet the same response.[147]

In addition to the ICC, as a party to the American Convention on Human Rights of the Organization of American States, Mexico is also subject to the jurisdiction of the Inter-American Court of Human Rights (hereinafter "IACHR").[148] At first blush, one may think that as the court for *human rights*, the IACHR is not equipped to adjudicate

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[142] *Id.* at 6.

[143] Hum. Rts. Watch, Uniform Impunity: Mexico's Misuse of Military Justice to Prosecute Abuses in Counternarcotics and Public Security Operations, 39–40 (2009), https://www.hrw.org/sites/default/files/reports/mexico0409web_0.pdf.

[144] Rome Statute of the International Criminal Court art. 77(1)–(2), July 17, 1998, 2187 U.N.T.S. 90.

[145] Sara Webb & Manuel Rueda, *Mexican Group Asks ICC to Probe President, Officials*, Reuters (Nov. 25, 2011, 10:05 PM), http://www.reuters.com/article/2011/11/26/us-mexico-icc-idUSTRE7AO0TA20111126.

[146] *Id.*; *see also Peña Nieto's Challenge*, *supra* note 35, at 30.

[147] Kimberly Curtis, *Will the International Criminal Court Take on the Mexican Drug War*, U.N. Dispatch (Sept. 18, 2014), http://www.undispatch.com/will-international-criminal-court-take-mexican-drug-war/.

[148] *See OAS Member States*, Corte Interamericana de Derechos Humanos, http://www.corteidh.or.cr/index.php/mapa-interactivo (last visited Nov. 16, 2014).

violations of IHL, and this instinct is not wrong.[149] Indeed, Article 62(3) of the American Convention on Human Rights (hereinafter "American Convention"), which delineates the Court's jurisdiction, makes no mention of armed conflicts and IHL.[150] Nevertheless, in a series of controversial decisions, the Court has reserved the right to use "international treaties,"[151] and has used the Geneva Conventions—among other IHL documents—to interpret both the substance and scope of human rights during armed conflict in accordance with the American Convention.[152] Thus, the IACHR could apply IHL in evaluating the Mexican military's crimes against civilians and others considered *hors de combat*, thereby subjecting Mexico to legal culpability for contraventions of the American Convention—including "torture or cruel, inhuman, or degrading punishment or treatment"—based on Common Article 3's prohibition of the same.[153] To date, several lawsuits have been brought against Mexico on claims including sexual assault and torture.[154]

A.II. Concerns over the Use of Force

Though the above discussion addressed violations of IHL amounting to war crimes, IHL does not—and by its nature cannot—prohibit all uses of force that result in harm, even to civilians. In fact, not only does IHL refrain from prohibiting the use of force, but it in actuality sanctions it.[155] The end result of such a sanction is more "legal deaths"—killing justified by law. This notion is reflected in the principles of proportionality, necessity, distinction, and the limitation of un-

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[149] *See* Alexandra Huneeus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, 107 AM. J. INT'L L. 1, 7 (2013).

[150] Organization of American States, American Convention on Human Rights art. 62(3), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[151] Laurence Burgorgue-Larsen & Amaya Úbeda de Torres, *"War" in the Jurisprudence of the Inter-American Court of Human Rights*, 33 HUM. RTS. Q. 148, 163 (2011) (citing Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1 ¶ 19 (Sept. 24, 1982)).

[152] *Id.* at 165–66.

[153] Organization of American States, American Convention on Human Rights art. 5(2), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[154] *See* Rosendo Cantu v. Mexico, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 216, ¶ 2 (Aug. 31, 2010); Cabrera García v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 2 (Nov. 26, 2010); García Cruz v. Mexico, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 12.288, ¶ 1 (Nov. 26, 2013).

[155] INT'L COMM. OF THE RED CROSS, VIOLENCE AND THE USE OF FORCE 10 (2011), https://www.icrc.org/eng/assets/files/other/icrc_002_0943.pdf.

necessary suffering, which are the four key factors states must consider when applying force *jus in bello* (during conflict).[156] These factors are each rooted in customary international law and codified in Additional Protocol I.[157] Understanding these four elements is critical to examining the impact of a NIAC designation on Mexico because by shifting from the law enforcement model of IHRL to IHL, the Mexican government and military experience a significant shift in the permissibility of use of force.

The four principles of IHL are an exercise in "humanizing the law" in order to protect civilians and civilian objects.[158] As Theodor Meron, President of the ICTY and Presiding Judge of the Appeals Chambers of both the ICTY and ICTR, notes, however, this humanization does not discourage war, give complete protection to civilians, or outlaw collateral damage within the parameters of proportionality.[159] Rather, it is intended to promote the rules of "fair play."[160] To this end, the principle of proportionality specifies that an attack is indiscriminate if it is expected to cause "incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof" and that would be "excessive in relation to the concrete and direct military advantage anticipated."[161] Important to note here is the language of future intent and anticipation—"expected to cause," "would be"—suggesting that parties to the conflict can violate this principle if they do not conduct a proportionality calculus before an attack. Alongside proportionality, military necessity specifies that targets must be limited to "objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[162] Again, this principle requires calculations prior to any use of force.

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[156] Gary D. Solis, The Law of Armed Conflict: International Humanitarian Law in War 250–86 (2010).

[157] Violence and the Use of Force, *supra* note 155, at 44–45.

[158] Theodor Meron, *The Humanization of Humanitarian Law*, 94 Am. J. Int'l L. 239, 241 (2000).

[159] *Id.*

[160] *Id.*

[161] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51(5)(b), June 8, 1977, 1125 U.N.T.S. 287.

[162] *Id.* at art. 52.

Similar to the first two elements, both distinction and limitation of unnecessary suffering require calculus prior to any attack. The principle of distinction specifies that parties to the conflict must "at all times distinguish between the civilian population and combatants and between civilian objects and military objectives."[163] After making such a distinction, parties must "direct their operations only against military objectives."[164] Finally, the principle of limiting unnecessary suffering prohibits parties from employing "weapons, projectiles[,] and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering" to opposing forces.[165] These four principles, taken as a whole, demonstrate that parties are not required to completely eliminate harm. They do not need to eliminate all suffering, just unnecessary suffering. They do not need to ensure that damage is not extensive, just not excessive. This exists in stark contrast to IHRL as applied to law enforcement actions, where personnel are only permitted to employ lethal force in self-defense.[166] Unlike IHL, IHRL prohibits the use of force and civilian harm unless absolutely necessary.[167]

In Mexico, shifting from IHRL to IHL, and thus introducing proportionality into the calculus of military forces, has significant consequences. The operations and regional control of cartels is such that in some cases, cartels have wrested full control of cities from the government.[168] Cartels have been remarkably successful in penetrating police departments and local bureaucracies, providing a continuous physical presence in localities.[169] In some cases, cartels like the Zetas have even established checkpoints into and out of their zones of control.[170] This pervasiveness means that cartel members, their informants, and their associates live and work among thousands of civilians. The breadth of the cartels' networks and modes of social control makes it extremely difficult for Mexican law enforcement and military personnel to accurately distinguish between the enemy and civilians. The cartels' habit

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[163] *Id.* at art. 48.

[164] *Id.*

[165] *Id.* at art. 35.

[166] Lubell, *supra* note 118, at 745–46.

[167] *Id.* at 744.

[168] *Peña Nieto's Challenge*, *supra* note 35, at 23.

[169] Ricardo C. Ainslie, Fight to Save Juárez: Life in the Heart of Mexico's Drug War 82–83 (2013) ("La Línea, the Juárez cartel's armed wing, represented the part of the Juárez cartel world where people got their hands dirty . . . . Most of the members of La Línea were current or former State and municipal people . . . .").

[170] Judith A. Warner, *Drug Trafficking and Narco-Terrorism*, *in* 2 Encyclopedia of Contemporary American Social Issues, 458, 462 (Michael Shally-Jensen ed., 2010).

of employing short-term contracted work further undermines Mexico's ability to determine whether a civilian is directly participating in hostilities (so-called "DPHing")[171] for a short period of time and is thus able to be targeted under IHL.

In light of these circumstances, military personnel will be forced to go to extra lengths to ensure that they are respecting the principles for applying force in armed conflict. For example, personnel who receive intelligence about a cartel safe house will have to conduct extensive surveillance to determine whether this is a purely military target and, if not, whether a disproportionate number of civilians will be killed. Two problems immediately arise. First, given the penetration of cartels into society, it may be impossible for Mexico to accurately determine whether a target is purely military, even with the best intelligence. Second, Mexico may view the permissibility of civilian deaths under IHL as an excuse to fire on such targets in the event of unavoidable ambiguity. The result will be higher civilian deaths in a campaign that began with the intention of "maximizing public safety, not minimizing harm."[172] It also requires reliance on a military that, as discussed above, is not free from abuse, impunity, and a seeming lack of significant care for civilian lives. As mentioned above, though estimates range, the current death toll is roughly 100,000 persons since 2006.[173] The transition from IHRL to IHL, rather than fulfilling IHL's underlying principle of humanity, instead may result in a far greater death toll for Mexican civilians.

B. *Implications for the United Nations*

In addition to impacting states, acknowledgement of unrest as a NIAC has consequences for international bodies, most notably the United Nations and the U.N. Security Council. Specifically, recogni-

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[171] "Direct Participation in Hostilities (DPH)" is a legal concept derived from Common Article 3 which pertains to "specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict." NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 43–45 (2009), https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf. Generally, those who engage in DPH experience a "temporary, activity-based loss of protection" for as long as they are neither directly engaging but neither before the relevant activities begin nor after they are complete. *Id.* DPH status exists in opposition to those with combatant status, who experience a "continuous, status or function-based loss of protection." *Id.*

[172] *See* Sánchez, *supra* note 78, at 493 (quoting Calderón's 2010 statement, "[M]y goal is to transform Mexico to a safe place where people and children could be really free.").

[173] Watson, *supra* note 9.

tion of the drug war as a NIAC raises the possibility of U.N.-sanctioned intervention. Under IHL, use of force against a state, even for humanitarian reasons, *prima facie* violates the prohibition of the use of force in Art. 2(4) of the U.N. Charter.[174] To sanction intervention, it must therefore be shown that either: (1) use of force is not contrary to the Charter; or (2) one of two exceptions to the prohibition is met: authorization by the Security Council under Chapter VII of the U.N. Charter, or self-defense under Art. 51.[175] Chapter VII permits the use of "Security Council-authorized collective humanitarian intervention," understood as the deployment of authorized military force for the "maintenance or restoration of international peace and security."[176] The court in *Tadić* found that it is a "settled practice" that the "threat to peace" has been broadly interpreted to include egregious and widespread human rights violations within a single armed conflict, including during NIACs.[177] Additionally, past U.N. Security Council Resolutions have sanctioned these interventions, most recently in Libya in 2011.[178]

Given the macabre tactics, high death tolls, and regional operations of the cartels, the U.N. Security Council could be asked to consider humanitarian intervention to restore international peace and security. This argument would be especially compelling considering the "spillover" effects of the current NIAC, which pose a threat to inter-

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[174] U.N. Charter art. 2, ¶ 4.

[175] *Id.* at art. 51. Article 51 justifies use of force for self-defense, but the preconditions of this circumstance remain controversial. *Id.* Under the jurisprudence of the International Court of Justice and the terms of Article 51, for a State to justify use of force for self-defense, five conditions must be satisfied. Oliver Dörr, *Use of Force, Prohibition of, in* Max Planck Encyclopedia of Pub. Int'l Law, ¶ 38 (June 2011) (referencing holdings in Nicar. v. U.S., 1986 I.C.J. 14; and Islamic Republic of Iran v. U.S. ("Oil Platforms Case"), 2003 I.C.J. 161). These are as follows: (1) there must be an armed attack; (2) measures of self-defense can only be directed against the State responsible for the armed attack; (3) the State must observe conditions of necessity and proportionality; (4) actions must be taken for purposes of self- defense; and (5) it must be reported to the U.N. Security Council. *Id.*

[176] U.N. Charter art. 39, 51.

[177] *See* Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 573, 623, 647–48, 717 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

[178] S.C. Res. 1973, ¶ 4, 5, 22 (Mar. 17, 2011). The resolution, in sanctioning intervention, expressly reaffirmed that Libya was a "part[y] to armed conflict[ ]" and determined that "the situation in the Libyan Arab Jamahiriya continues to constitute a threat to international peace and security" due to the "deteriorating situation, the escalation of violence, and the heavy civilian casualties." *Id.*

national peace.[179] In recent years, Mexican drug cartels have been implicated in murders on U.S. territory.[180] Cartels have also begun to expand to Central American nations.[181] An October 2011 joint project by Guatemalan and Mexican journalist outfits reported that for the Zetas, "Guatemala is the [n]ew Mexico."[182] According to the report, though Mexican cartels have operated in Guatemala for years, they now lack respect for peaceful coexistence between groups, resulting in high murder rates and continuous violence.[183] In recent months, this violence has produced a surge of unaccompanied minors at the U.S.-Mexico border.[184] The total number of U.S. Customs and Border Protection (hereinafter "CBP") apprehensions of unaccompanied and separated children from Guatemala, Honduras, and El Salvador rose from 4,059 to 10,443 from 2011 to 2012, and doubled to 21,537 in 2013.[185] In mid-2014, UNHCR called on the United States to designate these children as refugees.[186]

The spread of cartel violence into other Central American nations, combined with the massive influx of asylum-seekers—Mexico, Panama, Nicaragua, Costa Rica, and Belize recorded a 435 percent total increase in asylum applications initiated by persons from El Salvador, Honduras, and Guatemala in 2012[187]—can reasonably be considered a threat to international peace and security.[188] If neighboring countries become unable or unwilling to contain the violence and

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[179] John Burnett, *'Spillover' Violence from Mexico: Trickle or Flood*, NAT'L PUB. RADIO (July 6, 2011, 12:01 AM), http://www.npr.org/2011/07/06/137445310/spillover-violence-from-mexico-a-trickle-or-flood; *see also* Joe Carroll, *Murder on the Pipelines: Drug Cartels Turn Texas Oil Routes into Killing Zones*, BLOOMBERG BUS. WEEK (July 23, 2014), http://www.businessweek.com/articles/2014-07-23/texas-mexico-oil-pipelines-offer-cover-for-smugglers-violence.

[180] Carroll, *supra* note 179.

[181] Paola Hurtado, *For Zetas, Guatemala is the New Mexico*, GLOBAL INVESTIGATIVE JOURNALISM NETWORK (*originally published in* EL PERIÓDICO, Oct. 2, 2011), http://gijn.org/for-zetas-guatemala-is-the-new-mexico/.

[182] *Id.*

[183] *Id.*

[184] CHILDREN ON THE RUN, *supra* note 5, at 4.

[185] *Id.*

[186] Alberto Arce & Michael Weissenstein, *U.N. Pushes for Migrants to be Called Refugees*, ASSOC. PRESS, (July 8, 2014, 5:46 PM), http://bigstory.ap.org/article/un-pushes-migrants-be-called-refugees.

[187] CHILDREN ON THE RUN, *supra* note 5, at 4.

[188] Significantly, the Security Council has stopped short of recognizing that the refugee flows on their own represent a threat to peace and security, though the issue has been broached and past language of the Council hints at this notion. *See* Gary Wilson, *The United Nations Security Council and Refugee Flows as 'Threats to the Peace,' in* AN INTRO-

receive an increased number of new asylum-seekers, the region risks increased destabilization and bloodshed. Illustrative of this point, in July 2014, General John F. Kelly of the U.S. Southern Command commented that "violent criminal organizations, including gangs and groups engaged in trafficking, take advantage of the region's patchy development and fledgling democracies to threaten government operations and human security," thus posing a "dire threat to U.S. national security."[189] Under these circumstances, the U.N. Security Council may need to consider if international humanitarian intervention is necessary and how it should appropriately authorize such intervention.

Overall, as this Part suggests, the consequences of designating the violence in Mexico as a NIAC are significant. Switching legal regimes from IHRL to IHL implicates different obligations and means of enforcement by various state and international parties. Nevertheless, as the discussion thus far has occasionally hinted, legal obligations and policy considerations operate in different, sometimes vastly contradictory spheres. Without clear mechanisms to punish non-compliance, states can simply ignore their international obligations in the interests of their own geopolitical goals or the interests of their citizens. To explore this further, we turn to Part III, where the greater nuances of law and policy collide.

III. Policy Influences on the Legal Status of Conflict

A. *Security Council (In)action*

The International Committee of the Red Cross (hereinafter "ICRC") has referred to the problem of classifying conflicts as NIACs as the "[A]chilles' heel of international humanitarian law."[190] As the above discussion has demonstrated, it is clear why this is so: difficulties defining non-state actors and distinguishing levels of intensity and organization from mere banditry or, in the case of Mexico, criminality, is no small task. Nevertheless, the ICRC has encouraged that "[t]he scope of the application of [Common Article 3] must be as wide as possible,"[191] suggesting an interest in applying IHL liberally when human lives and global security are at stake. Given this sentiment and

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duction to Refugee Law 276–90 (M. Rafiqul Islam & Md. Jahid Hossain Bhuiyan eds., 2013).

[189] John F. Kelly, *SOUTHCOM Chief: Central America Drug War a Dire Threat to U.S. National Security,* Air Force Times (July 8, 2014, 6:00 AM), http://www.airforcetimes.com/article/20140708/NEWS01/307080064.

[190] Toni Pfanner, Editorial, 91 Int'l Rev. Red Cross, Mar. 2009, at 5.

[191] Pictet et al., *supra* note 104, at 36.

the legally binding nature of IHL, one would suspect that the United Nations, particularly the U.N. Security Council, would err on the side of observing international law and acknowledging armed conflict, at the very least. A review of U.N. history, however, suggests that this is not the case. Indeed, as the below discussion will explore, policy plays a powerful role in addressing issues of IHL. Having reviewed the complexities of conflict classification and the implications of such a designation on states and international organizations, this Part will explore in greater detail why states will be unwilling to classify the violence in Mexico as a NIAC, despite the legal arguments in its favor.

U.N. history and political theory indicate that states, though ascribing to U.N. principles in general, are first and foremost self-interested. Since the early 1990s, the United Nations has sanctioned humanitarian interventions in Somalia, Haiti, Rwanda, Bosnia and Herzegovina, Albania, East Timor, and most recently in Libya.[192] In all of these crises, concerns over grave human suffering, domestic political stability, and international peace and security motivated the Council to provide forces to stem the violence.[193] Though this list initially suggests progress, a closer look at these interventions, as well as those crises in which the Security Council chose *not* to intervene, reveal that the Security Council has vacillated greatly in its responses to humanitarian crises and armed conflicts.

For example, though the United Nations had sanctioned intervention in Rwanda, in 1995, as the state suffered the systematic hundred-day slaughter of 800,000 Tutsis at the hands of the military and civilian population, the Security Council chose to reduce its peacekeeping force from 2,558 to 270 troops while dithering over whether to restore the force.[194] The Security Council also failed to consider the Rwandan violence an armed conflict, instead referring to it as a "unique case."[195] Two months later, the Council ultimately voted to deploy a small French force.[196] During the Kosovo War, which lasted from February 1998 to June 1999, while Serb forces mounted increasingly violent at-

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[192] *See* S.C. Res. 794 (Dec. 3, 1992); S.C. Res. 836 (June 4, 1993); S.C. Res. 940 (July 31, 1994); S.C. Res. 929 (June 22, 1994); S.C. Res. 1101 (Mar. 28, 1997); S.C. Res. 1264 (Sept. 15, 1999); S.C. Res. 1973 (Mar. 17, 2011).

[193] *Id.*

[194] Ramesh Thakur, The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect 293 (2006).

[195] S.C. Res. 929 (June 22, 1994).

[196] *See id.* at ¶ 2 (requesting U.N. Member States to deploy a humanitarian aid force in Rwanda).

tacks against ethnic Albanians in Kosovo, the Security Council was unable to sanction more than an arms embargo against Serbia, denying intervention entirely in this case and failing again to recognize the existence of conflict.[197] Throughout the Kosovo War, Security Council members France, the United States, and the United Kingdom were stymied in their effort to respond to the humanitarian crisis by Russia and China, who threatened to veto any calls for humanitarian intervention.[198] In 2004, the Security Council again waivered, this time over how to respond to mass violence in the Darfur region of Sudan that had left 50,000 dead and 1.5 million displaced within Darfur.[199] Once again, the Council failed to authorize intervention beyond humanitarian aid and threats of sanctions.[200]

Most recently, in response to so-called Arab Spring-related violence in Libya in 2011, the Security Council responded swiftly, recognizing the existence of armed conflict and authorizing a no-fly zone over the country.[201] In this case, both China and Russia abstained from the resolution altogether.[202] And yet, despite ongoing violence, a death toll above 250,000, and over four million refugees, the Syrian crisis continues to remain outside the scope of U.N. Security Council intervention.[203] Russia, in particular, has obstructed efforts by the Security Council to sanction intervention. In 2011, Russia's Foreign Minister, Sergei Larov, noted, "it is not in the interests of anyone to send messages to the opposition in Syria or elsewhere that if you reject all reasonable offers we will come and help you as we did in Libya."[204] As the year 2015 closes, the Security Council continues to refrain from authorizing a humanitarian intervention in this beleaguered State.

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[197] *See* NICHOLAS J. WHEELER, SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY 261 (2000).

[198] *Id.*

[199] Morton Abramowitz & Samantha Power, *A Broken System*, WASH. POST (Sept. 13, 2004), http://www.washingtonpost.com/wp-dyn/articles/A17059-2004Sep12.html.

[200] *Id.*; *see also* S.C. Res. 1564 (Sept. 18, 2004).

[201] Press Release, Security Council, Security Council Approves 'No-Fly Zone' Over Libya, Authorizing 'All Necessary Measures' to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011).

[202] *Id.* at 3.

[203] *Syria Regional Refugee Response*, *supra* note 1; *see also About 2 Million People Killed and Wounded in 47 Months, and It is Still Not Enough . . . , supra* note 1 (noting that the Syrian Observatory for Human Rights had documented the deaths of 210,060 individuals in Syria since Mar. 18, 2011).

[204] *Russia Warns U.S., EU Not to Aid Syria Protests After Libya*, BLOOMBERG NEWS (June 2, 2011, 11:44 AM), http://www.bloomberg.com/news/articles/2011-06-01/russia-warns-u-s-nato-against-military-aid-to-syria-protests-after-libya.

One of the most compelling explanations for the inconsistencies in Security Council action is the dynamics of state self-interest—a purely political, rather than legal, consideration. Morton Abramowitz and Samantha Power provide such an explanation for why the Security Council "failed to tackle" the crisis in Darfur: "[t]he main answer is straightforward enough: Major and minor powers alike are committed only to stopping killing that harms their national interests. Why take political, financial and potential military risks when there is no strategic or domestic cost to remaining on the sidelines?"[205] Similarly, the Security Council's decision not to intervene in Syria is based largely on opposition from China and Russia, which view intervention as against their national interests.[206] This foot dragging has led some scholars to question whether the Security Council could be held criminally liable as bystanders to atrocities.[207]

Likewise, Michael Glennon, evaluating why the Security Council "failed" regarding U.S. involvement in Iraq, highlights the "first and last geopolitical truth," which is that states "pursue security by pursuing power."[208] Moreover, in pursuing that power, states invariably "use those institutional tools that are available to them."[209] In the context of Iraq, Glennon argues that the United States had become so powerful by 2003 that it had created a unipolar world, a situation against which other members of the Security Council, including France, Russia, and China, resisted.[210] To regain power and restore balance, these nations chose to use the Security Council, not to examine the legality of intervention in Iraq, but to return the world to a "multipolar system."[211]

And yet, we know that at times, the Security Council has responded to armed conflict. Thus, in distinguishing one case of Security Council (in)action from another, it becomes necessary to examine the domestic and geopolitical influences on Member States, rather than simply the outcomes of IHL analysis. Indeed, because there is no

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[205] Abramowitz & Power, *supra* note 199.

[206] Saira Mohamed, *Omissions, Acts, and the Security Council's (In)Actions in Syria*, 31 B.U. Int'l L. J. 413, 415, 419 (2013); *see also* Matt Schiavenza, *Why China Will Oppose Any Strike on Syria*, Atlantic (Aug. 29, 2013, 5:21 PM), http://www.theatlantic.com/china/archive/2013/08/why-china-will-oppose-any-strike-on-syria/279191/?single_page=true [hereinafter Mohamed, *Omissions*].

[207] Mohamed, *Omissions*, *supra* note 206, at 425–33.

[208] Michael J. Glennon, *Why the Security Council Failed*, 82 Foreign Aff. 16, 25 (2003).

[209] *Id.*

[210] *Id.* at 18–19, 25.

[211] *Id.* at 25.

"supranational government" that can punish states for illegal behavior and no mechanism to ensure that states compensate each other for harms, we must examine the "diverse array of noncoercive mechanisms that may influence State behavior."[212] Yet, for years, the study of international law and politics has been largely segregated. As noted by Paul Diehl and Charlotte Ku:

> Academics who study either international law or international politics share a dirty little secret: both groups know that the presence of international law is critical for international relations to occur, and both know that the practice of international politics is essential for international law to evolve and function. But each is reluctant to admit the necessity of the other.[213]

More significantly, Shirley Scott has noted that "international law is a part of international politics in a way that is not true *vice versa*," suggesting that the existence of international law may not influence politics, whereas international politics are rooted in, and justified by, international law.[214] This is an unsettling reality. Nevertheless, in recent years, scholars have made increased efforts to explore how the Security Council might be compelled to intervene, or how it may be held accountable if it does not.[215] In its annual report, Amnesty International called on Security Council members to adopt a code of conduct in which they would agree to voluntarily refrain from employing their veto power in the event of genocide, war crimes, and crimes against humanity.[216]

B. *Evaluating the Interplay*

Politics may infuse international law, but does it infuse all international law equally? Consider, for example, the World Trade Organization's (hereinafter "WTO") dispute resolution and compliance mechanism. Within the WTO, parties to a trade conflict submit their

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[212] Saira Mohamed, *Shame in the Security Council*, 90 WASH. U. L. REV. 1191, 1199 (2013) [hereinafter Mohamed, *Shame*].

[213] PAUL F. DIEHL & CHARLOTTE KU, THE DYNAMICS OF INTERNATIONAL LAW 4 (2010) (citing Christopher C. Joyner, *International Law is as International Theory Does?*, 100 AM. J. INT'L L. 248, 248 (2006)).

[214] Shirley V. Scott, *International Law as Ideology: Theorizing the Relationship Between International Law and International Politics*, 5 EUR. J. INT'L L. 313, 317 (1994).

[215] *See, e.g.*, Mohamed, *Shame*, *supra* note 212, at 1191 (examining the efficacy of shaming as a legal tool to encourage Security Council member responses to humanitarian crises).

[216] *Amnesty International Report 2014/15: The State of the World's Human Rights*, AMNESTY INT'L 3 (2015).

claims to a panel review, followed by the potential for appeal to an appellate body.[217] When the appellate body finds against a state party, that party has roughly fifteen months to decide whether or not to comply.[218] If the party fails to comply, the complaining party may ask the appellate body for a suspension of concessions—the right to unilaterally suspend some concession that the complaining party had previously made only to that party.[219] In theory, this compliance structure is inherently unequal, as larger, more powerful states have more leverage at the table. There is little incentive for large states to comply when their benefits of trade with significantly smaller states are often insignificant. In actual practice, however, there is a remarkable degree of compliance.[220] Certainly, though the stakes can still be high, international trade law is distinct from the law of war. But does this distinction also have an impact on compliance? If states can avoid responding to an armed conflict in Mexico by simply closing their eyes and not acknowledging that an armed conflict is occurring, is the acknowledgement of conflict under international law more like speeding in traffic: sometimes the cop just lets you go?[221] The answer is frustrating: yes and no.

In some regards, conflict, like speeding cars, is so commonplace that the burden on U.N. Member States to acknowledge and respond to each one would overwhelm the system. According to the Global Peace Index, as of 2014, 500 million people live in states at risk of instability and conflict, while 111 states have seen deteriorating levels of peace.[222] Instead, states must respond to those crises that are most egregious and most threatening to international peace and security. Sometimes, the car is speeding at one hundred miles per hour in a

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[217] *Understanding the WTO: Settling Disputes*, World Trade Org., https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Sept. 2, 2015).

[218] *Id.*

[219] *Id.*

[220] Shahid Bashir, *WTO Dispute Settlement Body Developments in 2012*, World Trade Org., http://www.wto.org/english/tratop_e/dispu_e/bashir_13_e.htm (last visited Sept. 23, 2015) (estimating that the rate of compliance as of 2012 was about ninety percent).

[221] Joseph A. Schafer & Stephen D. Mastrofski, *Police Leniency in Traffic Enforcement Encounters: Exploratory Findings from Observations and Interviews*, 33 J. Crim. Just. 225, 226–27 (2005) (finding that leniency was the most common police response to stopped offenders, potentially due to notions of justice, efficiency, or self-interest).

[222] Inst. for Econ. & Peace, Global peace index 2, 44 (2014), http://economicsandpeace.org/wp-content/uploads/2015/06/2014-Global-Peace-Index-REPORT_0-1.pdf

forty miles per hour zone. In this sense, conflict designation and response exist on a spectrum—the more serious, the more difficult it is for the Security Council to turn a blind eye. Like cars in traffic, the average speeder is unlikely to cause damage beyond a violation of the rules of the road. Police stations, even wealthy ones, do not have the finances or manpower to apprehend every violator. Beyond a certain speed, however, reckless drivers pose a threat not only to the rule of law, and not only to themselves, but to other cars on the road and to nearby pedestrians. They are a threat to the "peace and security" of drivers and bystanders alike, and they must be pulled over before their actions lead to a ten car pileup, a damaged storefront, and injured unassuming pedestrians. This seems to have been the case in Libya in 2011, where even Russia and China set aside their vetoes to respond to an exceptional and quickly deteriorating situation.[223] But, as the Syria crisis demonstrates, this is not always the case. Sometimes, all of the policemen are patrolling another strip of highway or chasing down a vehicle going eighty mph as another car wizzes by at one hundred and twenty mph. At other times, the police have ulterior motives for not stopping a particular speeder. Hence, the "no" side of this answer.

Ultimately, though conflicts are numerous, their existence stands in opposition to the foundations of international law, that states are sovereign and that non-state actors lack legitimacy when fighting in opposition to the state. This was the basis for states' concerns, addressed in Part II, that recognizing NIACs as a form of armed conflict would grant *de facto* validity to non-state actors.[224] NIACs, particularly those that embroil the state itself in conflict, are a direct threat to the basis of the international, political, *and* legal order because they put in peril the only legally legitimate governing power within a state. Returning, then, to the distinction between international trade and IHL, it would seem that while economics and trade are frequently heated political issues, and though they are critical elements of state identity and security, the immediacy of conflict—and the ripples that armed conflict designation can have on responses to future conflicts—set IHL apart as more deeply imbued with, and inseparable from, international politics. As the two are intertwined, in determining whether or not to apply the law, states must consider their own interests. This seems to have been the case with Russia's response to the current Syria crisis and the war in Kosovo in the late 1990s.

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[223] *See* S.C. Res. 1973, *supra* note 178.
[224] *See generally* David, *supra* note 53.

If the Security Council acts more from policy than law, and more from state self-interest than concerns for the principle of humanity, then in the case of Mexico, where the legal implications of a NIAC designation are politically problematic, the Security Council is unlikely to ever designate the violence as such. In this case, pressure is likely to emanate primarily from Mexico, although Security Council members will also be unwilling to support a NIAC designation.

C. *The Interplay in the Mexican Context*

For Mexico, as Part II illuminated, an acknowledgement of armed conflict between the state and Mexican drug cartels has grave political, as well as legal, significance. In the context of self-interest, one of the clearest reasons why the Peña administration would be unwilling to subject itself to IHL relates to the punishments that NIAC classification can bring to perpetrators of war crimes. As has been discussed in detail in Part II, as a party to the Rome Statute, Mexico is a party to the ICC, such that its leadership—including Peña himself—could be brought before the Court on war crimes charges.[225] Mexico would certainly be unwilling to subject itself to international criminal law if it could avoid doing so simply by avoiding an acknowledgement of the violence as a NIAC. While it is true that officials could still be brought before the Court for violating crimes against humanity, one less possible charge is politically advantageous, both domestically and internationally.

In terms of domestic politics, although the Geneva Conventions make it clear that a NIAC designation does not grant legitimacy to non-state parties, the perception can often be otherwise.[226] Mexico would likely be concerned that acknowledgment of a NIAC would grant legitimacy and authority to violent drug cartels that already control sections of Mexican territory and, as a consequence, Mexico's civilian population within those territories.[227] Cartels would themselves be bolstered by international recognition of their power and influence, and outside observers may begin to view the cartels as more than simply profit-seeking criminal elements. The need to eschew ascribing legitimacy to cartels is all the more pressing for Mexican authorities now,

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[225] *See* SCHABAS, *supra* note 127.

[226] *See* Geneva Convention, *supra* note 125, at art. 3; *see also* Dawn Steinhoff, Note, *Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups*, 45 TEX. INT'L L.J. 297, 309, 313 (2013).

[227] *Warner*, *supra* note 170.

as increased condemnations of police abuse, impunity, and immunity threaten to undermine the government.[228] The Peña Administration has a steep road toward recovering the people's trust, and this effort will be poorly served if powerful rivals appear to be afforded greater legitimacy by international bodies.

Finally, Mexico will likely be concerned that acknowledging the violence as a NIAC will serve to rebrand the entire country as "war-torn" or "failing," thus harming Mexico's economy. The Mexican government has proudly broadcast its country's ability to develop financially despite ongoing violence. In 2011, the Minister of Finance, Ernesto Cordero, noted that there was "no evidence [that] investment is not coming to Mexico or that investors are being put off because of violence," and indeed, the Mexican economy grew by 5.5 percent in 2010, its fastest annual rate in ten years.[229] Yet, some have suggested that more recent incidents, including the disappearance of forty-three students in Iguala in September 2014, may be undermining Mexico's economic advance.[230] Whereas Mexico can now broadcast to the world that the violence is isolated to particular regions, the public and international perception of a country embroiled in *armed conflict* is one in which all areas of the state are unsafe to visit.[231] This uncertainty and fear will likely reduce tourism and foreign direct investment, hurting both local economies and the Mexican peso. It may also have the effect of impacting domestic self-perceptions, further heightening fear and harming the economy. Once again, the Peña Administration would be loath to permit this, not only because a crumbling economy would jeopardize reelection efforts, but also because on a more nationalistic level, it is against Mexico's self-interest to permit its economy to

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[228] *See* NEITHER RIGHTS NOR SECURITY, *supra* note 5.

[229] *Mexico Economy Unharmed by Violence—Finance Minister*, BBC NEWS (Mar. 22, 2011), http://www.bbc.com/news/business-12818647.

[230] *See generally* Gustavo Robles et al., *Las Consecuencias Económicas de la Violencia del Narcotráfico en México*, (INTER-AM. DEV. BANK, Working Paper No. WP-426, 2013), https://publications.iadb.org/bitstream/handle/11319/4679/Las%20consecuencias%20econ%C3%B3micas%20de%20la%20violencia%20del%20narcotr%C3%A1fico%20en%20M%C3%A9xico.pdf?sequence=1 (arguing that cartel violence has direct negative impact on the Mexican economy); *see also* Tim Padgett, *In Mexico, History is Repeating Itself*, BLOOMBERG (Jan. 15, 2015, 11:58 AM), http://www.bloomberg.com/news/articles/2015-01-15/mexicos-economic-progress-undercut-by-drug-violence.

[231] A 2015 U.S. State Department Travel Warning expressly notes that traveling to "certain places in Mexico," but not all, poses a threat to safety and security due to the presence and activities of drug cartels. *Mexico Travel Warning*, U.S. STATE DEPT. (May 5, 2015), http://travel.state.gov/content/passports/english/alertswarnings/mexico-travel-warning.html.

suffer based purely on a re-designation of violence that has already been raging in the country since 2006.

Beyond Mexico itself, members of the Security Council may be resistant to the notion of a NIAC designation for Mexico. Specifically, it is worth considering the potential attitudes of Russia and China toward such a scenario, as these two nations have a history of Security Council vetoes. Here, it is likely that these two powers will resist any Security Council decisions related to Mexico, especially given their resistance to Security Council intervention in Syria—a far larger humanitarian crisis. Russia may choose to threaten a veto based on concerns that the Security Council is overreaching and over-classifying violence in such a way as to undermine State sovereignty. In many regards, Mexican drug cartels can be viewed as akin to Russian criminal organizations. Like the latter, which "target[ ] rivals, anyone who pose[s] a threat[,] . . . and those who were obstacles to efforts to seize control of particular business," Mexican cartels are similarly engaged in attacks on rival cartel members, politicians, journalists, and policemen.[232] When considering the profit-seeking behavior of Mexican cartels, others have argued that they appear to represent a "classic case of organized crime."[233] Yet, if the Security Council decides to acknowledge Mexican organized criminal cartels as non-state actors in an armed conflict, Russia may be concerned that such analogies could render its own state subject to U.N. humanitarian intervention or sanction.

In addition to concerns regarding intervention, both Russia and China may worry that NIAC designation and the potential for humanitarian intervention may be a cloaked effort by the United States to assert greater power and maintain hegemonic influence in the international community, particularly given the proximity of Mexico to the United States. George Glennon suggested in his evaluation of Security Council responses to the war in Iraq, that China, and Russia, as well as western states, are concerned with the global balance of power, specifically that wielded by the United States.[234] While it is arguably not in the United States' interest to classify the violence as a NIAC—

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[232] Sánchez, *supra* note 78, at 502 (quoting Paul Rexton Kan & Phil Williams, *Afterword: Criminal Violence in Mexico—A Dissenting Analysis*, 21 SMALL WARS & INSURGENCIES 223 (2010)).

[233] *Id.* (quoting 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).

[234] *See* Glennon, *supra* note 208.

given U.S. concern with maintaining positive relations with the Mexican government—other nations may nonetheless aim to keep the United States away from militarily intervening in neighboring countries.

And what of the United States? Thus far, the U.S. government has sought to distance itself from any notions that the violence could be considered an armed conflict. In September 2010, then-U.S. Secretary of State Hillary Clinton remarked that the violence in Mexico may be "morphing into or making common cause with what we would call an insurgency."[235] In response, the Obama Administration quickly distanced itself, claiming that the situation in Mexico is nothing like that in Colombia, and that Clinton was being misinterpreted.[236] And yet, there are reasons for the United States to care about the designation of the violence. Though this conflict began in Mexico, it has since spilled across the U.S. border, invoking responses by the U.S. government. In May 2008, the U.S. Justice Department issued a warning identifying the spillage of violence into the United States from Mexico.[237] The Justice Department further warned law enforcement agencies in Texas, Arizona, and Southern California to expect encounters with Los Zetas in the coming months.[238] Since that time, residents along the U.S.-Mexico border have cited incidents of spillover violence—believed by law enforcement to be false—though these incidents are largely isolated and have not risen to the level of violence south of the border.[239]

Significantly, shortly before the Justice Department warning, in October 2007, the United States and Mexico formally announced the Mérida Initiative (hereinafter "the Initiative"), involving a $1.4 billion proposal for U.S. government assistance to Mexican and Central American efforts to combat drug trafficking, gangs, and organized crime.[240] For many, this Initiative bore similarities to Plan Colombia, the U.S.-driven effort to assist Colombia in battling narco-mafias plaguing the state, suggesting that the United States was committing itself to yet an-

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[235] *A Conversation with U.S. Secretary of State Hillary Rodham Clinton*, COUNCIL ON FOREIGN REL. (Sept. 8, 2010), http://www.cfr.org/world/conversation-us-secretary-state-hillary-rodham-clinton/p34808.

[236] Frank James, *Obama Rejects Hillary Clinton Mexico-Colombia Comparison*, NAT'L PUB. RADIO (Sept. 9, 2010, 8:39 PM), http://www.npr.org/blogs/thetwo-way/2010/09/09/129760276/obama-rejects-hillary-clinton-mexico-colombia-comparison.

[237] Grayson, *supra* note 46.

[238] *Id.*

[239] Burnett, *supra* note 179; *see also* Carroll, *supra* note 179.

[240] COOK ET AL., *supra* note 6, at 1.

other narco-war.[241] Alongside the Initiative, the U.S. Defense Department sent approximately $208.6 million in counternarcotics support to Mexico between 2009 and 2011.[242] In addition to financial support, the United States has also provided military training through the U.S. State Department and the Department of Defense.[243] In response to the murder of two U.S. agents working inside Mexico in 2011, the House Committee on Homeland Security held a hearing entitled "the U.S. Homeland Security Role in the Mexican War against Drug Cartels," in which the Subcommittee Chairman noted: "We are spending billions of dollars halfway across the world, and we talk about Libya in the press, and yet we have a threat just south of our border, right in our own backyard. We need to step up to the plate."[244] Aside from the title itself referring to a "war," these efforts suggest elements within the U.S. government place significant stake in the outcome of the violence and hope for further involvement.

Given what seems to be divided opinion within the Obama Administration and Congress, the United States' potential position on NIAC designation is not immediately clear. The United States will need to weigh domestic national security concerns and regional instability with the military role it wishes to play in the world following the wars in Iraq and Afghanistan. With the rise of ISIS diverting U.S. military attention along with the destabilization of order in Eastern Europe in light of recent Russian aggression against Ukraine, the United States will likely be unwilling to direct its energies toward Mexico. Though armed conflict designation does not immediately require this, domestic politics may pressure the White House to endorse sending greater military aid. Additionally, as the Mexican government is itself loath to acknowledge the existence of a NIAC, the U.S. government will likely seek to maintain its diplomatic and economic relationship with Mexico by following the Mexican government's lead on conflict classification. So long as the United States can perceive the cartels as criminal elements covered under the U.N. Convention against Transnational Organized Crime (hereinafter "UNTOC"), it can eschew acknowledgement of a conflict. Moreover, the United States, like Mexico, will be unwilling to inadver-

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[241] *Id.*

[242] Clare Ribando Seelke & Kristin M. Finklea, Cong. Res. Serv., U.S.-Mexican Security Cooperation: The Merida Initiative and Beyond 8 (2013).

[243] *Id.* at 27.

[244] *The U.S. Homeland Security Role in the Mexican War Against Drug Cartels: Hearing Before the H. Comm. on Homeland Security*, 112th Cong. 1–2 (2011) (statement of Michael T. McCaul, Chairman, S. Comm. on Oversight, Investigations, and Management).

tently grant cartels legitimacy by acknowledging them as parties to a conflict. If the Mexican government is willing to work with the United States to combat cartels via the Mérida Initiative and other efforts, the United States will see little political benefit in acknowledging the violence as a NIAC.

Finally, whether to mask their self-interest or out of a genuine concern for the principle of humanity, Security Council members may be worried that the application of the use of force under IHL, addressed in Part II, may lead to greater civilian deaths. As noted above, IHL does not outlaw violence; it sanctions it. In doing so, IHL introduces the concept of proportionality into military forces' calculus of target selection. However, given the cartels' effective infiltration of Mexican society, accurately assessing whether a potential target is purely military becomes almost impossible. Moreover, given the Mexican government's own record of abuse and impunity, the state may interpret the application of IHL as permission to fire on civilian targets in the event of any ambiguity.[245] The threat of additional civilian deaths may thus be considered so great that the Security Council will be unwilling to afford Mexico NIAC status.

The Security Council was founded on four missions: to maintain international peace and security; to develop friendly relations among nations; to cooperate in solving international problems and in promoting respect for human rights; and to be a center for harmonizing the actions of nations.[246] Despite these lofty goals, without a supranational government, states that comprise the Security Council have and will continue to act primarily out of self-interest and their own security, rather than an observation of international law. As the case of Mexico demonstrates, even where sound legal arguments support armed conflict designation, such a designation will likely never come to be, as both Mexico and permanent members of the Security Council will not find it in their best interest.

IV. Conclusion: Why Armed Conflict Designations Matter

The above discussion presents a bleak forecast for the international designation of the violence in Mexico as a NIAC. International law, for all of its idealism, is largely toothless if states are unwilling to

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[245] Neither Rights nor Security, *supra* note 5, at 5–6.

[246] *What is the Security Council?*, U.N. Security Council, http://www.un.org/en/sc/about/ (last visited Dec. 14, 2014).

comply. What, then, is the value of a NIAC designation under international law? Some may argue that in fact, there is none. They may argue that IHRL is sufficient, and in some cases preferred, to protect civilians, and that an expansion of IHL creates a slippery slope for future designations. They may also point to the geopolitical concerns of states as legitimate factors to consider in a legal analysis. Much as the U.S. Supreme Court has altered its rulings with the times and in response to the concerns of the separate states—notably regarding issues of civil rights[247]—so too, it can be argued, international law is not divorced from the changing of norms and the dynamic of geopolitics. If states, including the ones most affected by violence, determine that a designation of armed conflict would disturb the world order by upsetting geopolitical balancing and trust between Member States, then such an acknowledgement may not be true to the object and purpose of IHL and the principle of humanity outlined above, which aim to protect civilians by voiding further disturbances and unrest.

Perhaps, and yet, there are compelling reasons, beyond simply the promotion of the rule of law, to distance interpretations of law from the international body politic. Rather than focusing on the way in which IHL may inhibit the goals of states, it is also important to examine how IHL can bring benefits to individuals. Chief among the reasons in support of legal designation of the conflict for Mexico, and for NIACs generally, is the prevention of impunity for perpetrators and the recognition of the magnitude of violence and civilian suffering that has occurred in Mexico for almost a decade. These two interrelated goals are critical for national healing and transition.

In his 2008 article, Cherif Bassiouni noted that because the international community has not accepted the Responsibility to Protect ("R2P")—a non-binding principle by which the international community overrides non-intervention in instances of mass atrocity crimes not addressed by a state—the Security Council has been left free to determine when and whether to intervene in a conflict.[248] The result, Bassiouni observes, "has been to reduce international interventions and for the U.N. to develop political quick fixes to end conflict, which pro-

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[247] See, for example, the Court's evolution from *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that the "separate but equal" doctrine is constitutional) to *Brown v. Board of Education,* 347 U.S. 483 (1954) (holding that the "separate but equal" doctrine was unconstitutional when applied to U.S. public schools).

[248] M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. Crim. L. & Criminology 711, 801–02 (2008).

vide *de facto* impunity."[249] Impunity is discussed in both IHL and IHRL, as the "impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account."[250] Impunity, frequently the result of policies aimed at peaceful transition, is due to the balance between *realpolitik* and justice—it is better, proponents argue, to simply put the past aside and move forward than to draw the perpetrators into the public eye and relive their crimes for months and years.[251] As a result, in post-conflict situations, impunity has the consequence of belittling victims' suffering by suggesting that mass violence can be condoned and its perpetrators are not culpable. Indeed, some have suggested that impunity "actually prevents reconciliation."[252]

The harm inflicted on societies by such evasions of justice cannot be understated. As one example, a 2005 study of psychiatric and cognitive effects of the Yugoslav Wars on the civilian population in the Former Yugoslavia revealed that "impunity for those held responsible for trauma" was a factor in the development of posttraumatic stress reactions among test subjects.[253] In this case, impunity was found to directly impact individuals and create long-term suffering. Given the prospect of damage to individuals that can last well beyond the timeframe of a conflict, it can be assumed that the failure to identify perpetrators as such can have lasting detrimental effects on a society as a whole. Impunity, then, should be combated for the sake of the nation.

As much as the impunity of individual perpetrators creates harm in the national and individual psyche, so too does a failure of the outside world to recognize atrocities at all. In recent years, efforts like the Truth and Reconciliation Commissions (hereinafter "TRC") in Sierra Leone, South Africa, and East Timor have served to accommodate both individual criminal responsibility and rational reconciliation in

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[249] *Id.*

[250] U.N. Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

[251] M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 409, 413 (2000).

[252] Mark S. Ellis, *Combating Impunity and Enforcing Accountability as a Way to Promote Peace and Stability—The Role of International War Crimes Tribunals*, 2 J. NAT'L SEC. L. & POL'Y 111, 114 (2006).

[253] Metin Başoglŭ et al., *Psychiatric and Cognitive Effects of War in Former Yugoslavia: Association of Lack of Redress for Trauma and Posttraumatic Stress Reactions*, 294 J. AM. MED. ASS'N 580, 580 (2005).

order to promote national healing and forgiveness.[254] Though some claim that the recitation of crimes is harmful for transition,[255] recognition reinforces that victims are not forgotten and that they were not deserving of their suffering. It is true that the violence in Mexico has not gone unnoticed by international media and the international community. Nor is it suggested that an effort like a TRC is necessary in Mexico. Nevertheless, by recognizing a conflict as a distinct situation, either through classification, justice systems, or commissions, the international community thus supports this healing process and enables transition.

Conflict classification would serve to officially recognize the extent of the violence and human suffering that has taken place in Mexico between cartels and the state since 2006. It would empower bodies like the ICC to try individual perpetrators in Mexico for war crimes, including heads of state responsible for abuse against civilians. And it could lead to national healing. As history has proven, laws are frequently unjust, and blind obedience to laws is not necessarily the best course of action in the pursuit of justice. Similarly, states and governments must consider their own geopolitical concerns when engaging with other states. Nevertheless, in the case of IHL, where great care was placed on developing a system based on the principle of humanity, and where examples are available to facilitate reconciliation and national healing, acknowledgement of the violence in Mexico as a NIAC may be the best remedy for the people of Mexico. When viewed from this lens, national interests and politics may not be a better guide than the law.

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[254] *See* Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The U.N. Truth Commission for East Timor*, 95 AM. J. INT'L L. 952, 956 (2001).

[255] For an example of this, see Erin Daly, *Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition*, 2 INT'L J. TRANSITIONAL JUST. 23 (2008).