

**A NEW WAR ON AMERICA'S OLD FRONTIER:
MEXICO'S DRUG CARTEL INSURGENCY**

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*"We don't have to go overseas to see a war; there is a war on our homefront right here on the Rio Grande on the southwest border."*¹

I. Border Incursion: A Short Story

One mile from the United States–Mexican border east of Nogales, Arizona, the large green and white Border Patrol Chevy Tahoe lumbered slowly and deliberately on the bumpy, dusty unpaved trail. It was an exceptionally hot day, and Border Patrol agents Reese and Reeves knew

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¹ *Border Wars* (National Geographic Channel broadcast Nov. 17, 2010) (quoting Supervisory Border Patrol Agent Joe Ramos).

that when darkness fell and the rugged landscape cooled down, the narcotics and human smugglers would more than likely make their move. With the drug cartels firmly rooted less than a mile away in Heroica Nogales, Mexico, desperate people will take desperate measures to escape, and bodies of Mexicans attempting to cross have occasionally been found. About to make a radio check, Agent Reese notices movement in a small wooded area. Reese points toward what he saw and pulls out his binoculars as Reeves drives toward the movement. The ride is jarring and Reese has a difficult time focusing. He makes out ten to twelve men in what appears to be black battle dress uniforms in the brush. Reeves stops the vehicle and reaches for the radio while Reese picks up his M4 carbine steps out to investigate.

Agent Reese walks toward the group when suddenly multiple shots are fired and two rounds pierce his open door. With years of border experience, Reese reacts quickly and returns fire as he runs toward a ditch for cover. Not fast enough, a round grazes his left leg and he tumbles into the ditch and drops his weapon. Reese quickly regains his composure, secures his weapon and assesses the situation.

Reeves drives the vehicle closer. As more rounds strike the vehicle, Reese gets into a position and returns fire at a moving black uniform that drops, but he is unsure if he hit his target. Another man carrying a hand held radio points at the vehicle and ducks for cover. To Reese's surprise, shots are fired at the vehicle from another direction. The vehicle stops: tires are flattened, the windshield is pocked with bullet holes, and blood is spattered on the passenger window. He hears the familiar voice of Supervisory Agent Marsh from Command Post reassuring him help is on the way. Reese provides him a report of his tenuous situation, including the possibility that Reeves is dead. As they talk, Reese ducks to avoid shots fired in his direction. He sees the second group bound up and over the hill as the first group fires, pinning him down in the ditch. The first group on the hill disappears over the top as the Customs and Border Patrol helicopter and ground patrol vehicles arrive. Paramedics race to the shot up vehicle as Agent Marsh helps Reese out of the ditch.

"What the hell happened?" asks Agent Marsh.

"I have no idea, but I think these guys were professionals. They had a radioman, and bounded back over the hill as the guys at the top laid suppressive fire. I couldn't return fire. What do you think, another Mexican Army incursion? Zetas?"

“Who knows, this kind of thing has been going on more frequently than we’d like. Don’t worry about Reeves, the medics are on him,” says Agent Marsh as he helps Reese toward an arriving ambulance. He continued, “The helicopter reported that they jumped in a couple Humvees and raced back across the border.”

In the ambulance, Reese sits oblivious to the paramedic attending to his wound as he listens to the traffic on his handheld radio; the area where the attackers fled yielded a cache of 500 pounds of marijuana. The best news was yet to come. Agent Reeves was alive but in critical condition and being airlifted to the nearest emergency room.²

II. Introduction

Unfortunately, the previously described attack is not merely a creative anecdote. While some specific details above are fiction, the event is a true story. Given the military-style tactics, the attackers in this story may have been Los Zetas,³ one of seven cartels battling each other and the Mexican government for supremacy in the drug trade—a struggle

² The short story is a work of fiction by the author, but based on actual reported events. See *Illegal Immigration Enforcement and Social Security Protection Act of 2009 and Rapid Response Border Protection Act of 2005: Hearing on H.R. 98 and H.R. 4044 Before the H. Homeland Security Subcomm. on Investigations*, 109th Cong. (2006) (statement of T.J. Bonner, President, National Border Patrol Counsel).

June 30, 2005, at approximately 12:30 p.m., east of Nogales, Arizona: Two U.S. Border Patrol agents encountered a group of ten to twelve men wearing black military-style uniforms about a mile north of the international border. Some of the men opened fire on the agents, and at least one of them utilized a hand-held radio to direct gunfire of several hidden shooters. A total of more than fifty high-powered rifle rounds were fired at the agents, both of whom were seriously wounded. The gunmen retreated back to Mexico using military-style cover and concealment tactics. Nearly five hundred pounds of marijuana were recovered during a search of the area. [The] . . . assault may have been perpetrated by henchmen of the drug cartels, a significant number of whom are former Mexican soldiers or law enforcement officers. One such group, Los Zetas, works for the Gulf Cartel, and many of its members received training from the U.S. military and/or law enforcement agencies while they were employed by the government of Mexico.

Id.

³ GEORGE W. GRAYSON, *MEXICO: NARCO-VIOLENCE AND A FAILED STATE?* 179 (2010) (Los Zetas is a cartel composed of former Mexican Army Airborne Special Forces Groups, or GAFE in Spanish, discussed further below.).

resulting in the deaths of 28,000 people since 2006.⁴ Some of the murders are committed in gruesome fashion and bodies are found in mass graves.⁵ Mexican officials report that most of those killed are related to the cartels themselves. However, critics argue the deaths are evidence of the government's inability to stop the cartels from enforcing their own gang "law."⁶

The cartels may not seek total destabilization of Mexican society, but they seek freedom to conduct their illicit drug trade. They battle each other for control of that very lucrative trade, and fight the Mexican security forces⁷ because of their interference. Whether or not it is their intent, the cartels' very existence and manner of operation threaten the Mexican state. The cartels control the local media and municipal and state governments through violence, corruption, and intimidation, requiring the government to resort to military force to re-establish control. Under these conditions, the government risks losing sovereignty to criminal organizations and devolving into a failed state. At this stage of the conflict, Mexico may be moving from "*Colombianization*" to "*Afghanistanization*."⁸ The issue is viewed seriously by the U.S. Joint

⁴ Q&A: *Mexico's Drug Related Violence*, BBC NEWS (Nov. 10, 2010), <http://www.bbc.co.uk/news/world-latin-america-10681249>.

⁵ *Id.*

⁶ *Id.*

Mass graves have been turning up increasingly frequently—some containing dozens of bodies. Beheadings and bodies hung from bridges point to a rise in gruesome attacks. The Mexican government argues that the violence shows that the gangs are turning on one another—reflecting the success of government policies. However, some observers argue that the cartels have become so powerful that, in effect, they control some parts of the country—the violence is evidence of their gang law.

Id.

⁷ The term "security forces" includes both the Mexican military and police.

⁸ Mathieu von Rohr, *A Nation Descends into Violence*, SPIEGEL ONLINE (Dec. 23, 2010), <http://www.spiegel.de/international/world/0,1518,735865,00.html>

One expert, Edgardo Buscaglia, who specialized in drug-related organized crime . . . currently working in Kandahar, Afghanistan . . . said he had stopped using the expression 'Colombianization' to describe what's happening in Mexico. 'There are now areas in some states that remind me of what I see here in Afghanistan.' . . . Narcos, or drug dealers, control about 12 percent of Mexican territory, according to some estimates.

Forces Command, which reported in a 2008 study⁹ that “two large and important states bear consideration for a rapid and sudden collapse: Pakistan and Mexico.”¹⁰

From the beginning of the conflict, the Mexican government has been treating the war as a police action with the aim of prosecuting the leadership of the cartels. However with its police forces unable to cope with the cartels' corrupting influence and military power, the Mexican government deployed its army. The Mexican government has yet to admit the cartels pose a direct threat to the Mexican state.

Despite U.S. efforts to increase border security since 2006,¹¹ Mexican cartels have smuggled drugs and people into the United States, with weapons and profits of \$40 billion in cash being sent back to Mexico.¹² While U.S. border cities are fairly free of violence, the same

Id.

⁹ UNITED STATES JOINT FORCES COMMAND, THE JOE 2008 (2008) (JOE stands for “Joint Operating Environment” or “the JOE”); *see generally* (In the words of General J.N. Mattis, USMC, Commander of Joint Forces Command, “The Joint Operating Environment (JOE) is our historically informed, forward-looking effort to discern most accurately the challenges we will face at the operational level of war, and to determine their inherent implications.”) *Id.* at iv.

¹⁰ *Id.* at 36 (“The Mexican possibility may seem less likely, but the government, its politicians, police, and judicial infrastructure are all under sustained assault and pressure by criminal gangs and drug cartels. How that internal conflict turns out over the next several years will have a major impact on the stability of the Mexican state. Any descent by Mexico into chaos would demand an American response based on the serious implications for homeland security alone.”). *See also Mexican Collapse*, WASH. TIMES, Jan. 22, 2009, <http://www.washingtontimes.com/news/2009/jan/22/mexican-collapse/?page=all> (“Indiscriminate kidnappings. Nearly daily beheadings. Gangs that mock and kill government agents. This isn't Iraq or Pakistan. It's Mexico, which the U.S. government and a growing number of experts say is becoming one of the world's biggest security risks.”).

¹¹ Steven Donald Smith, *'Operation Jump Start' Puts 2,500 Guardsmen on Southern Border in June*, AM. FORCES PRESS SERV., June 6, 2006, <http://www.defense.gov/news/newsarticle.aspx?id=16109>. *See also* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 1002, 120 Stat. 424, 2371(c) (Border Security—Amounts authorized to be appropriated to the Department of Defense for fiscal year 2006 in the National Defense Authorization Act for Fiscal Year 2006 are hereby adjusted, with respect to any such authorized amount, by the amount by which appropriations pursuant to such authorization are increased by a supplemental appropriation, or decreased by a rescission, or both, or are increased by a transfer of funds, pursuant to title V of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006).

¹² BBC News, *Mexican Drug Gangs 'Spread in US'*, Mar. 3, 2010, <http://news.bbc.co.uk/1/hi/americas/8588509.stm>.

cannot be said for the Mexican border cities where violence is a daily occurrence and Mexican citizens live in constant fear of the drug cartels and the Mexican Army. In an ironic twist, El Paso, Texas, was considered the second safest city in America in 2009, while Ciudad Juarez, just across the border, suffered more than 5,000 murders in the last two years.¹³ Left unchecked by the U.S. government, it is only a matter of time before more than illegal immigrants and Mexican drugs make their way across the border. As the Mexican cartels battle each other for valuable shipping corridors, their battles could cross the border into America. In some respects, they already have.¹⁴ The cartels are already represented in the United States by various gangs.¹⁵ The lawlessness on the Mexican-American frontier could soon be reminiscent of the days of the “Wild West,” as bands of cartel enforcers assume the role of desperados operating *carte blanche* on both sides of the border.

From an international law perspective, Mexico is embroiled in a non-international armed conflict governed by Common Article 3 of the Geneva Conventions¹⁶ with the cartels acting as “criminal insurgents”¹⁷

¹³ Katie Connelly, *US Border Violence: Myth or Reality?*, BBC NEWS, Jul. 28, 2010, <http://www.bbc.co.uk/news/world-us-canada-10779151> (citing CQ Press City Crime Rankings 2009–2010, http://os.cqpress.com/citycrime/2009/Rankings2009_Population.pdf (last visited Apr. 25, 2012) (El Paso had the second lowest crime rate for a city with a population of 500,000 or more. Detroit, Michigan was listed as having the highest crime rate in that category.) (As the drug war intensifies it remains to be seen that El Paso will maintain its reputation as a safe city).

¹⁴ COLLEEN W. COOK, CONG. RESEARCH SERV., RL34215, MEXICO’S DRUG CARTELS 6 (Oct. 16, 2007); see also *Mexican Drug Gangs ‘Spread to Every Region of US,’* BBC NEWS, Mar. 6, 2010, <http://news.bbc.co.uk/2/hi/8588509.stm>.

¹⁵ *Id.*

¹⁶ There are four Geneva Convention treaties. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV] (collectively referred to as ‘Geneva Conventions’). Article 3 of all four of the 1949 Geneva Conventions is referred to as “Common Article 3” because the article is verbatim in all four Geneva Conventions, and states,

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

motivated by money, but clearly affecting political ends. This article explores historical details that led Mexico to become the new front on the “War on Drugs.”¹⁸ With this historical background, the article analyzes

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

Id. art. 3.

¹⁷ John P. Sullivan & Adam Elkus, *State of Siege: Mexico's Criminal Insurgency*, SMALL WARS J. 7 (2008), www.smallwarjournal.com. Sullivan and Elkus describe the criminal insurgent as

resolutely apolitical; he challenges the will of the state because he seeks to sever its regulatory arms. If the cartel insurgent has an ideal model of a Mexican state, it is a balkanized series of urban fiefs barely ruled by a supine national government that decides national and foreign policy. However we use the term ‘insurgency’ because it best describes the nature of the internal war waged by cartels against the Mexican state.

Id.

¹⁸ Claire Suddath, *The War on Drugs*, TIME, Mar. 25, 2009, <http://www.time.com/time/world/article/0,8599,1887488,00.html> (The phrase “War on Drugs” was coined by President Nixon with the creation of the Drug Enforcement Agency (DEA) in 1973. Much like what happened after World War II, the Nixon Administration was reacting to addicted American troops returning home from another war, Vietnam. Under the Nixon

how the insurgents within the context of the drug cartels are driven by economics under current counterinsurgency doctrine¹⁹ and why Common Article 3 of the Geneva Conventions should be the guiding principle of the Mexican forces in the field. The article argues that the Mexican drug cartel insurgency triggers Common Article 3 and application of the law of armed conflict. After arguing a non-international armed conflict exists in Mexico, the article concludes with a discussion of current American policy and initiatives to support the Mexican government.

Part III describes the background of the conflict, including the cartel forces, and the Mexican government response. Part IV analyses international law theories and focuses on the Mexican cartels as an insurgency, argues why the intensity of the insurgency triggers Common Article 3 of the Geneva Convention, and supports the proposition that Mexico is engaged in a non-international armed conflict.

It is important to note that this “drug war” is an ongoing conflict. More specifically, facts and outcomes presented in this article are subject to change, and are contingent on the success or setbacks of the Mexican government’s efforts to overpower the major drug cartels.

III. The Mexican War on Drugs

*“The cartels don’t seek a failed state. Rather they want ‘dual sovereignty’—that is, to pay off public officials in return for their closing their eyes to criminality.”*²⁰

It all began with opium.²¹ In 1805, scientists refined the juice of the

Administration the DEAs purpose was to establish a single unified command to combat “an all-out global war on the drug menace.”). *See generally* Reorganization Plan No. 2 of 1973, 38 Fed. Reg. 15,932 (1973) (Section. 3 states: “The Bureau of Narcotics and Dangerous Drugs, including the Office of Director thereof, is hereby abolished, and section 3(a) of Reorganization Plan No.1 of 1968 is hereby repealed.”) (Sec. 4. Drug Enforcement Agency. “There is established in the Department of Justice an agency which shall be known as the Drug Enforcement Administration . . .”).

¹⁹ U.S. DEP’T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY (12 Dec. 2006) [hereinafter FM 3-24].

²⁰ Nacha Cattán, *Rodolfo Torre Cantu Assassination: Why Are Drug Cartels Killing Mexican Candidates?*, CHRISTIAN SCI. MONITOR, Jun. 28, 2010, <http://www.csmonitor.com/World/Americas/2010/0628/Rodolfo-Torre-Cantu-assassination-Why-are-drug-cartels-killing-Mexican-candidates>

opium poppy to create morphine.²² Morphine revolutionized battlefield medicine—ameliorating suffering from wounds and treating field related issues such as malaria, dysentery, and diarrhea.²³ Chinese immigrants arriving in the northwestern Mexican state of Sinaloa after the 1906 San Francisco earthquake brought opium with them.²⁴ Along the U.S. and Mexican border in Ciudad Juarez, just across the Rio Grande from El Paso, Texas, Chinese immigrant Sam Hing became the first drug lord of the region.²⁵ Prior to the regulation of narcotics, the use and sale of opium, morphine, and cocaine was legal in the United States and was prescribed for numerous health conditions, including baby teething syrups.²⁶

During World War II, the United States was concerned about the supply of opium used to make morphine because Japanese forces occupied opium poppy sources in Asia. Despite earlier policy to stem the illegal narcotics trade, the United States entered into an agreement with Mexico to reopen Sinaloa to poppy cultivation.²⁷ During this wartime period of officially sanctioned opium trade, many Sinaloans prospered.²⁸

The end of the war brought the end of the U.S. need for Mexican opium for morphine and the United States once again pressured the Mexican government to begin efforts to curb production and export of

²¹ P.G. Kritikos & S.P. Papadaki, *The History of the Poppy and of Opium and Their Expansion in Antiquity in the Eastern Mediterranean Area*, UNODC, BULL. ON NARCOTICS NO. 3, January 1, 1967, at 18

The first written record of the poppy is found in Hesiod (eighth century B.C.), who states that in the vicinity of Corinth there was a city named Mekonê (Poppy-town): 'For when the gods and mortal men were divided at Mekonê, even then Prometheus was forward to cut up a great ox and set portions before them, trying to beguile the mind of Zeus.' According to commentators on Hesiod, this city received its name from the extensive cultivation of the poppy in the area.

(First published in the *Journal of the Archaeological Society of Athens*, translated from the original Greek by George Michalopoulos).

²² GRAYSON, *supra* note 3 at 19.

²³ *Id.*

²⁴ *Id.* at 22.

²⁵ *Id.* at 23.

²⁶ STEVEN R. BELENKO DRUGS AND DRUG POLICY IN AMERICA 1–2 (2000).

²⁷ GRAYSON, *supra* note 3, at 24.

²⁸ *Id.*

opium.²⁹ Reversing policy was not easy. Sinaloans who enjoyed the prosperity of the war-time poppy production established smuggling networks to feed the addiction of thousands of addicted U.S. servicemembers returning from duty overseas.³⁰ In 1947, the Mexican government created the Federal Security Directorate to combat drug trafficking and assist American counter-narcotic policy.³¹

The long history of narcotics trade between the United States and Mexico is the foundation for the current drug war. However, to understand Mexico's cartels, it is instructive to look back at the cartel drug war in Colombia. Prior to their rise, the Mexican cartels were mostly conduits for the more powerful Colombian cartels, the Medellín and Cali, both named after their home cities in Colombia.³²

The first cartel to emerge was the Medellín. Headed by Pablo Escobar, it was an established and powerful organization.³³ Much like in Mexico today, they protected their enterprise with extreme violence, to include assassination of public officials.³⁴ In 1985, Colombia had the highest national murder rate in the world.³⁵ Fearing the Colombian government would relent to pressure by the United States to extradite drug traffickers, the Medellín used increasingly violent measures to force the government to pass legislation to prevent extradition.³⁶ The 1991 Colombian constitutional provision prohibiting extradition of Colombians was seen as a victory for the Medellín.³⁷ Knowing he could not be extradited, Pablo Escobar surrendered to Colombian authorities and ran his operation from inside prison.³⁸ After escaping prison in July 1992 with the assistance of prison guards,³⁹ Escobar was killed in a gun

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 25. See also Jorge Castaneda, *What's Spanish for Quagmire?*, FOREIGN POL'Y, Jan.-Feb. 2010, http://www.foreignpolicy.com/articles/2010/01/04/whats_spanish_for_quagmire (stating that the Federal Security Directorate itself had to be disbanded because it had been taken over by the drug cartels).

³² DRUG ENFORCEMENT AGENCY, DEA HISTORY BOOK pt. 1, at 62 (2003) [hereinafter DEA Part I] http://www.justice.gov/dea/pubs/history/history_part1.pdf.

³³ *Id.* at 44.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 77.

³⁷ *Id.*

³⁸ *Id.* at 78.

³⁹ *Id.*

battle with the Colombian National Police at his residence in Medellín.⁴⁰ Pablo Escobar's death, along with the surrender and arrest of other cartel leaders, marked the decline of the Medellín cartel as a major trafficking organization and security threat to the Colombian government.⁴¹

Concurrently, the Cali cartel, led by Gilberto Rodriguez-Orejuela and Jose Santacruz-Londono, rose quietly.⁴² The Cali organization was run like a tightly controlled multinational corporation generating massive profits. In 1992, the Drug Enforcement Agency (DEA) began its "Kingpin Strategy" which is credited with bringing down the Cali cartel.⁴³ The new strategy used the Cali cartel's tight control against them by targeting their finances, communications, transportation, and leadership structures.⁴⁴ With DEA's assistance on the investigation the Colombian National Police arrested Rodriguez-Orejuela and Santacruz-Londono in the summer of 1995. Other prominent Cali member arrests that summer marked the decline of the cartel.

During this period, Mexican drug traffickers assisted the Colombian cartels with the transportation of cocaine by deliberately bypassing Caribbean routes previously compromised by U.S. interdiction efforts.⁴⁵ Mexican drug traffickers transported cocaine from Colombia to Mexico, and the planes returned to Colombia laden with cash.⁴⁶ Initially, the

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 77. See also U.S. GOV'T ACCT. OFF., GAO/GGD 99-1081, DRUG CONTROL: DEA'S STRATEGIES AND OPERATIONS IN THE 1990S, at 48 (1990) (explaining how the DEA took down the Medellín and Cali cartels).

Developed in 1992, the Kingpin Strategy targeted the major Colombian cocaine . . . trafficking organizations. According to the DEA, the heads of the . . . organizations tightly controlled all aspects of their operations and telephoned subordinates directly to give directions. The DEA concluded that this was a weakness in the operations of these organizations. The DEA decided to exploit this weakness by monitoring their communications and analyzing telephone numbers called to identify the kingpins and their key subordinates for U.S. and/or foreign investigation, arrest, and prosecution and seizure of their domestic assets.

Id.

⁴⁴ *Id.* at 62.

⁴⁵ DRUG ENFORCEMENT AGENCY, DEA HISTORY BOOK pt. II, at 20 (2003) [hereinafter DEA pt. II]. See http://www.justice.gov/dea/pubs/history/history_part2.pdf.

⁴⁶ *Id.*

Colombian cartels paid the Mexican gangs in cash for the transport services, but this later evolved into payment with cocaine.⁴⁷ The Mexicans received 35 to 50 percent of each cocaine shipment.⁴⁸ Under this arrangement, the Mexican organizations began their ascendancy as the new “Cocaine Cowboys.”⁴⁹ As the Colombian cartels were brought down, the Mexican cartels rose to dominate the U.S. narcotics market.⁵⁰

Due to endemic corruption, the Mexican government remained passive toward the cartels until events in Colombia shifted the front on the American “War on Drugs” to Mexico, and specifically the U.S.-Mexico border transport corridors.

A. Executive Action

*“Do you remember the program ‘24,’ the TV show?
Well, I want all the toys, all that. All the instruments needed
to be superior to the criminals.”*⁵¹

In the late 1980s, President Carlos Salinas engaged the Mexican Army to stop the rising cartels, but his effort was weakened by his own officers colluding with the cartels.⁵² His successor, President Ernesto Zedillo, had a major setback when his senior narcotics officer, General J.J. Gutierrez Rebollo, was convicted for accepting payment from the drug cartels.⁵³ When violence increased in 2000, President Vicente Fox

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ The DEA, police, and the media used the phrase “Cocaine Cowboys” when referring to the drug dealers who waged a war on the streets of Miami in the 1980s. America’s Most Wanted, <http://www.amw.com/fugitives/brief.cfm?id=61019> (last visited Apr. 9, 2012).

⁵⁰ DEA pt. I, *supra* note 31, at 100. See *Mexican Drug Gangs*, *supra* note 12.

⁵¹ CBS News, *An Exclusive Look Inside Mexico’s Drug War*, www.cbsnews.com (Nov. 12, 2010) (quoting Mexican President Felipe Calderon). See generally *24 (TV Series)*, Fox Network broadcast, [http://en.wikipedia.org/wiki/24_\(TV_series\)](http://en.wikipedia.org/wiki/24_(TV_series)) (last visited Apr. 10, 2012) (President Calderon is referring to the high-tech command center of the fictional Counter Terrorism Unit which provides, “telemetry via satellite footage, decrypting intelligence, hacking enemy computer systems, searching for leads amongst the city’s background chatter of cell-phone and e-mail traffic, looking up files on the season’s antagonists, helping with navigation or tracking, and generally trying to stay up-to-date on what has, is, or might be happening.”).

⁵² BRIAN R. HAMNETT, *A CONCISE HISTORY OF MEXICO* 300 (2d ed. 2006).

⁵³ *Id.*; see also Tim Golden, *U.S. Officials Say Mexican Military Aids Drug Traffic*, N.Y. TIMES, Mar. 26, 1998, <http://www.nytimes.com/1998/03/26/world/us-officials-say-mexican-military-aids-drug-traffic.html> (“Until his arrest, General Gutierrez Rebollo was

sent small numbers of troops to Nuevo Laredo on the U.S.–Mexican border to fight the cartels.⁵⁴ These forces met with little success. President Fox believed his more democratic regime did not need to spend large amounts of money on internal security; this lack of focus may have led to “lost years” in the war against the cartels.⁵⁵

Since 2006, President Felipe Calderon has taken a more active policy against the cartels. Calderon has deployed 45,000 troops and 5,000 federal police to 18 Mexican states in an aggressive offensive against the cartels.⁵⁶ President Calderon has demonstrated a total commitment to collaborating in joint U.S. counterdrug measures.⁵⁷ President Calderon has used the military and federal police to arrest traffickers, establish checkpoints, and eradicate marijuana and poppy fields.⁵⁸ In February 2009, he surged troop strength in Juarez where cartel violence killed 1,653 people in 2008, and ordered the military to take over all local law enforcement and prison responsibilities.⁵⁹ These operations militarizing law enforcement have garnered criticism from Mexican society and human rights organizations, and have done little to curb the violence.⁶⁰ However, due to rampant corruption throughout state and local law enforcement, coupled with the cartels’ military strength, only the Mexican military has the command and control and weapons to counter cartel combat capabilities.

one of the Mexican military's most prominent and respected commanders. . . . After he was [selected] by President Zedillo to head the National Institute for the Combat of Drugs, he was described by General McCaffrey as a soldier ‘of absolute, unquestioned integrity’ . . . two officials said the intelligence reports had turned up nothing to refute a chilling account they heard from an informant even before General Gutierrez Rebollo's arrest: that the officers were negotiating for a bribe of \$60 million or more, in return for the protection of Mr. Carrillo Fuentes's drug operations.”)

⁵⁴ STRATFOR Global Intelligence, *The Vital Role of ‘Gatekeepers’ in the Smuggling Business*, Dec. 23, 2006, reprinted in MEXICO IN CRISIS: LOST BORDERS AND THE STRUGGLE FOR REGIONAL STATUS 49 (Michael McCullar ed., 2009) [hereinafter STRATFOR].

⁵⁵ JUNE S. BEITTEL, CONG. RESEARCH SERV., R40582, MEXICO’S DRUG RELATED VIOLENCE 2 (May. 27, 2009).

⁵⁶ *Id.* at 3.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 13; see also *Killings in Juarez Increase Fivefold in 2008*, BANDARASNEWS.COM, Jan. 2009, <http://bandarasnews.com/0901/nr-juarezkillings.htm> (last visited Apr. 10, 2012).

⁶⁰ *Id.* at 14 (“Human rights watch alleges serious human rights violations by the military. They report 17 cases of disappearances, killings, torture, rapes, and arbitrary detention. In 2008 Mexico’s National Human Rights Commission reported 1,200 complaints of human rights abuses at the hands of security forces.”).

B. Regional Warlords

The Mexican cartel areas of control represented in Figure 1 are fluid throughout the country due to shifting alliances and turf battles. This section provides details of the major cartels—the primary enemy in this multi-front war facing the Mexican Government.



Mexican Cartel Areas of Influence⁶¹

Figure 1.⁶²

1. Sinaloa Cartel

Named for their home state of Sinaloa, most of Mexico, primarily along the west and southern areas, is within the sphere of the Sinaloa cartel's influence.⁶³ Previously a federation which included the Juarez Cartel and the Beltran Leyva Organization, it dissolved in 2008. The Sinaloa cartel remains strong and is headed by Joaquin "El Chapo" Guzman.⁶⁴ Guzman is a folk legend in Mexico and *narcocorridos* are

⁶¹ Legend: 1. Tijuana Cartel; 2. Sinaloa Cartel, Zetas, Beltran Leyva Organization; 3. La Familia Michoacana; 4. Sinaloa Cartel; 5. Zetas; 6. Zetas, Gulf and Sinaloa Cartels; 7. Gulf Cartel, Zetas, Beltran Leyva Organization; 8. Juarez Cartel; 9. All Cartels.

⁶² BEITTEL, *supra* note 55, at 7 (author's re-creation of a graphic). The map of Mexico contained in this figure can be found online at the U.S. Government website. CIA WORLD FACTBOOK (updated Jan. 12, 2011), https://www.cia.gov/library/publications/the-world-factbook/maps/maptemplate_mx.html (last visited Apr. 10, 2012).

⁶³ BEITTEL, *supra* note 55, at 7 (referring to legend and map in Figure 1, Mexican Cartel Areas of Influence, the Sinaloa cartel can be found in Sinaloa, Jalisco, Colima, Michoacan, Durango, Western Sonora, Oaxaca, Chiapas, Yucatan Peninsula, and the Federal District).

⁶⁴ *Id.* at 4.

sung about him.⁶⁵ He has been equated to a Mexican Osama Bin Laden. Despite being the most wanted man in Mexico, with a \$5 million bounty on his head, he is protected by the rough terrain of the Sierra Madre mountains and the strong loyalty of his people. In 2009, Forbes magazine listed him as one of the wealthiest people in the world,⁶⁶ and Time magazine named him one of the most influential people of 2009,⁶⁷ incensing Mexican government sensitivities about the glorification of a drug lord.⁶⁸ Guzman is respected by the community for creating poppy cultivation jobs, constructing hospitals, and schools, paving roads, and repairing churches.⁶⁹ Led by Guzman, the Sinaloa cartel remains the biggest threat to the Mexican government.

2. Juarez Cartel

The Juarez cartel is named for its “capital” Ciudad Juarez located in the Mexican state of Chihuahua. The cartel is also known as the Vicente Carrillo Fuentes Organization, and operates across the border from El Paso, Texas, in Juarez. The cartel controls trafficking in the state of Durango, and has a presence in the Federal District.⁷⁰ Juarez is a prime battleground for cartels seeking a lucrative transport corridor to the United States, and has suffered the most cartel violence over control of the *plaza*, a battle being fought between the Juarez cartel and with their former allies, the Sinaloa cartel.⁷¹ The Juarez cartel relies on two enforcement arms, La Linea, former Chihuahua police officers in

⁶⁵ *The Current: The Last Narco* (Canadian Broadcast Corporation Radio broadcast, Oct. 25, 2010) (downloaded using iTunes) (Interview with Malcolm Beith, author, in Los Angeles, Canada (Oct. 25, 2010)) (Malcolm Beith is the author of *The Last Narco: Inside the Hunt for El Chapo, the World's Most Wanted Drug Lord* (A *narcocorrido* is a song that mythologizes a drug lord.)).

⁶⁶ Jesse Bogan, *Cocaine King*, FORBES (Mar. 30, 2009) (“In 2008 Mexican and Colombian traffickers laundered between \$18 billion and \$39 billion in proceeds from wholesale shipments to the U.S., according to the U.S. government. Guzmán and his operation likely grossed 20% of that—enough for him to have pocketed \$1 billion over his career and earn a spot on the billionaires’ list for the first time.”).

⁶⁷ Tim Padgett, *Joaquín Guzmán*, TIME, Apr. 30, 2009, http://www.time.com/time/specials/packages/article/0,28804,1894410_1893847_1894205,00.html.

⁶⁸ GRAYSON, *supra* note 3, at 63.

⁶⁹ *Id.* at 62.

⁷⁰ BEITTEL, *supra* note 55, at 7.

⁷¹ STRATFOR, *supra* note 54, at 167 (citing *Mexico in Crisis (Addendum): 2008 Cartel Report*) (Dec. 11, 2008). See also BEITTEL, *supra* note 55, at 6 (“Plazas” are “lucrative drug smuggling routes.”).

Mexico; and the street gang Barrio Azteca, operating in Texas.⁷² The original leader, Armando Carrillo Fuentes, died in 1997 while undergoing plastic surgery to alter his appearance.⁷³ The residents of Guamuchilito held an elaborate funeral for Fuentes, as he was respected as a local “Robin Hood” figure who was known to donate generously to the Catholic Church “in what are known in Mexico as narco-alms or *narcolimosnas*.”⁷⁴ The Juarez cartel is now headed by its namesake, the flamboyant Vincente “The Viceroy” Carrillo Fuentes, the brother of the late Amando Fuentes.⁷⁵

3. Tijuana Cartel

This cartel operates in the cities of Tijuana, Ensenada, and Mexicali and in western areas of the Mexican state of Sonora.⁷⁶ Also called the Arellano Felix Organization, the last member at large, Eduardo “El Doctor” Arellano Felix, was arrested in October 2008.⁷⁷ The leadership vacuum after Felix’s arrest split the organization into factions fighting for control of the Tijuana plaza in deadly battles that left more than 100 people dead in 2008.⁷⁸ It is believed one of the Tijuana cartel factions receives support from the Sinaloa cartel, providing the Sinaloa with a lucrative plaza in Tijuana to conduct trafficking into the United States.⁷⁹ The government’s hope that the cartel’s fracture would lead “to smaller and more manageable [cartels],” had been described as just leading “to smaller and violent [ones].”⁸⁰

⁷² STRATFOR, *supra* note 54, at 167 (citing *Mexico in Crisis (Addendum): 2008 Cartel Report*) (Dec. 11, 2008)).

⁷³ GRAYSON, *supra* note 3, at 76.

⁷⁴ *Id.* at 77.

⁷⁵ *Id.* at 78 (“The flamboyant Viceroy, wanted for multiple crimes in southeast Texas . . . continued to indulge his taste for strong rum, luxurious automobiles, gaudy mansions, platoons of bodyguards, and sexy women.”).

⁷⁶ BEITTEL, *supra* note 55, at 7.

⁷⁷ STRATFOR, *supra* note 54, at 169 (citing *Mexico in Crisis (Addendum): 2008 Cartel Report*) (Dec. 11, 2008)).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ GRAYSON, *supra* note 3, at 85 (quoting David Shirk, Dir. of the University of San Diego’s Trans-Border Inst.).

4. Los Zetas

The Zetas operate in northeastern Mexico, the Gulf Coast, Yucatan Peninsula, and along the southern Mexican border, but their contract services take them everywhere.⁸¹ The most lethal of the cartels, Los Zetas is a group of former members of the Mexican military's Special Air Mobile Force Group (*Grupos Aeromoviles de Fuerzas Especiales* or GAFE).⁸² Originally linked to the Gulf Cartel,⁸³ Los Zetas "contract" out to other organizations but have allied themselves with the Beltran Leyva Organization.⁸⁴ They control much of southern Mexico taken from the Gulf Cartel and have come to operate as their own independent cartel.⁸⁵ They also engage in kidnapping, extortion, and human smuggling operations.⁸⁶ The Zetas maintain their military readiness standards by training and inducing government troops to defect.⁸⁷ North of the border, the Zetas have been recruiting Latino gangs in Laredo, Texas, to expand their activities in the United States.⁸⁸ In 2010, the Zetas were responsible for an attack on an American couple, Tiffany and David Hartley, who were jet skiing on Falcon Lake in Texas.⁸⁹ Rolando Flores Villegas, a Mexican police official investigating the case, was later beheaded by the cartel.⁹⁰ The Zetas have further international reach—they are also active in Guatemala and threaten instability to the government of that nation.⁹¹

⁸¹ BEITTEL, *supra* note 55, at 7.

⁸² STRATFOR, *supra* note 54, at 160 (citing *Mexico in Crisis (Addendum): 2008 Cartel Report*) (Dec. 11, 2008)).

⁸³ *See infra* note 96.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ GRAYSON, *supra* note 3, at 184 ("[Los Zetas] have set up at least six camps . . . to train young recruits aged 15 to 18 years old, as well as ex-federal, state, and local police officers. Los Zetas allegedly conduct training at locations . . . across the border from Brownsville [TX]. . . . In March 2009 Guatemalan police discovered a Zeta instructional compound 155 miles north of Guatemala City."). *See also* STRATFOR, *supra* note 54, at 95 ("There are also reports of Israeli mercenaries visiting these camps to provide tactical training.") (citing *The Fallout from Phoenix*, STRATFOR GLOBAL INTELLIGENCE, July 2, 2008).

⁸⁸ GRAYSON, *supra* note 3, at 187.

⁸⁹ *Border Wars*, *supra* note 1 (David was killed in the attack).

⁹⁰ Lynn Brezosky, *Policeman Possibly Linked to Falcon Lake Case Beheaded*, SAN ANTONIO EXPRESS NEWS, Oct. 12, 2010, <http://www.chron.com/disp/story.mpl/metro-politan/7243583.html>. *See also supra* note 1.

⁹¹ *See infra* Part III.C.

5. Other Cartels

The Beltran Leyva Organization (BTO), La Familia Michoacana, and Gulf Cartel were once three major cartels that are now in decline. The BTO was once one of the most powerful trafficking groups in Mexico until its leader, Arturo Beltran Leyva, was killed in a battle against the Mexican marines on December 11, 2009.⁹² In that same year, the organization is credited that same year with the high-profile assassination of Edgar Millan Gomez, the acting federal police director.⁹³

In 2006, La Familia Michoacana was described by the DEA as an “emerging cartel”⁹⁴ when they burst into a nightclub in Uruapan, Michoacan, on September 6, 2006, and lobbed five human heads onto the dance floor in the name of “divine justice.”⁹⁵ La Familia is a cartel which resembles a religious cult-like organization through their spiritual leader Nazario Moreno González, also known as “El Mas Loco” or “The Craziest One,” La Familia was dealt a severe blow when “El Mas Loco” was killed on December 9, 2010, fighting Mexican troops.⁹⁶

As its name implies, the Gulf Cartel is located in northeastern Mexico, along the Gulf Coast and the Yucatan peninsula.⁹⁷ Until 2007, the Gulf Cartel was viewed as the most powerful criminal organization in Mexico, but has been consistently targeted by the Mexican government.

⁹² Tracy Wilkinson, *Mexico Drug Hero's Family Slaughtered*, L.A. TIMES, Dec. 23, 2009, <http://articles.latimes.com/print/2009/dec/23/world/la-fg-mexico-revenge-attack23-2009dec23> (It appears that the BTO is not yet out of the fight yet. The same night of a state funeral for a marine also killed in the December 11th battle, gunmen believed to be Los Zetas, allied to the BTO, stormed the house of his grieving family and opened fire, killing the marine's mother, sister, brother, and an aunt).

⁹³ STRATFOR, *supra* note 54, at 162 (citing *Mexico in Crisis (Addendum): 2008 Cartel Report*) (Dec. 11, 2008)).

⁹⁴ BEITTEL, *supra* note 55, at 5.

⁹⁵ Steven Fainaru & William Booth, *A Mexican Cartel's Swift and Grisly Climb*, WASH. POST, Jun. 13, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/06/12/AR2009061203829.html> (stating that the La Familia leave macabre public displays of headless bodies, and hacked-off limbs, “La Familia members have killed rivals by driving ice picks through their skulls and boiling them to death”).

⁹⁶ *La Familia Drug Gang: Mexico Says Cartel 'in Retreat'*, BBC NEWS, Jan. 26, 2011, <http://www.bbc.co.uk/news/world-latin-america-12284210> (The Cartel is in retreat after their leader was killed on December 9, 2010.) (“Banners purportedly signed by La Familia Michoacana were hung from bridges on 25 January, announcing that the gang was dissolving itself.” A new organization called the South Pacific Cartel may be supplanting La Familia.).

⁹⁷ BEITTEL, *supra* note 55, at 7.

Their leader, Osiel Cardenas Guillen, was arrested in 2003 and extradited to the United States in 2007. It is believed his brother Antonio Ezequiel “Tony Tormenta” Cardenas Guillen is now head of the cartel. The organization was further weakened by the loss of its paramilitary arm, Los Zetas, the source of most of their power in the region.⁹⁸

C. International Reach

The worldwide scope of narcotics cultivation and traffic is a massive front for counter-narcotics efforts. From coca leaf in the Andes and poppy for heroin in Central and South East Asia, the draw of cash for the poor farmer is great. Large-scale cocaine trafficking to Europe has been a problem in West Africa since 2004.⁹⁹ The small, impoverished nation of Guinea-Bissau is reputed to be Africa’s first narco-state.¹⁰⁰ The weak infrastructure and instability of West African governments make them even more susceptible to cartel influence.¹⁰¹ In the Pacific, Australian authorities recently disrupted the operations of the Sinaloa cartel.¹⁰² When the Australians made their arrests in June 2010, they seized 240 kilograms of cocaine worth \$83 million.¹⁰³ Even in Afghanistan, after 10 years of conflict, with coalition troops present, only small eradication efforts have been made.¹⁰⁴ The United States, with Afghan government support, has engaged in multiple eradication programs with limited success as they have been hampered by some of the same socio-political

⁹⁸ STRATFOR, *supra* note 54, at 158 (citing *Mexico in Crisis (Addendum): 2008 Cartel Report*) (Dec. 11, 2008)).

⁹⁹ U.N. OFFICE OF DRUGS & CRIME, WORLD DRUG REPORT 27 (2010).

¹⁰⁰ Arthur Brice, *Latin American Drug Cartels Find Home in West Africa*, CNN.COM, Sep. 21, 2009, <http://edition.cnn.com/2009/WORLD/africa/09/21/africa.drug.cartels/>.

¹⁰¹ *Id.*

¹⁰² Dylan Welch, *Killer Cocaine Cartel Has Sydney in Sights*, SYDNEY MORNING HERALD, Jan. 2, 2011, <http://www.smh.com.au/nsw/killer-cocaine-cartel-has-sydney-in-sights-20110101-19ciw.html>.

¹⁰³ *Id.*

¹⁰⁴ See generally U.S. DEP’T OF STATE, INT’L NARCOTICS CONTROL STRATEGY REPORT 94-102 (2010) [hereinafter INCSR] (claiming decrease in opium cultivation and Afghan government counternarcotics activities). *Contra* Joel Brinkley, *Afghanistan Turns into a Narco-State*, KOREA HERALD, Jan. 27, 2011, <http://www.koreaherald.com/opinion/Detail.jsp?newsMLId=20110127000811> (Brinkley claims Afghanistan is becoming a narco-state, as President Karzai repeatedly pardons traffickers who return to business. The U.N. “Afghanistan Opium Survey” states that the total area of poppy cultivation has increased ninety percent in northeastern Afghanistan, notably, not traditional poppy growing regions.).

issues seen in Mexico.¹⁰⁵ Closer to Mexico, the small nation of Guatemala is feeling the pressure of Mexican cartel influence, where Los Zetas have made credible threats to assassinate Guatemalan President Alvaro Colom and were involved in the massacre of 27 Guatemalan farm workers.¹⁰⁶ Los Zetas are believed to have established an offshoot, the New Zetas, recruited from Guatemala's notorious Special Forces unit, the Kaibiles.¹⁰⁷ Members claiming to be Los Zetas have threatened a war in the northern Guatemalan province of Alta Verapaz where the government has declared a "state of siege."¹⁰⁸ The province is a corridor

¹⁰⁵ INCSR, *supra* note 104, at 95. See also Dione Nissenbaum, *Afghan Opium Output Surges*, WALL ST. J., Oct. 12, 2011, <http://online.wsj.com/article/SB10001424052970204450804576625003263984480.html>

Opium production surged 61% this year in Afghanistan, as rising demand and worsening security helped the reversal of three years of progress in antidrug efforts, the United Nations reported. . . . The country's drug industry isn't the exclusive realm of the insurgency. A network of Afghan power brokers, warlords, military commanders and politicians also conspire to keep the profitable business alive, according to analysts Military commanders argue that . . . eradication efforts punish ordinary farmers, many of whom have borrowed money to plant opium. Destroying the crops, they say, gives these farmers and their families no choice but to join the insurgency.

Id.

¹⁰⁶ Jeremy McDermott, *Mexican Cartel Threatens Guatemala President*, TELEGRAPH, Mar. 2, 2009, <http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/guatemala/4928428/Mexican-cartel-threatens-Guatemala-President.html>; see also *Suspect in Slaying of 27 Workers Arrested in Guatemala*, CNN.COM, May 25, 2011, <http://edition.cnn.com/2011/WORLD/americas/05/24/guatemala.massacre> ("The killing spree was one of the nation's worst since the end of the civil war in 1996. The killers decapitated several victims and left their body parts strewn across the terrain . . . the group that attacked the farm consisted of more than 50 armed men, dressed in fatigues, who had Mexican accents.").

¹⁰⁷ See *infra* notes 108, at 117. See also GRAYSON, *supra* note 3, at 185 ("Los Zetas have recruited into their ranks ex-troops from Guatemala known as Kaibiles. Reviled as 'killing machines,' these tough-as-nails jungle warriors and counter-insurgency specialists train in an isolated camp . . . 260 miles north of Guatemala City. . . . One reporter compared the Kaibiles to a combination of 'U.S. Rangers, British Gurkhas, and Peruvian Commandos.'").

¹⁰⁸ Herbert Hernandez, *Outgunned Guatemala Army Extends Battle with Drug Gangs*, REUTERS, Jan. 18, 2011, <http://www.reuters.com/article/2011/01/19/us-guatemala-drugs-idUSTRE70H5KT20110119> ("Organized crime is not just infiltrating us, it pains me to say it but drug traffickers have us cornered," [President] Colom told Congress last week. "Just the weapons seized in Alta Verapaz are more than those of some army brigades.").

for smuggling from Honduras to Mexico.¹⁰⁹ With the pressure of U.S. and Mexican interdiction efforts on the border, cartels are now considering reopening the Caribbean routes, including in earthquake-devastated Haiti.¹¹⁰

IV. Civil War, “Mere Act Of Banditry,” Or Both?

The Mexican cartels are an insurgency embroiled in a non-international armed conflict with the Mexican government.¹¹¹ As presented above, the situation in Mexico, particularly in the border areas, appears dire. The cartels have the ability to shut down local government at will,¹¹² and even close off ingress and egress through their “narco-blockades.”¹¹³ Ciudad Juarez, situated across the Rio Grande from El Paso, Texas, is a city under siege. Seven thousand Mexican troops are fighting for control and have assumed the role of law enforcement.¹¹⁴ The fighting is not without its costs. As military operations mount, the numbers of civilians caught in the crossfires grow, as do the allegations of human rights abuses by Mexican forces.¹¹⁵

¹⁰⁹ *Drug Gang Threatens Guatemala War*, ALJAZEERA.NET, Dec. 29, 2010, <http://english.aljazeera.net/news/americas/2010/12/2010122941020654735.html>.

¹¹⁰ *The Last Narco*, *supra* note 64.

¹¹¹ The terms “internal armed conflict” and “non-international armed conflict” are used interchangeably in this paper.

¹¹² *Ciudad Mier Evacuates After Zetas Threaten to Kill Residents*, MONITOR, Nov. 9, 2010, <http://www.themonitor.com/articles/mier-44352-residents-tamps.html> (A former Ciudad Mier resident notes, “The authorities do not go there. There are no soldiers there. There is nobody. The mayor is not there anymore, there is no police, no traffic authority—nobody. It’s a ghost town. All the businesses are closed. . . . They have strangled my town.”). *See generally* von Rohr, *supra* note 8.

¹¹³ *Drug Gang Blockades Mexican City*, ALJAZEERA.NET, Dec. 10, 2010, <http://english.aljazeera.net/news/americas/2010/12/2010121021336922450.html> (“Armed men have blockaded a western Mexican city, torching stolen cars and busses. . . . The burnt out vehicles were used to block the roads into the city Such blockades have become a common tactic used by the cartels in Mexico’s drug war.”).

¹¹⁴ *Mexico Sending More Emergency Troops to Ciudad Juarez*, NACIONALPRESS, Jan. 27, 2011, <http://www.nacionalpress.com/mexico-sending-more-emergency-troops-to-ciudad-juarez/> (5000 to reinforce 2000 troops already there.).

¹¹⁵ Jose Miguel Vivanco, *Time to Speak Up on Military Abuse in Mexico*, FOREIGN POL’Y, May 17, 2010, http://www.foreignpolicy.com/articles/2010/05/17/time_to_speak_up_on_military_abuse_in_mexico. *See also infra* Part IV.E.

As described above, there are diverse types of cartels of varying degrees of dangerousness,¹¹⁶ but all cartels are feasible threats to the Mexican state, Mexican sovereignty on the U.S. border regions, and possibly a threat to Mexican sovereignty on the Guatemalan border.¹¹⁷ For the purpose of the following analysis, the various Mexican cartels will be referred to as a singular group “the Cartel,” with individual examples highlighted where necessary. As the Mexican drug war moves on into its sixth year, consideration of the Mexican government’s guiding principles in fighting the drug war will be the focus of the next section.

A. Toward Governing Conflict

Prior to World War I, armies fought their wars in mass formations in contests of size, speed, and strength of will. Even in those times, rules were necessary to conduct wars to alleviate suffering and prevent participants from devolving into barbarism.¹¹⁸ As technology turned modern armies into efficient killing machines, as evidenced by the slaughters of World War II, nations came together in 1949 to devise rules to prevent the unnecessary suffering of civilians. These rules we commonly refer to as “the Geneva Conventions.”¹¹⁹ Within the Geneva Conventions, there are two articles common to all four of the conventions. The third article common to all four of the conventions is referred to as “Common Article 3.”¹²⁰ While the entire body of the Geneva Conventions applies in times of war between states, Common Article 3 is specifically drafted to provide minimum protections to conflicts, “not of an international character occurring in the territory of

¹¹⁶ *E.g.*, The Zetas with their military background, or the sophisticated Sinaloa cartel with their money and local support. *See supra* Part III.B. (discussing details of the major cartels).

¹¹⁷ Rory Carroll, *Drug Gangs Seize Parts of Northern Guatemala*, GUARDIAN.CO.UK, Jan. 7, 2011, <http://www.guardian.co.uk/world/2011/jan/07/narco-gangs-guatemala> (“These individuals were not just preparing to confront the security forces, they were preparing to take control of the country,” Guatemala’s president, Alvaro Colom, told reporters. Drug gangs were “invading” central America to move contraband from Colombia to Mexico and the United States, he said.)

¹¹⁸ LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 19 (2002) (“The first real attempt at the codification of the laws of land warfare was drawn up during the American Civil War by Dr. Francis Lieber, in the form of a military manual for the forces in the field which became known as the ‘Lieber code.’”) (The codification of rules for conflict continued with the Geneva Convention of 1864, and the Hague Convention.).

¹¹⁹ Geneva Conventions, *supra* note 16.

¹²⁰ *Id.* (providing a full text of Common Article 3).

one of the High Contracting Parties.” Common Article 3 has been referred to as a “convention in miniature,”¹²¹ applicable to these non-international, or internal, armed conflicts.

In 1977, two protocols to the Geneva Convention were created. These protocols, referred to as Additional Protocols I and II, were meant to supplement, rather than replace, the four 1949 Geneva Conventions. Additional Protocol I concerns the protection of victims of international armed conflict, whereas Additional Protocol II provides supplementary protection for those suffering during non-international armed conflicts.¹²² State sovereignty is a paramount factor in international law and the rules of armed conflict are no different.¹²³ The vast majority of the laws of war focus on conduct between state actors participating in the armed conflict. The actions of the United Nations, established to maintain global peace and security, are also bound by the respect for state sovereignty.¹²⁴ For the most part, states are able to conduct their internal affairs with little scrutiny.¹²⁵ However, since the 1949 convention, most armed conflicts in

¹²¹ COMMENTARY ON THE GENEVA CONVENTION I, at 49 (Jean S. Pictet, ed. 1952) [hereinafter COMMENTARY ON THE GENEVA CONVENTION I]; see also COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, general introduction, at 1321 (Yves Sandoz, Christophe Swinarski, Bruno Zimmerman eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOL II].

¹²² Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 81, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts, art. 5, Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] (Both Protocols can be found in their entirety online at: <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>). See also COMMENTARY ON THE ADDITIONAL PROTOCOL II, *supra* note 121, at 1350.

¹²³ See generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201(1987) (A State defined as “a state is an entity that has a defined territory and permanent population, under the control of its own government, and that engages in, or had the capacity to engage in, formal relations with other such entities.”). See also INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GEN.’S LEGAL CTR & SCH., U.S. ARMY, JA 422, LAW OF WAR DESKBOOK 2 (Jan. 2010) (“Inherent to sovereignty is the notion that a State should be free from outside interference; international law, however, seeks to regulate State conduct. States ‘trade’ aspects of sovereignty in order to reap the benefits of the international legal system.”).

¹²⁴ UN Charter art. 2, sec. 1 (“The Organization is based on the principle of the sovereign equality of all its Members.”).

¹²⁵ See generally Zhang Weiwei, *Western Concept of Human Rights Too Rigid*, EMBASSY OF THE PEOPLE’S REPUBLIC OF CHINA IN THE UNITED STATES OF AMERICA (Oct. 30, 2010), <http://us.china-embassy.org/eng/gdxw/t765321.htm> (presenting the Chinese view of Western human rights diplomacy as interference in sovereignty and claiming that the Western hegemony in human rights is in decline).

the modern age have been internal in nature. These armed conflicts may at times involve international state actors,¹²⁶ but predominantly the armed conflicts are often referred to as rebellions and civil wars that are governed by Common Article 3.

The *Tadić* case of 1995 is an important evolutionary step in the development of international law concerning international and non-international armed conflict.¹²⁷ Dusko Tadić was a Bosnian Serb charged with violating international humanitarian law, including “grave breaches” under the fourth Geneva Convention of 1949.¹²⁸ In *Prosecutor v. Tadić*, one of the defense issues raised before the International Criminal Tribunal for the former Yugoslavia (ICTY) concerned lack of jurisdiction of the tribunal over internal armed conflicts.¹²⁹ The Appeals Chamber ruling was a pivotal moment in the recognition and application of International Humanitarian Law in all facets of armed conflict, stating:

Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals,

¹²⁶ E.g., During the Vietnam War, the United States provided support to the South Vietnamese government; similarly the Soviet Union provided support to the communist regime in Afghanistan. See also *Background Note: Vietnam, American Assistance to the South* (Jan. 5, 2012), <http://www.state.gov/r/pa/ei/bgn/4130.htm>; Hans Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. UNIV. L. REV. 145, 148 (1983), <http://www.wcl.american.edu/journal/lawrev/33/gasser.pdf>.

¹²⁷ *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

¹²⁸ Geneva Convention IV, *supra* note 16, art. 147 states that

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Id.

¹²⁹ See *Tadić*, Case No. IT-94-1-I (Part IV. Lack of Subject Matter Jurisdiction).

churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted “only” within the territory of a sovereign State?¹³⁰

The ICTY Appeals Chamber went further in its Jurisdiction Decision in the *Tadić* case, summarizing four reasons supporting the concept of merging international humanitarian law to cover internal armed conflicts, notably the frequency and cruelty of civil wars, scale and globalization invariably involve a third state, and the advent of international humanitarian law since the Universal Declaration of Human Rights in 1949.¹³¹

¹³⁰ *Id.* ¶ 97.

¹³¹ *Id.* See generally *id.* In pertinent part: Since the 1930s . . . the . . . distinction has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. There exist various reasons for this development:

First, civil wars have become more frequent, not only because technological progress has made it easier for groups of individuals to have access to weaponry but also on account of increasing tension, whether ideological, inter-ethnic or economic; as a consequence the international community can no longer turn a blind eye to the legal regime of such wars.

Secondly, internal armed conflicts have become more and more cruel and protracted, involving the whole population of the State where they occur: the all-out resort to armed violence has taken on such a magnitude that the difference with international wars has increasingly dwindled [.]

Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects.

Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-

What is the legal status of the parties in Mexico? The Mexican government is fighting several large and highly armed groups, but these groups do not have an obvious political aim. These cartel groups are internationally recognized as criminal organizations, yet in many respects have the military and economic power in their respective regions characteristic of an insurgent group.¹³²

B. The Cartel Insurgency

*“These drug cartels are showing more and more indices of insurgencies, it’s looking more and more like Colombia looked 20 years ago, when the narcotraffickers controlled certain parts of the country.”*¹³³

The Mexican government was quick to repudiate the remarks above made by Secretary of State Hillary Clinton. Out of sensitivity to Mexico, and so close in time to President Calderon’s visit to the United States,¹³⁴ President Obama relieved the diplomatic furor by issuing his own Spanish language statement. Countering Secretary Clinton’s statement, the President declared that Mexico is a vast, progressive democracy with a growing economy that cannot be compared to Colombia of twenty years ago.¹³⁵ Unfortunately, being a progressive democracy with a growing economy has not saved Mexico from either violence on a scale of brutality exceeding Colombia’s or drug cartel attacks on its

sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned.

Id.

¹³² See generally Håvoll, *infra* note 175, at 11–13.

¹³³ Clinton: Mexico Drug Cartels Like ‘Insurgency,’ FOXNEWS.COM, Sep. 9, 2010, <http://www.foxnews.com/world/2010/09/08/mexican-mayor-killed-marines-arrest-suspects-massacre-migrants/> (quoting Secretary of State Hillary Clinton).

¹³⁴ Mexico Drug War Not Comparable to Colombia: Obama, REUTERS, Sep. 9, 2010, <http://www.reuters.com/article/2010/09/09/us-usa-mexico-obama-idUSTRE6885TH20100909>.

¹³⁵ *Id.*

government institutions.¹³⁶ As in Colombia, the attacks on Mexico's government come from both destabilizing corruptive practices and physical violence.

Secretary Clinton's remarks may not have been diplomatically sensitive, but they were not baseless. The State Department travel warning for Mexico is twice as long as the travel warning for Pakistan, and describes much more specific threats such as kidnappings, assassinations, and killings at unauthorized cartel checkpoints.¹³⁷ Putting the situation into perspective, the same day Secretary Clinton made her remarks, gunmen burst into the office of El Naranjo's mayor, Alexander Lopez Garcia, and shot him to death.¹³⁸ Just over a week before, 72 migrants were massacred 100 miles from Brownsville, Texas, allegedly by members of Los Zetas drug cartel.¹³⁹ The state prosecutor leading the investigation also went missing, and in the same town a car bomb exploded outside a television station.¹⁴⁰

These events, presumably orchestrated by the militarily trained Zetas, make the reality of war south of the border difficult to ignore. For the average American familiar with on-going insurgencies in Iraq and Afghanistan, these events near the Mexican border should be of similar concern as they are so close to home. Car bombs, kidnappings, torture, beheadings, and a take-no-prisoners mentality are the modus operandi of the Taliban and Al Qaeda. Now this similar violence on our southern border is creeping closer. Just across the river from El Paso, Texas, in Ciudad Juarez, as well as other locations in Mexico, some of the violence

¹³⁶ *Id.* Mexico is worse and more brutal. ("When it comes to justice and the social dynamic, we are losing against criminal organizations," says Javier Oliva Posada, a drug expert at the National Autonomous University of Mexico. "It is not just in the number or murders, but the cruelty in each one of them.") Sara Miller Llana, *Mexico Massacre: How the Drug War Is Pushing Cartels into Human Trafficking*, CHRISTIAN SCI. MONITOR, Aug. 30, 2010.

¹³⁷ See U.S. DEP'T STATE TRAVEL WARNING, BUREAU OF CONSULAR AFF., MEXICO, www.state.gov (Sep. 10, 2010); see also U.S. DEP'T STATE TRAVEL WARNING, BUREAU OF CONSULAR AFF., PAKISTAN, www.state.gov (July 22, 2010).

¹³⁸ *Clinton: Mexico Drug Cartels Like 'Insurgency,' supra* note 133; see also *supra* note 136.

¹³⁹ *Id.* (The lone survivor, an Ecuadorian man, describes how the Zetas captured the group by Ciudad Victoria and wanted to recruit them; when they refused, the shootings began. The group was blindfolded and shot one by one, including teenagers and a pregnant woman.).

¹⁴⁰ *Id.*

is directed against U.S. sovereignty itself.¹⁴¹ Even tourist destinations such as Acapulco and Puerto Vallarta, touted as safe from the drug war, are not immune.¹⁴² These events illustrate the ‘indices’ of insurgency to which Secretary Clinton referred.

1. What Is an Insurgency?

Classical international law categorizes armed challenges to the authority of the State into three stages, with each growing more violent in its intensity: rebellions, insurgencies, and belligerencies.¹⁴³ At the lowest level, disaffected sections of society may rebel against the government for a number of grievances.¹⁴⁴ These rebellions are localized and not sufficiently strong to overthrow state power.¹⁴⁵ In other words, a rebellion is considered a small uprising that the state has little difficulty suppressing.¹⁴⁶ A rebellion was seen as a passing challenge to the government and was dealt with swiftly by its internal security forces in modern times, often a local or national police force.¹⁴⁷ In these cases, the conflict maintains a purely domestic flavor. A rebellion does not require international restraints on the conduct of parties, and apprehended rebels are subject to the state’s domestic laws.¹⁴⁸

Elevation to an insurgency is evidenced by an escalation of violence against the parent state government.¹⁴⁹ The insurgency is sufficiently organized to present a significant challenge to the state’s authority and legitimacy.¹⁵⁰ Third-party states may acknowledge the presence of the insurgency to protect their own interests, though foreign recognition of

¹⁴¹ von Rohr, *supra* note 8. See e.g., Nicholas Casey, *U.S. Mexican Consulate Attacked*, WALL ST. J., Apr. 11, 2010, <http://online.wsj.com/article/SB10001424052702304168004575177250573251946.html> (stating that attacks on U.S. Consulates, the first attack in Ciudad Juarez, on March 13, 2010, killed three people, and stating that there were no casualties on the second attack April 9, 2010, in Neuvo Laredo).

¹⁴² The implication is not that tourists are targeted, but that even popular getaways may not be safe. See also *Mexico Violence: Headless Bodies Found in Acapulco*, BBC NEWS, Jan. 8, 2011, <http://www.bbc.co.uk/news/world-latin-america-12143227>.

¹⁴³ MOIR, *supra* note 118, at 4.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

an insurgency does not connote any special status on the insurgent.¹⁵¹ Instead, the foreign state concedes it must enter into a relationship with an insurgency for economic reasons, humanitarian concerns, or both.¹⁵²

The final stage of conflict against the State is recognition of the insurgent movement as a belligerent party.¹⁵³ Recognizing the belligerent party entitles both the state and the insurgent movement to recognition as parties of an international armed conflict.¹⁵⁴ This recognition could be granted by the government or by a third-party state.¹⁵⁵ Recognition does not mean the insurgent movement is a government in its own right. The recognition merely points to a state of war between two competing powers, thereby invoking the customary protections in the conduct of war.¹⁵⁶

2. *How Are the Cartels an Insurgency?*

The cartel threat to Mexican state power is a sum of their parts. The Mexican government is fighting multiple ongoing insurgencies amalgamated as “the cartels.” Having provided the legal concept of insurgency in international law, this section defines how the cartels are an insurgency under U.S counterinsurgency doctrine.

¹⁵¹ *Id.* at 5.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* See also ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 15 (2010) (citing the *Prizes Cases* of 1862).

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the Government. . . . When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence, have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerent, and the contest a war.

E.g., id. at 16 (citing *Williams v. Bruffy*, 96 U.S. 176, at 186 (1877) (“When a rebellion becomes organized, and attains such proportions as to be able to put a formidable military force in the field, it is usual for the established government to concede to it some belligerent rights.”)).

a. Elements of an Insurgency

The elevation of a rebellion to an insurgency is in part based on application of violence, but there are other factors that support the proposition that the cartels are in fact insurgencies. The elements of insurgency from the U.S. Army Field Manual 3-24, *Counterinsurgency*,¹⁵⁷ reveals a direct correlation between insurgents and cartels.

Field Manual 3-24 explains that one of the goals of the insurgency is to break away from state control and form an autonomous entity or ungoverned space that it controls.¹⁵⁸ The cartels are motivated in part by a similar goal. The cartels may not seek the overthrow of the Mexican government, but they do seek to break away from state control and operate as autonomous entities. To achieve that end, the cartels resort to assassinating local political officials and law enforcement who stand in the way. By breaking down the social order provided by government, the cartels fill the vacuum and maintain a system of order supporting their own interests.

For the parent government, providing security is the key to reducing the insurgency. However, particularly in Mexico's case, maintaining security in an unstable environment requires vast resources, and a small number of motivated insurgents with simple weapons and limited mobility can still undermine security over a large area.¹⁵⁹ Mexico does not have vast resources to combat the enemy. In contrast, the insurgents have a wide range of available weapons, from simple assault rifles to sophisticated weapons like rocket-propelled grenades, machine guns, and car bombs.¹⁶⁰ They also have wide-ranging mobility, possess their own aircraft, intersperse among the general population and conduct their illegal activities across the country.¹⁶¹

An insurgent organization normally consists of five elements: movement leaders, combatants, political cadre, auxiliaries, and a mass base.¹⁶² Addressing these in turn will demonstrate these elements are present in Mexico.

¹⁵⁷ FM 3-24, *supra* note 19, para. 1-5.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* para. 1-10.

¹⁶⁰ BEITTEL, *supra* note 55, at 2, 8, 12.

¹⁶¹ *E.g.*, GRAYSON, *supra* note 3, at 64.

¹⁶² FM 3-24, *supra* note 19, para. 1-59.

Cartels are centrally managed. The Mexican government has identified the heads of these tightly held organizations.¹⁶³ Men like “El Chapo” are the movement leaders who provide leadership.¹⁶⁴ These leaders are like corporate heads, running a large enterprise underground. Similar to military commanders, the cartels have thousands of “soldiers” under arms.¹⁶⁵ Combatants are the fighters and security of the cartel.¹⁶⁶ These soldiers “protect and expand the counterstate”¹⁶⁷ by battling the Mexican government and other cartels to expand their zone of control. Additionally, much like government officials, the cartel leaders also make economic decisions such as providing jobs and building infrastructure for the local population—which can result in reverence by the local population for the cartel leaders, who are perceived as being able to make local improvements when elected officials cannot.¹⁶⁸

Political cadres are those people engaged in achieving political goals.¹⁶⁹ The term cadre is a throwback to communist insurgencies.¹⁷⁰ Modern non-communist insurgencies do not use the term but nonetheless have personnel dedicated to shaping the political battlefield.¹⁷¹ In Mexico, the cartels are in a position to have a heavy impact on Mexican politics with their money and weaponry.¹⁷² The kidnapping and murder of public officials, police officers, and the influencing of elections with drug money is the means the cadre use to manipulate the political

¹⁶³ STRATFOR, *supra* note 5, at 77 (citing *Organized Crime in Mexico*) (May 11, 2008) (“Drug cartels in Mexico have a hierarchical structure, with some of the largest cartels controlled by members of a family. The leadership structure in most Mexican organized crime groups shows sophistication and efficiency.”).

¹⁶⁴ *The Last Narco*, *supra* note 64.

¹⁶⁵ *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/> (“The U.S. Defense Department thinks Mexico’s two most deadly drug cartels together have fielded more than 100,000 foot soldiers—an army that rivals Mexico’s armed forces and threatens to turn the country into a narco-state.”).

¹⁶⁶ FM 3-24, *supra* note 19, para. 1-12.

¹⁶⁷ FM 3-24, *supra* note 19, para. 1-62.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*; *id.* para. 1-63.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² BEITTEL, *supra* note 55, at 9. See generally Renato Busquets, *Drug Money in Mexican Elections? Political Financing Rules Might Help*, GLOBAL INTEGRITY COMMONS (Jan. 20, 2010), <http://commons.globalintegrity.org/2010/01/drug-money-in-mexican-elections.html> (translating proposed reforms from the Mexican newspaper *Reforma*. Martha Martínez, *Narco Poder: Tema para la Reforma Política*, REFORMA, Jan. 10, 2010).

dialogue. While the cartels may not have a political “cadre” in the traditional sense of the term, their impact on politics is unquestionable.

The mass base of the cartel insurgency in the broadest sense are the drug consumers of the world fueling the insurgency with vast amounts of money. Simple access to weapons in the United States also contributes to the arming of the insurgency.¹⁷³ In a more narrow sense, the base of the cartel insurgency is those Mexicans who directly or indirectly support the insurgency. These base members include those who take bribes from the cartels in order to facilitate their business. These members can also be defined as auxiliaries.¹⁷⁴ The links between the base and the auxiliaries, at least in the doctrinal sense, are wholly intertwined. Auxiliaries likely form the bulk of the cartels composition. The auxiliary are sympathizers who perform supporting efforts for the cartel.

b. Transnational Organized Crime and the ‘Criminal Insurgent’

The traditional view characterizes insurgencies as groups challenging local authority with the objective to topple the government and seize power.¹⁷⁵ To achieve this objective, the insurgency must have a strategy, defined political objectives, and the means to achieve it.¹⁷⁶ Organized crime in relationship to an insurgency is “parasitic” to the state and opportunistic in suiting its agenda, while the traditional insurgency is more politically based.¹⁷⁷ The focal point is the “political goal” of the insurgent. Twenty-first century examples include the Revolutionary Armed Forces of Colombia (*Fuerzas Armadas Revolucionarias de*

¹⁷³ Mathieu von Rohr, *Ciudad Juarez Takes on Drug Cartels*, SPIEGEL ONLINE, Sep. 23, 2009, <http://www.spiegel.de/international/world/0,1518,650553,00.html> (The mayor of Ciudad Juarez “talks of American women on welfare smuggling Kalashnikovs over the border for \$100 a piece.”).

¹⁷⁴ FM 3-24, *supra* note 19, para. 1-65 (Auxiliaries are active sympathizers who provide important support services. They do not participate in combat operations. Auxiliaries may do the following: Run safe houses; store weapons and supplies; act as couriers; provide passive intelligence collection; give early warning of counterinsurgent movements; provide funding from lawful and unlawful sources; provide forged or stolen documents and access or introductions to potential supporters.).

¹⁷⁵ Harald Håvoll, *COIN Revisited: Lessons of the Classical Literature on Counterinsurgency and Its Applicability to the Afghan Hybrid Insurgency*, NORSK UTENRIKSPOLITISK INST. 6 (2008).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

Colombia, or FARC), an insurgent group seeking a Marxist regime,¹⁷⁸ or the Al Qaeda terrorist group that seeks reestablishment of a Caliphate.¹⁷⁹ Both are examples of violent movements with a political aim. With the end of the Cold War, there has been a rise in new threats along ethnic and religious lines, but the significance of the international global crime threat cannot be discounted. These criminal organizations are parasitic and conjure up images of the fictional shadowy underworld of Don Corleone or Tony Soprano,¹⁸⁰ and gangsters who sit in dark bars trying to influence the system, but not necessarily “rocking the boat.” Mexican cartels are different. They are like these fictional characters, but with more money and a strong private army. In a developing nation like Mexico, “parasitic” criminal organizations would actually be preferable; however, the cartels are a cancer, and a significant threat to stability and security of the state.

In 2001, Peter Andreas and Richard Price published an article¹⁸¹ astutely describing a growing shift in security policy due to the decline of violent geopolitical conflicts. Their theory is that security policies focus more on *crimefighting* than *warfighting*. The article was written before the advent of the Global War on Terror, but the concepts of a security agenda-shift from *warfighting* to *crimefighting* fit the Mexico paradigm.

¹⁷⁸ *Profiles: Colombia's Armed Groups*, BBC NEWS, Feb. 17, 2011, <http://www.bbc.co.uk/news/world-latin-america-11400950> (“The group was founded in 1964, when it declared its intention to use armed struggle to overthrow the government and install a Marxist regime.”).

¹⁷⁹ See also DAVID KILCULLEN, *COUNTERINSURGENCY* 168 (2010)

[T]he first stage of the campaign would reestablish the caliphate, the historical source of spiritual and temporal authority for all Muslims, which existed from the death of Muhammed (in A.D. 632) until A.D. 1924, when it was dissolved by the Turkish Republic after the fall of the Ottoman Empire. . . . The second stage of the strategic plan would use the ‘restored’ caliphate as a launchpad for jihad against the West, in order to remake the world order with the Muslim world in a dominant position.

Id.

¹⁸⁰ Don Corleone, mafia family boss in *The Godfather*. *THE GODFATHER* (Paramount Pictures 1972), Tony Soprano, head of a crime syndicate in *The Soprano's* (Home Box Office broadcast 1999–2007).

¹⁸¹ Peter Andreas, a professor at Brown University, and Richard Price from the University of British Columbia are published experts in the emergence of national security and transnational crime studies. Peter Andreas, http://www.brown.edu/Departments/Political_Science/faculty/facultypage.php?id=1106969919; Richard Price, <http://www.politics.ubc.ca/index.php?id=2509>.

In 1995, Deputy U.S. Attorney General Jamie Gorelick told the Senate Select Committee on Intelligence:

The end of the Cold War has changed the nature of the threats to our national security. No longer are national security risks exclusively or predominately military in nature. Transnational phenomena such as terrorism, narcotics trafficking, alien smuggling, and the smuggling of nuclear material all have been recognized to have profound security implications¹⁸²

A name for this threat is *transnational organized crime*. The Center for Strategic and International Studies has called organized crime the “New Evil Empire” and concluded that global organized crime was a greater international security threat than anything the West had to cope with during the cold war.¹⁸³ There is much truth in this assertion. First it was Colombia, but Guinea-Bissau, Guatemala, and Mexico, are among nations falling under organized crime’s control. Even Russia is often viewed as a mafia-controlled state.¹⁸⁴

Transnational organized crime has a political agenda to meet an economic goal: production and distribution of illegal commodities and management of the wealth derived from sales. From this perspective, the Mexican cartels are in reality a business, or a multinational corporation, whose product happens to be illegal, but is in very high demand and generates massive revenue. To sustain their businesses over the years, the cartels invested in public officials through corruption and intimidation.¹⁸⁵ The cartels also invest in capital equipment, like methamphetamine labs, aircraft, and vehicles, as well as infrastructure such as roads and a tunnel

¹⁸² Peter Andreas & Richard Price, *From War Fighting to Crime Fighting: Transforming the American National Security State*, 3 INT’L STUD. REV. 31, 31–52 (2001).

¹⁸³ Linnea P. Raine & Frank J. Cilluffo, eds., *Global Organized Crime: The New Evil Empire* (Ctr. for Strategic and Int’l Studies, Wash. D.C. (1994)).

¹⁸⁴ *Wikileaks: Russia Branded 'Mafia State' in Cables*, BBC News, Dec. 2, 2010, <http://www.bbc.co.uk/news/world-us-canada-11893886>; see also *US Embassy Cables: Russia Is Virtual 'Mafia State', Says Spanish Investigator*, GUARDIAN.CO.UK, Dec. 2, 2010, <http://www.guardian.co.uk/world/us-embassy-cables-documents/247712> (providing text of cable) (“Grinda stated that he considers Belarus, Chechnya and Russia to be virtual “mafia states” and said that Ukraine is going to be one. For each of those countries, he alleged, one cannot differentiate between the activities of the government and [Organized] [Crime] groups.”).

¹⁸⁵ See generally Peter Andreas, *The Political Economy of Narco-Corruption in Mexico*, CURRENT HISTORY 160 (1998).

under the U.S.-Mexican border to transport their illegal products.¹⁸⁶ Cartels raise armies and spread violence as they compete for plazas while simultaneously protecting themselves from the Mexican government. Under these conditions the cartels represent a criminal insurgency based on economics.¹⁸⁷

The criminal insurgent differs from other insurgents by lack of political goal, but the pursuit of an economic goal, the unencumbered ability to conduct business without interference from the government.¹⁸⁸ The economic insurgent is the ultimate capitalist, willing to take up arms to advance a business agenda. The insurgency happens to result in large political effects and displacement of the government—not to create a counter-state, but to create a semi-anarchic environment from which to conduct business unhindered.¹⁸⁹ To remain “de-regulated,” the insurgent bribes officials, and selectively assassinates authority figures who get in the way.

Mexican cartels are distinguished from groups referred to as “narcoterrorists.” The term narcoterrorism is often used to define armed groups involved in drug trafficking as a means of advancing political goals. The FARC and Irish Republican Army (IRA)¹⁹⁰ are noted examples. The term is problematic in the Mexican context; it is unclear

¹⁸⁶ E.g., Sara A. Carter, *Feds Say Border Patrol Vehicles Being ‘Cloned’ by Mexican Smugglers*, WASH. EXAMINER, Apr. 4, 2010, <http://washingtonexaminer.com/news/feds-say-border-patrol-vehicles-being-039cloned039-mexican-smugglers>; see e.g., *Drug Catalyst Discovered on Mexico Border*, MSNBC.COM, Jan. 26, 2011, http://www.msnbc.msn.com/id/41282726/ns/world_news-americas/. See also e.g., Jennifer Medina, *Drugs Seized in Tunnel Near Border*, N.Y. TIMES, Nov. 3, 2010, <http://www.nytimes.com/2010/11/04/us/04tunnel.html>.

¹⁸⁷ See *supra* note 17.

¹⁸⁸ *Id.*

¹⁸⁹ See generally *id.*; see also von Rohr, *supra* note 8; see also *No Police in Mexico Town After Last Officer Kidnapped*, BBC NEWS, Dec. 28, 2010, <http://www.bbc.co.uk/news/world-latin-america-12085405>; Randal C. Archibold, *Bit by Bit, a Mexican Police Force Is Eradicated*, N.Y. TIMES, Jan. 11, 2011, <http://www.nytimes.com/2011/01/12/world/americas/12mexico.html>.

¹⁹⁰ See generally *supra* note 186 (E.g., *FARC's Cocaine Sales to Mexico Cartels Prove Too Rich to Subdue*, BLOOMBERG NEWS, Jan. 20, 2010, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aQfKk3ykBBes>; see also Jeremy McDermott & Toby Harnden, *The IRA and the Colombian Connection*, TELEGRAPH, Aug. 15, 2001, <http://www.telegraph.co.uk/news/uknews/1337467/The-IRA-and-the-Colombian-connection.html> (“Although very few IRA members are directly involved in drug dealing in Northern Ireland, [Royal Ulster Constabulary] RUC and Army intelligence officers state that the organisation “licenses” drug dealers in nationalist areas and takes a portion of their profits.”).

whether to emphasize the “*narco*” aspect or the “*terrorism*” aspect.¹⁹¹ The FARC and IRA are groups with noted political agendas that supersede their desire to become rich from trafficking in narcotics, but this is not so in the case of the Mexican cartel insurgent who seeks personal enrichment and prestige.

During the period of the Mexican cartel assistance to the Colombians, the cartels were merely a criminal enterprise haphazardly attacked by the Mexican police forces. As the Colombian cartels collapsed, the Mexican cartels transformed into the formidable forces described above and have developed into an insurgency in their own right.¹⁹² As the insurgency has evolved and its security system has become a potent military force, Mexico must be prepared to fight this criminal insurgent who relies on creating an anarchic environment for the promotion of their criminal business enterprise.

C. Is This a Non-International Armed Conflict?

There is great danger to states admitting to the imbroglio of internal armed conflict. States do not wish to have the appearance of lack of control for political and economic reasons. States may not want to have political ties with a faltering government for the sake of their standing with a possible successor government. Foreign business may not want to invest in an area seen as unstable and damaging to their enterprise. Application of Common Article 3 by a State is a tacit admission of loss of control, and therefore rarely ever applied.¹⁹³

Internal armed conflict derives from conventional and customary international law.¹⁹⁴ For conventional sources, Common Article 3 and Additional Protocol II govern internal armed conflict. Common Article 3 provides humanitarian standards to conflicts within a state’s sovereign territory. The article does not provide for combatant immunity—that is,

¹⁹¹ John Holmberg, *Narcoterrorism* (May 11, 2009) (on file with the Terrorism, Transnational Crime and Corruption Center at George Mason University) (citing Emma Bjornehed, *Narco-Terrorism: The Merger of the War on Drugs and the War on Terror*, 6 GLOBAL CRIME 306 (2004), available at http://www.silkroadstudies.org/new/docs/publications/2005/Emma_Narcoterror.pdf).

¹⁹² See *supra* Part III.B.

¹⁹³ Major Alex G. Peterson, *Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict*, 171 MIL. L. REV. 15, 20 (2002).

¹⁹⁴ *Id.* at 26.

an insurgent (state agent or otherwise) who kills can be subject to domestic law as a murderer.¹⁹⁵ Modernization of the 1949 Geneva Conventions led to the 1977 Additional Protocols, specifically Additional Protocol II, for internal armed conflicts. Additional Protocol I, applicable to international armed conflicts, also applies where the insurgents have reached belligerency status. However, as discussed above, this is not the situation in Mexico. It must be noted that at the other end of the conflict spectrum, Additional Protocol II does “not apply to 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.” Mexico is somewhere in between; however, Additional Protocol II applies to the internal conflict in Mexico, both in fact and as customary international law.

1. Elements of Internal Armed Conflict

There are two main elements of an internal armed conflict. First, is an armed conflict taking place; and second, is it taking place “in the territory of one of the High Contracting Parties?”¹⁹⁶ Mexico is a signatory of the Geneva Convention, and there is an obvious conflict of some nature taking place within its territory. The question arises as to what extent the first element is met, defining an armed conflict. It is here that Mexican officials, from both past and present, will argue that their war is not an armed conflict as envisioned by Common Article 3, but is instead a police action against criminals.¹⁹⁷

There is no concrete definition of what constitutes a conflict in the 1949 Geneva Conventions.¹⁹⁸ For international armed conflict the process is easy: an armed conflict between two states is all that was required.¹⁹⁹ The level of intensity is not an issue when it is clear State

¹⁹⁵ *Id.* at 19.

¹⁹⁶ Geneva Conventions, *supra* note 16.

¹⁹⁷ MOIR, *supra* note 118, at 68–74. *See generally id.* (France was less willing to admit application of Article 3 in the conflict in Algeria, though France implicitly acted within the provisions of the Article.).

¹⁹⁸ COMMENTARY ON THE GENEVA CONVENTION I, *supra* note 120, at 32, 49.

¹⁹⁹ This Common Article of the Geneva Conventions states,

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or

parties are involved.²⁰⁰ For an internal armed conflict, other issues arise due to the paramount view of state sovereignty, as well as the unintended consequence of giving legitimacy to those who may be deemed criminals by the parent state.²⁰¹ The members of the Diplomatic Conference for the Geneva Conventions were unable to establish the criteria for the definition of an internal armed conflict due to genuine concerns that broad application of Common Article 3 would apply to any act of anarchy, rebellion, or even banditry.²⁰² In the end, the delegates abandoned defining armed conflict.²⁰³ Jean Pictet's commentaries on the Geneva Conventions²⁰⁴ provide limited guidance from which one can create specific "elements" for the purpose of this analysis.

On the surface, establishing that an insurgency exists may appear to establish a state of internal armed conflict; but the next step is to apply

more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

See supra note 16, art. 2.

²⁰⁰ COMMENTARY ON THE GENEVA CONVENTION I, *supra* note 120, at 32.

Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2 It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbersome machinery. It all depends on circumstances. If . . . only at single wounded person as a result of the conflict, the Convention will have been applied as soon as he has been collected and tended

Id.

²⁰¹ *Id.* at 34.

²⁰² *Id.* at 43.

²⁰³ *Id.* at 49.

²⁰⁴ *See generally* COMMENTARY ON THE GENEVA CONVENTIONS, *supra* note 120.

the elements of an internal armed conflict to the factual situation in Mexico.²⁰⁵ The elements are as follows: a “party in revolt against the de jure Government;”²⁰⁶ government recourse to the use of military force; recognition of the insurgents as belligerents; and the insurgent organization having the characteristics of a state.²⁰⁷ These elements are meant to be guidelines in determining the applicability of Common Article 3, not the hard and fast rule.²⁰⁸ The purpose is to demand respect for rules of civility in combat, not to usurp the state’s inherent police powers. As such, in fulfilling much of the criteria of armed conflict for an apolitical insurgency, Common Article 3 and Additional Protocol II apply to the drug war in Mexico as both conventional and customary international law.²⁰⁹

²⁰⁵ MOIR, *supra* note 118, at 35 (deriving elements from Commentary on the Geneva Convention I). COMMENTARY ON THE GENEVA CONVENTION I, *supra* note 120, at 49:

- (1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
- (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
- (3) (a) That the de jure Government has recognized the insurgents as belligerents; or
 - (b) that it has claimed for itself the rights of a belligerent; or
 - (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
 - (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
- (4) (a) That the insurgents have an organisation purporting to have the characteristics of a State.
 - (b) That the insurgent civil authority exercises de facto authority over persons within a determinate territory.
 - (c) That the armed forces act under the direction of the organized civil authority and are prepared to observe the ordinary laws of war.
 - (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

The above criteria are useful as a means of distinguishing a genuine armed conflict from a mere act of banditry or an unorganized and short-lived insurrection.

²⁰⁶ See *supra* note 207, para. (1).

²⁰⁷ MOIR, *supra* note 118, at 35.

²⁰⁸ *Id.* See also COMMENTARY ON THE GENEVA CONVENTION I, *supra* note 120, at 50.

²⁰⁹ Peterson, *supra* note 197, at 29.

2. A “Catch All?” *Tadić* Revisited

Although there is no internationally accepted definition of internal armed conflict, the *Tadić* case provides a singular element, a catch all, to show “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized groups or between such groups within a State.”²¹⁰ Under the *Tadić* ICTY Appeal Chamber definition, these two factors are present: a six-year protracted conflict between the cartels and the government and the use of military force. Based on these factors, it is clear there is an internal armed conflict in Mexico.

D. Legal Status for Cartel Fighters

In a conventional Common Article 2 conflict, states may capture members of the armed forces of the opposing state. In those situations, the third Geneva Convention on Prisoners of War provides guiding principles on combatant protections.²¹¹ Article 4 of the third Geneva

²¹⁰ Prosecutor v. *Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

²¹¹ See Geneva Convention III, *supra* note 16. Article 4 states,

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

(1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) that of being commanded by a person responsible for his subordinates;

(b) that of having a fixed distinctive sign recognizable at a distance;

(c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization, from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

(1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

(2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without

Convention lists the categories of persons eligible for POW status.²¹² In situations arising where there is a need to determine the status of a combatant, Article 5 prescribes that “such persons shall enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal.”²¹³ These tribunals assist a belligerent state in determining who is worthy of their protection under the convention or who are criminals to be punished under the law of the capturing state. For example, the U.S. Army governs these Article 5 tribunals under Army Regulation (AR) 190-8 and establishes procedural measures for composition of the tribunal and the conduct of the hearing.²¹⁴ Importantly, the regulation also provides rules and protections for those denied POW status.²¹⁵

prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

²¹² *Id.*

²¹³ Geneva Convention III, *supra* note 16, art. 5.

The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation. Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Id.

²¹⁴ U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES para. 1-6 (1 Oct. 1997) [hereinafter AR 190-8]. The following paragraphs pertain to tribunals:

c. A competent tribunal shall be composed of three commissioned officers, one of whom must be of a field grade. The senior officer shall serve as President of the Tribunal. Another non-voting officer, preferably an officer in the Judge Advocate General Corps, shall serve as the recorder.

d. The convening authority shall be a commander exercising general courts-martial convening authority.

.....

In viewing the situation of the United States at the Guantanamo Bay detention center, there are enemy fighters held who belong to no state armed force and are considered “unlawful combatants”²¹⁶ and therefore not afforded the protections of the Geneva Convention other than as provided by government policy. These personnel are presented before a Combatant Status Review Tribunal (CSRT). The Tribunal is modeled after the AR 190-8 tribunal for POWs.²¹⁷

g. Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status *may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed.* The record of every Tribunal proceeding resulting in a determination denying EPW status shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.

(emphasis added).

²¹⁵ AR 190-8, *supra* note 214, para. g.

²¹⁶ The Term unlawful combatants was introduced into law by *Ex parte Quirin*, 317 U.S. 1 (1942) (“By universal agreement and practice the law of war draws a distinction between . . . those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”). In the case of the Guantanamo detainees, the term was changed to “unprivileged enemy belligerent” through the Enemy Belligerent Interrogation, Detention and Prosecution Act of 2010. Senate Bill 3081, 111th Cong. (2009–2010). Senate Bill 3081 as defined in section 6, “Definitions (9) UNPRIVILEGED ENEMY BELLIGERENT.—The term ‘unprivileged enemy belligerent’ means an individual (other than a privileged belligerent) who—(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposely and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of capture.”

²¹⁷ Combatant Status Review Tribunal Fact Sheet, at <http://www.defense.gov/news/Jul2007/CSRT%20Fact%20Sheet.pdf> (last visited May 22, 2012).

Detainees at Guantanamo are not held as “Prisoners of War.” The President has determined that those combatants who are a part of al-Qaeda, the Taliban or their affiliates and supporters, or who support such forces do not meet the Geneva Convention’s criteria for POW status. Accordingly, there was no need to convene tribunals under Article 5 of the Geneva Convention. International law, including the Geneva Conventions, has long recognized a nation’s authority to detain unlawful enemy combatants without benefit of POW status. The U.S. Government treats unlawful combatants in accordance with Common Article 3 of the Geneva Conventions . . . CSRTs offer many of the procedures contained in U.S. Army Regulation 190-8, which

In contrast, the cartels are criminal organizations by their nature. They kidnap, murder, and traffic drugs and people, but should they be afforded combatant status? Assuming the cartels are insurgent groups, it is evident that not all members of the insurgency are the leaders, such as El Chapo, the Beltran Leyva brothers, or special militarily trained Zetas.²¹⁸ Amongst the cartel, there are foot soldiers—young men and teens—some of whom have been forced into the cartel, or brainwashed by a charismatic convincing adult figure. There may also be cases of child soldiers.²¹⁹

By applying the POW standard under the Geneva Convention to all combatants, the detaining state is entitled to hold the insurgent indefinitely as a POW for the duration of hostilities.²²⁰ From the Mexican judicial perspective, given the threat to the system by the cartels and the rampant corruption of the current police forces, it may serve the Mexican government to detain captured cartel fighters in POW-type camps within Mexico or coordinate with international partners for use of more secure detention facilities resistant to cartel corruptive practices compared to Mexico's less effective Puente Grande maximum security prison.²²¹

From an internal armed conflict perspective, the Mexican government could treat and hold cartel criminal insurgents as “unlawful

the Supreme Court has cited as sufficient for U.S. citizen-detainees entitled to due process under the U.S. Constitution.

Id.

²¹⁸ See *supra* Part III.B (background of Mexican cartels).

²¹⁹ E.g., *Mexican Drug Cartels Hire Teens, Children for Smuggling, and Murder*, CATHOLIC ONLINE, Dec. 20, 2010, http://www.catholic.org/international/international_story.php?id=39660 (Mexico is in shock learning of a fourteen-year-old boy who was “known as ‘Ponchi’ [and] began killing for the cartels at age 11”). See also Ioan Grillo, *Mexico's Lost Youth: Generation Narco*, TIME, Nov. 7, 2010, <http://www.time.com/time/world/article/0,8599,2028912,00.html> (There is a growing concern about “*los ni nis* or “neither nors”—young people who neither work nor study” and are turning to the cartels for career opportunities. Execution videos have involved young people as the killers.).

²²⁰ EMILY CRAWFORD, *THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT* 161 (2010).

²²¹ GRAYSON, *supra* note 3, at 58, 146 (Puente Grande maximum security prison is where Sinaloa Cartel leader “El Chapo” Guzman escaped after his “electronically controlled cell door inexplicably flew open during a period when video cameras temporarily went dark A federal investigation led to the arrest of seventy-one prison officials, and comedians began calling Puente Grande (the ‘Big Bridge’) Puerta Grande (the ‘Big Door’),” notorious for accommodating cartel inmates.) (The judiciary is lax toward the drug traffickers, and on some occasions freed traffickers executed the police official and judge involved in their cases.). See generally Andreas, *supra* note 189.

combatants” until the cartels are dismembered or the Mexican government determines that the cartels cease being a threat to the state.²²² Indefinite incarceration for the duration of the war against the cartels may be as unpalatable to the Mexican government as the detention of detainees in the Global War on Terror has been to the U.S. public. The war against the cartels is going on six years and could last much longer. In this situation, an Article 5 or CSRT-type tribunal would be useful. These hearings will sift out petty dealers and cartel foot soldiers with societal rehabilitative potential from high-value cartel targets for extradition to the United States or special jurisdiction Mexican military or civilian courts to hear cartel criminal cases. This method will satisfy the requirements of Common Article 3, to have “judgment pronounced by a regularly constituted court.”²²³

E. A Multinational Response

The Mexican cartels are more than mere criminal organizations, but are destabilizing insurgent forces turning parts of Mexico into ungoverned areas similar to Pakistan’s Federally Administered Tribal Area (FATA).²²⁴ This lawlessness is firmly rooted in Mexico’s history of instability and corruption. Without increased overt action from the United States, that violence and corruption will surely bleed over into the United States. Some say it already has, with blatant cartel hits being carried out in American cities,²²⁵ and the rise in corruption of our own

²²² The proposition is based on customary international law because Articles 4 and 5 of Geneva Convention III only apply to international armed conflict.

²²³ Geneva Conventions, *supra* note 16, art. 3, para. (1)(d); *see also id.* para. (2) (“shall not affect the legal status” of the armed group). *See also* Dawn Steinhoff, *Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups*, 45 TEX. INT’L L. J. 297, 315 (2010) (“When a state captures an opponent in an internal conflict, the state can still treat the individual according to its laws of treason, even if the individual did not violate the laws of war. Consequently, many insurgent fighters forfeit significant humanitarian protections in lieu of domestic criminal prosecution or indefinite military detention.”).

²²⁴ INT’L CRISIS GROUP, PAKISTAN: COUNTERING MILITANCY IN FATA, ASIA REPORT NO. 178 (Oct. 21, 2009) (“Pakistani Taliban groups have gained significant power in the tribal agencies, seven administrative districts bordering on Afghanistan. While state institutions in [Federally Administered Tribunal Area] FATA are increasingly dysfunctional, the militants have dismantled or assumed control of an already fragile tribal structure.”).

²²⁵ STRATFOR, *supra* note 54, at 93 (citing *The Fallout from Phoenix*, STRATFOR GLOBAL INTELLIGENCE, July 2, 2008). *E.g.* On June 22, 2008, a heavily armed tactical team approached a house in Phoenix, Arizona, to serve a warrant. The team members were outfitted in the typical gear: boots, black battle dress uniforms (BDU), Kevlar

security and law enforcement personnel.²²⁶ Unfortunately the Federal Bureau of Investigation (FBI), with its mandate to pursue corruption, is stretched thin with its other responsibilities in counterterrorism and financial criminal investigations.²²⁷

The serious effort against drug trafficking has been a long struggle for close to forty years since the formation of the DEA. Since that time the United States has attacked drug trafficking by training and assisting foreign police forces and providing military assistance with equipment and training. The International Narcotics Control Strategy Report details the great efforts in capacity-building by the DEA, Customs and Border Patrol, and United States Coast Guard to assist Mexican law enforcement in combating drug trafficking.²²⁸ What is notably missing, or understated, is the Department of Defense role, and its ability to assist in those efforts. Through ten years of combat in Iraq and Afghanistan, the Department of Defense now has considerable counterinsurgency experience in dealing with similar low intensity conflict, corruption, and criminal organizations in order to support those new, less stable, democratic governments.

helmets, body armor covered by Phoenix Police Department (PPD) raid shirts. They were armed with pistols and AR-15 assault rifles equipped with Aimpoint sights for use during low light operations. Unlike normal PPD procedure, this team unleashed a barrage of fire into the windows of the residence while a second element entered to serve the warrant. In this case, it was a death warrant signed by a Mexican drug lord, intended for the target, Andrew Williams, a Jamaican drug dealer.). *See also* Amanda Lee Myers, *Arizona Beheading Raises Fears of Drug Violence*, ASSOCIATED PRESS, Oct. 29, 2010, available at http://azstarnet.com/hnews/local/crime/article_c93bd79-e887-59e5-868a-a8179cfe830b.html.

²²⁶ STRATFOR, *supra* note 54, at 223–28 (citing *A Counterintelligence Approach to Controlling Cartel Corruption*) (May 20, 2009)) (“As border security has tightened, the number of border officials charged with corruption has risen. Twenty-one CPB officers were arrested in fiscal year 2008, in contrast to four the year before.”).

[T]he problem of corruption extends further In recent years, police officers, state troopers, county sheriffs, National Guard members, judges, prosecutors, deputy U.S. marshals and even the FBI special agent in charge of the El Paso office have been linked to Mexican drug-trafficking organizations. Significantly, the cases being prosecuted against these public officials of all stripes are just the tip of the iceberg. The underlying problem of corruption is much greater.

Id.

²²⁷ *Id.* at 224.

²²⁸ *See generally* NATIONAL DRUG CONTROL STRATEGY (2010), available at <http://www.whitehousedrugpolicy.gov/publications/policy/ndcs10/ndcs2010.pdf>.

Moving away from a “war on drugs” concept to a counterinsurgency perspective in accordance with military doctrine will better enable the United States to assist Mexico in controlling the problem. As the United States winds down commitments in Afghanistan and Iraq, it is time to start focusing on a conflict which literally hits closer to home.

During the Colombian government’s multi-front war on the cartels and the FARC insurgency, the United States provided assistance in the form of the Andean Counterdrug Initiative (ACI).²²⁹ Andean Counterdrug Initiative supported then-President of Columbia Andres Pastrana’s *Plan Colombia*.²³⁰ The goal of Plan Colombia was to end the conflict with the FARC, eliminate drug trafficking and promote development.²³¹ Plan Colombia is touted as a success in saving Colombia. The current situation in Colombia is not idyllic, but due to Plan Colombia it is by no means dire.²³² Colombia has successfully

²²⁹ See generally CONNIE VEILETTE, CONG. RESEARCH SERV., RL32337, ANDEAN COUNTERDRUG INITIATIVE (ACI) AND RELATED FUNDING PROGRAMS: FY2005 (May 10, 2005).

The Andean Counterdrug Initiative is the primary U.S. program that supports Plan Colombia, a six year plan developed by President Andres Pastrana (1998-2002) of Colombia. . . . The countries considered a part of the ACI include Bolivia, Brazil, Colombia, Ecuador, Panama, Peru and Venezuela, with most funding allocated for programs in Colombia. Funds are divided between programs that support eradication and interdiction efforts, as well as those focused on alternative crop development and democratic institution building.

Id.

²³⁰ See generally CONNIE VEILETTE, CONG. RESEARCH SERV., RL32774, PLAN COLOMBIA: A PROGRESS REPORT (June 22, 2005).

The objectives of Colombia and the United States for Plan Colombia differ in some aspects, although there is a significant overlap of goals. The primary U.S. objective is to prevent the flow of illegal drugs into the United States, as well as help Colombia promote peace and economic development because it contributes to the regional security in the Andes. The primary objectives of Colombia are to promote peace and economic development, and increase security. Addressing drug trafficking is considered a key aspect of those objectives.

Id.

²³¹ *Id.*

²³² *The Current: Plan Colombia for Mexico*, Canadian Broadcast Corporation Radio broadcast (July 22, 2010) (downloaded using iTunes) (Interview by Jim Brown with

eluded capitulation to drug cartels. Cartels are no longer assassinating government officials and waging war against the national police or the military, and there is a marked improvement in government services across the country in the twelve years since the inception of Plan Colombia.²³³

The United States' response to the Mexico crisis is the Merida Initiative, which has also been described as a sort of Plan Colombia for Mexico.²³⁴ The Merida Initiative as a subset of the ACI is a "security cooperation initiative with Mexico and the countries of Central America in order to combat the threats of drug trafficking, transnational crime, and terrorism in the Western Hemisphere."²³⁵ Under the three-year program Congress approved \$400 million for Mexico the first year, \$300 million with a supplemental \$450 million in 2009, and \$450 million in 2010.²³⁶ The initiative will provide not only military aid, but also other institutional capacity-building needs such as rule of law, drug treatment, and education.²³⁷

Success of the Merida Initiative and the ACI must be viewed as a major front in the war against the Mexican drug cartels. As the Mexican government increases pressure on the cartels who are fighting over the trade routes, American and South American efforts to drastically reduce the amount of drugs coming from the Andean region may provide the

Robert Bonner, Adm'r DEA 1990–1993, then 2001–2005, Comm'r of U.S. Customs and Border Protection in Los Angeles, Ca.) (Bonner states, "It is a success story if you're Colombian because there are no organizations that threaten the legitimate institutions of the government. Colombia is hugely successful if the goal is to destroy these major criminal organizations.").

²³³ *Id.*

²³⁴ *Id.*

²³⁵ COUNCIL ON FOREIGN RELATIONS, JOINT STATEMENT ON THE MERIDA INITIATIVE, DEP'T STATE (Oct. 22, 2007), <http://www.cfr.org/mexico/joint-statement-merida-initiative/p14603>.

²³⁶ U.S. DEP'T STATE, MERIDA INITIATIVE: MYTH VS. FACT, WWW.STATE.GOV (Jun. 23, 2009), <http://www.state.gov/j/inl/rls/fs/122395.htm>.

²³⁷ *Id.* ("Transnational organized crime has a corrosive impact on all levels of society. A primary goal of the Merida Initiative is to help strengthen a broad spectrum of institutions engaged in combating criminal organizations by equipping and training police, supporting judicial reform plans, building prosecutorial capacity, and cooperating with other key agencies—including border security, corrections, customs, and when appropriate, the military. The Initiative also addresses a broad range of needs outside of law enforcement and the judiciary—including funding drug treatment centers, gang prevention activities, education, and public outreach.").

financial death blow to the major Mexican cartels that the people of Mexico so desperately need for the cartels to begin crumbling.

Recognizing there is an insurgency in Mexico, increased vigilance is necessary to prevent more armed groups from crossing the border and for the United States to make appropriate accommodation for the refugees coming across the border in accordance with our laws and international treaty obligations. To the extent the United States must put more troops in the southwest for border protection as in the late 19th and early 20th century, it should.²³⁸

Robert Bonner, former DEA Administrator, stated, “There is hope for Mexico especially if Mexico understands and applies the critical lessons from Colombia that go back 15 to 20 years ago,” and follows four steps necessary to successfully defeat the cartels:

[First] Need to have an understood and shared goal. Not just in Mexico . . . President Calderon and the political leadership do understand the most important objective here is to dismantle and destroy these major drug cartels in Mexico that are a threat to the state itself . . . through corruption and intimidation seek to . . . operate with impunity and beyond the rule of law. It is important that the US understand this goal, sometimes we get caught up on the goal of eradicating drug trafficking. . . . The real goal and the U.S. needs to share this goal, is to destroy and dismantle the major drug cartels.

[Second] Need to use a proven strategy. Use the Kingpin Strategy, not just identifying locating and apprehending the kingpins, top lieutenants and potential successors . . . but also understands how you weaken these organizations by attacking vulnerabilities (cash flow and so on).

²³⁸ Arguments concerning posse comitatus are beyond the scope of this paper; however, for a good article on this issue, see Major Craig T. Trebilcock, *The Myth of Posse Comitatus*, U.S. Army Reserve, (Oct. 2000), at <http://florida.tenthamentendmentcenter.com/2011/12/the-myth-of-posse-comitatus-the-feds-have-not-felt-bound-by-this-for-years> (“The Posse Comitatus Act was passed in the 19th century when the distinction between criminal law enforcement and defense of the national borders was clearer, the rise of militant transnational organized criminal groups like Mexican drug cartel insurgency is a clear example of how this distinction is now blurred, or even irrelevant.”).

[Third] Can't just do it using the military, [but the military has] a role because the cartels have highly, heavily armed paramilitary enforcement groups . . . [the Mexicans must] Develop evidence, confidential informants, electronic surveillance, that's principally a law enforcement job.

[Fourth] In longer term, Mexico needs to reform its police, prosecutorial, judicial, and even penal institutions to make them more resistant to corruption, professionalize them, so that ultimately on a sustained basis, eliminate these very large and powerful drug organizations. This is a very daunting challenge for Mexico because it is a large problem, and it takes time to do these transformations, it can be done, in fact it has to be done.²³⁹

Reforming Mexico is as much a human rights issue as it is a law enforcement issue. Mexico has the laws, treaty obligations, and even the funding, but has not yet been successful in fully implementing redress of human rights abuses by the Mexican military.²⁴⁰ As the United States assists Mexico in fighting the war, the United States must also maintain its own values and position on human rights in order to better develop Mexico's. In light of the current war the United States must strike a balance between adhering to the basic protections of Additional Protocol II, and being unencumbered by U.S. human rights laws when assisting troubled nations like Mexico.²⁴¹

²³⁹ *Plan Colombia for Mexico*, *supra* note 232.

²⁴⁰ See generally Human Right Watch, *Uniform Impunity: Mexico's Misuse of Military Justice to Prosecute Abuses in Counternarcotics and Public Security Operations* (Apr. 2009), <http://www.hrw.org/en/reports/2009/04/28/uniform-impunity> (E.g., "Military investigations into grave human rights abuses committed by the military over the past few decades have routinely failed to hold perpetrators accountable, contributing to a culture of impunity."). In this report the Mexican military attorney general and human rights director were unable to provide any examples of cases where serious human rights violation committed by the military that were dealt with by military courts resulting to convictions.

²⁴¹ E.g., Military Construction Appropriations Act, Pub. L. No. 106-246, § 3201, 114 Stat. 511 (2000) (providing provisions of human rights requirements); see Department of Defense Appropriations Act, Pub. L. No. 106-259, § 8092, 114 Stat. 656 (2000) ("None of the funds made available by this Act may be used to support any training program involving a unit of the security forces or a foreign country if the Secretary of Defense has received credible information from the Department of State that [a member of such] unit has committed a gross violation of human rights, unless all necessary corrective steps

The assistance effort cannot be America's burden alone, and the United Nations can play an important role in a post conflict Mexico as it has in other regions around the world.²⁴² The UN brings expertise in disarmament, demobilization, reinsertion and reintegration, which will be helpful to bring the many young Mexicans who were seduced by the drug cartels back into a rule-of-law-based society,²⁴³ and it is incumbent upon the Mexican government to ensure that it is a reformed and promising society with prospects for a future without the allure of drug cartels.

V. Conclusion

*Continued success forces the U.S., Colombia, Mexico, and other regional partners to think about how to take on the challenge regionally and how we implement a truly holistic hemispheric policy. Because if not, all we will be doing is playing Whack-A-Mole.*²⁴⁴

The Mexican Ambassador has fittingly described the solution to the drug war in Mexico. This is not just their war, but a regional issue that

have been taken.”). See also MERIDA INITIATIVE, *supra* note 252. The Merida Initiative also provides for human rights accountability in Mexico and Central America:

Further professionalize their law enforcement agencies; Improve the effectiveness of citizen participation councils to help oversee law enforcement agencies and improve the effectiveness of community policing; Establish or strengthen offices of accountability and oversight within government agencies; Conduct ethics and human rights training at law enforcement academies; and Establish links between bar associations and law schools across our borders as part of law school curriculum development and continuing legal education development.

Id.

²⁴² The United Nations is and has been involved in many post conflict zones, such as Bosnia, Rwanda, The Democratic Republic of the Congo, and East Timor. See *List of Peacekeeping Missions 1948-2011*, available at <http://www.un.org/en/peacekeeping/documents/operationslist.pdf>.

²⁴³ See generally, U.N. OPERATIONAL GUIDE TO INTEGRATED DISARMAMENT, DEMOBILIZATION AND REINTEGRATION STANDARDS (2010), available at http://unddr.org/docs/Operational_Guide_REV_2010_WEB.pdf.

²⁴⁴ R.M. Schneiderman, *Mexico Fights Back*, NEWSWEEK, Nov. 8, 2010, <http://www.newsweek.com/2010/11/08/mexican-ambassador-speaks-out-on-drug-war.html> (quoting Arturo Sarukhan, Mexican Ambassador to the United States).

requires a regional solution. The supremacy of these criminal organizations will destabilize the hemisphere if not checked.

This article argues that recognition of an internal armed conflict in Mexico will assist the region in reducing violence. The solution to the violence lies in breaking down the cartels from major “armed groups” to “mere banditry.” That goal of breaking down the cartels into minor street gangs can only be achieved with concerted military force rather than just law enforcement measures.

Under the framework of Common Article 3 of the Geneva Convention, Mexico suffers from an internal armed conflict, and as a party to the convention, Mexico incurs legal obligations. Within that analysis, a review of the background of the conflict, thresholds for non-international armed conflict, and the legal status of criminal organizations operating in the conflict zones has demonstrated that all the cartels are an insurgency. By their own actions, the cartels meet the criteria as an armed group and criminal insurgency party to an internal armed conflict, thereby placing the Mexican government as a “High Contracting Party” under a *de facto* Common Article 3 conflict. In recognizing this state of insurgency, the Mexican government must use whatever means within international law standards to prosecute the war against the cartels as a military, rather than law enforcement, operation.