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## Drug War: International Law and Counter-Narcotics

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## COMMENT

# DRUG WAR: INTERNATIONAL LAW AND COUNTER-NARCOTICS

JASON RAETHER\*

### INTRODUCTION

In 2006, the fishermen of Ondame, a small fishing village in Guinea-Bissau, came across something that would change their country forever.<sup>1</sup> A smuggling boat had sunk offshore and packages of pure Columbian cocaine, some weighing as much as thirty kilograms, were scooped up by the villagers.<sup>2</sup> Not knowing what they had, some villagers used the powder as fertilizer, killing their crops in the process, while others tried it as food seasoning.<sup>3</sup> When two men showed up with \$1 million in buy-back cash, Guinea-Bissau's transformation into a narco-state had begun.<sup>4</sup> Within eighteen months, £150 million worth of cocaine was flowing from Guinea-Bissau each month, equal to the worth of the country's GDP over the course of an entire year.<sup>5</sup> Corruption ran rampant and, at one point, a seized stash of 674 kilograms of cocaine disappeared from Guinea-Bissau's treasury after men in military uniforms opened the vault for "counting."<sup>6</sup> Meanwhile, two Columbians caught with the cocaine were set free.<sup>7</sup>

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1. Colin Freeman, *The African Gateway for UK Cocaine*, THE TELEGRAPH, June 10, 2007, <http://www.telegraph.co.uk/news/worldnews/1554135/The-African-gateway-for-UK-cocaine.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Colin Freeman, *The African Gateway for UK Cocaine*, THE TELEGRAPH, June 10, 2007, <http://www.telegraph.co.uk/news/worldnews/1554135/The-African-gateway-for-UK-cocaine.html>.

In 2010, on the other side of the ocean from Guinea-Bissau, a group of high school students was celebrating a friend's fifteenth birthday.<sup>8</sup> The birthday boy and his family lived in Ciudad Juárez, a city where two of Mexico's most powerful Drug Trade Organizations (DTOs) battle for control.<sup>9</sup> More than 2000 people had already died that year in violent attacks that took place in bars and restaurants, so the boy's mother believed it would be safer to hold the celebration at their house.<sup>10</sup> A gunman arrived during the party and asked about a car parked in front of the house.<sup>11</sup> When no one answered his questions, he opened fire with a pistol, killing thirteen people at the party, most of whom were high school students.<sup>12</sup> The attacker escaped and the police had no information with which to track down the killer.<sup>13</sup> Given the level of violence in the city and the ability of DTOs to kill with relative impunity, it is unlikely any informants will be stepping forward.<sup>14</sup> Sadly, this story is nothing new in a country plagued by horror stories of drug-related violence.

This Comment will analyze the options for an international, and intra-national, response to the drug trade through the rubric of international law. In Part I, this Comment will examine traditional concepts of statehood and how those concepts are distorted in countries called "narco-states," where the flow of narcotics dwarfs any legitimate economy. In doing so, the Comment will distinguish between "pure narco-states," or countries where the narcotics trade has virtually dominated all aspects of government, and "hybrid narco-states," or countries where the presence of narcotics have subverted but have not eliminated the rule of law. The Comment will then examine how the U.N. Charter applies to narco-states, and, specifically, how it hinders international drug-fighting efforts.

In Part II, the Comment will shift focus from an international to an intra-national response to the narcotics trade. It will begin by using Mexico as an example of a state ripped apart by drug-fueled violence, describing some of the DTOs operating within the country as well as efforts made so far to restore the rule of law. The Comment will define International Humanitarian Law (IHL) and explain some of its sources. The Comment will then apply IHL, particularly customary IHL regarding non-international armed conflicts, to Mexico's struggles to curb the DTO violence. Finally,

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8. Olivia Torres, *Mexico: 13 Dead in Massacre at House Party in Juárez*, EL PASO TIMES, Oct. 23, 2010, [http://www.elpasotimes.com/newupdated/ci\\_16415786](http://www.elpasotimes.com/newupdated/ci_16415786).

9. *Id.* Because they are not involved in the price-fixing and other collusive economic activity, the organizations are more accurately termed Drug Trade Organizations rather than drug cartels. JUNE S. BEITTEL, CONG. RESEARCH SERV., R41576, MEXICO'S DRUG TRAFFICKING ORGANIZATIONS: SOURCE AND SCOPE OF THE RISING VIOLENCE 1 (2011).

10. Torres, *supra* note 8.

11. *Id.*

12. *Id.*

13. *Id.*

14. *See id.*

the Comment will detail how IHL changes the ways in which Mexico may confront the DTOs within its borders. Mexico may respond to DTOs as enemies in war while DTOs are subject to additional criminal sanctions within the framework of international law. While the U.N. Charter limits the options available to third parties in confronting narco-trafficking, this Comment will show that IHL provides Mexico with considerable latitude in confronting non-state actors operating within its borders.

## I. U.N. CHARTER LAW

### A. *Narcotics and Traditional Concepts of Statehood*

According to Hobbes, a state is a contract between citizens and a governing body, whereby citizens transfer power to a “commonwealth” in return for “peace and common defence.”<sup>15</sup> More recently, Max Weber defined a state as a “compulsory political association with continuous organization” that has an “administrative staff [which] successfully upholds a claim to the *monopoly* of the *legitimate* use of physical force in the enforcement of its order.”<sup>16</sup> Legitimate uses of physical force include maintaining law and order within the state, defending against external attacks, caring for the bodily and spiritual welfare of citizens at home, and protecting citizens abroad.<sup>17</sup> A narco-state is created when the prevailing influence of the drug trade has distorted the traditional concept and legitimate functions of statehood. The drug trade affects states differently, however, and it is important to distinguish between two different types of narco-states: pure narco-states and hybrid narco-states.

#### 1. *Pure Narco-States*

In a pure narco-state, the state is subsumed by the drug trade and the legitimacy of its government is in question. Third-world nations are particularly susceptible to corruption as drug traffickers can offer government officials many times their yearly salary in bribes.<sup>18</sup> High-ranking officials may even become directly involved in the drug trade, such as in Guinea-Bissau where the military is run by known drug traffickers.<sup>19</sup> Pure narco-states distort the principles of statehood in many ways. In a pure narco-state, the social contract is broken through a steady process of corruption that eventually reaches the highest echelons of a state’s government. A pure narco-

15. THOMAS HOBBS, *LEVIATHAN* 109 (Edwin Curley ed., Hackett Publ’g Co. 1994) (1668).

16. MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 154 (Talcott Parsons ed., Collier-Macmillan Canada, Ltd. 1st paperback ed. 1964).

17. See Alfred von Verdross, *Forbidden Treaties in International Law: Comments on Professor Garner’s Report on “The Law of Treaties”*, 31 AM. J. INT’L L. 571, 574 (1937) (listing the minimum functions of a state).

18. See U.N. OFFICE ON DRUGS AND CRIME, *WORLD DRUG REPORT 2010*, 242 (U.N. Sales No. E.10.XI.13 2010).

19. *Id.*

state may fulfill some of the basic functions of governance, but only in so far as they advance profits for the de facto government.<sup>20</sup> When the basic functions of governance get in the way of profit, those basic functions will be dropped.<sup>21</sup> A pure narco-state may have a monopoly on the use of force, though Weber's definition of statehood does not apply since the pursuit of illicit profits is not a legitimate use of force.<sup>22</sup>

Despite a lack of legitimacy, pure narco-states retain statehood status. Traditional international law holds that states only become extinct in a limited number of circumstances: the state incorporates into another, the state is annexed by another state, the state fuses into one or more other states, or the state is dismembered into smaller units.<sup>23</sup> The transition of a state into a pure narco-state fits none of those categories. Thus, pure narco-states maintain their status as a state, even though they do not conform to any traditional concept of statehood.

## 2. *Hybrid Narco-States*

Hybrid narco-states exist when a state's government retains a core of legitimacy, but its resources are overwhelmed by drug-funded non-state actors. Belize serves as an example of a hybrid narco-state. Up to 37% of the cocaine destined for the U.S. passes through the borders of this tiny Central American country.<sup>24</sup> Belize seizes large amounts of cocaine, however, at one time capturing 2.4 tons in a single seizure.<sup>25</sup> Thus despite the huge amount of cocaine passing through its borders, the government of Belize has not been completely subverted by the drug trade and Belize could not be considered a pure narco-state. While there is likely some corruption present, the core of the government still strives to uphold Hobbes's social contract.

Hybrid narco-states may be further distinguished from pure narco-states based on the motives of the drug-traffickers. Unlike a pure narco-state, where the government and drug-traffickers work hand in hand to maximize profit, the drug trade is used in some hybrid narco-states to fuel an insurgency that is actively fighting legitimate government forces. This is the case in Columbia, where the Revolutionary Armed Forces of Colombia (Spanish: Fuerzas Armadas Revolucionarias de Colombia or "FARC") use the sale of cocaine to finance its operations.<sup>26</sup> Other examples include Af-

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20. Government involvement in drug trafficking can actually decrease violence since high-level corruption obviates the need for open conflict. *See id.* at 244.

21. *See id.* at 245 ("Any sudden change, whether it be in volumes or players, seems to have the potential to set off a violent competition for opportunity.")

22. *See* WEBER, *supra* note 16, at 154.

23. CHIARA GIORGETTI, A PRINCIPLED APPROACH TO STATE FAILURE 52 (2010).

24. U.N. OFFICE ON DRUGS AND CRIME, CRIME AND DEVELOPMENT IN CENTRAL AMERICA 47-48 (U.N. Sales No. B.07.IV.5 2007).

25. *Id.*

26. WORLD DRUG REPORT 2010, *supra* note 18, at 71.

ghanistan and Myanmar, where rebel forces are funded by heroin production.<sup>27</sup> While the actions of these rebel groups may be viewed as a domestic and not an international problem, it is important to note that the majority of the drugs produced within a narco-state (hybrid or otherwise) are destined for the international market.<sup>28</sup>

Any country heavily afflicted by the drug trade will contain elements of both pure and hybrid narco-states. Hybrid narco-states will often have massive government corruption,<sup>29</sup> while pure narco-states will experience conflict between non-state actors and legitimate, if ineffective, government forces.<sup>30</sup> It is important to keep these categories distinct for the purpose of applying international law, though, and the analysis that follows will address pure and hybrid narco-states as separate categories.<sup>31</sup>

### B. State Sovereignty

At the outset, the U.N. Charter explains that the U.N. exists “[t]o maintain international peace and security.”<sup>32</sup> Specifically, the Charter provides that the U.N. should be engaged “in solving international problems of an economic, social, cultural, or humanitarian character.”<sup>33</sup> Based on these goals, it would seem the U.N. Charter would be a perfect tool for confronting narco-states since they are a problem of an economic, social, cultural, and humanitarian character. However, these lofty purposes are in tension with another guiding principle of the U.N. Charter—that of sovereign equality between all member states.<sup>34</sup> To protect this sovereignty, the Charter forbids “the threat or use of force against the territorial integrity or political independence of any state.”<sup>35</sup>

27. *Id.* at 232.

28. *See id.* at 38–39 (explaining that Afghanistan provides 85% of the global heroin supply, though it accounts for only 7% of the actual demand); *see also* CRIME AND DEVELOPMENT IN CENTRAL AMERICA, *supra* note 24, at 49 (illustrating that only a small percentage of cocaine flow remains in some transit countries).

29. While accurate figures on government corruption are difficult to track, perception of corruption in public figures ranges from 63% to 77% in Central American countries. CRIME AND DEVELOPMENT IN CENTRAL AMERICA, *supra* note 24, at 71.

30. In Guinea-Bissau, Tagme na Wai, the head of the army, was killed in an attack that was blamed on the president and, in return, forces loyal to Tagme na Wai attacked the presidential palace and killed the president. WORLD DRUG REPORT, *supra* note 18, at 243. Though admittedly both groups could be labeled state actors, the men carrying out the attacks were clearly not acting within the apparatus of the state.

31. This article will not attempt the difficult task of determining where a particular state resides on the pure narco-state / hybrid narco-state spectrum. If one wishes to make this determination, relevant factors would include the level of involvement of high-ranking officials and the influence narcotics have on the armed forces. *See id.* at 244.

32. U.N. Charter art. 1, para. 1.

33. *Id.* at art. 1, para. 3.

34. *Id.* at art. 2, para. 1.

35. *Id.* at art. 2, para. 4.

Because there is no language in the U.N. Charter qualifying the sovereignty of questionably legitimate states, the principle of state sovereignty prevents foreign states affected by the drug trade from using armed force within narco-states in order to combat the international drug trade. The International Court of Justice (ICJ) spoke to the conflict between state sovereignty and crime-fighting efforts in *Costa Rica v. Nicaragua*.<sup>36</sup> There, Costa Rica instituted proceedings against Nicaragua, asserting that Nicaragua was violating the principle of state sovereignty by sending armed forces into its territory.<sup>37</sup> Nicaragua disputed the allegation that it had crossed any territorial lines.<sup>38</sup> It also argued that it was necessary to place security forces in the disputed territory in order to combat drug trafficking in the area.<sup>39</sup> The ICJ recognized the need to prevent crime, but forbade both parties from sending security forces into the disputed territory.<sup>40</sup> Thus, state sovereignty took precedence over crime prevention, even when ownership of the targeted territory was in dispute.

In most cases, narco-states will be protected by clear borders and the argument for state sovereignty will be even stronger. This is especially true in the case of pure narco-states, where the cartel acting as the de facto government is directly protected by state sovereignty. The drug cartels in hybrid narco-states will also be protected by state sovereignty unless the legitimate government of the host state explicitly invites third-party intervention.<sup>41</sup> Even if a host state invites third-party intervention, it may be rescinded, as was demonstrated in 2008 when President Morales expelled the U.S. Drug Enforcement Agency from Bolivia.<sup>42</sup> Because the Charter specifically prevents the U.N. from intervening “in matters which are essentially within the domestic jurisdiction of any state,”<sup>43</sup> governments in a narco-state may claim that the issue is domestic and thus outside the scope of the U.N.’s authority.

### C. *The Security Council*

According to Chapter VII of the U.N. Charter, the Security Council may take action when it determines there is a “threat to the peace, breach of

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36. Certain Activities Carried Out by Nicaragua in the Border Area (*Costa Rica v. Nicar.*), 2011 I.C.J. 150, ¶ 78 (Mar. 8) (Order), available at <http://www.icj-cij.org/docket/files/150/16324.pdf>.

37. *Id.* ¶ 2. Costa Rica made other allegations, though they are not relevant to the discussion here.

38. *Id.* ¶ 70.

39. *Id.* ¶ 72.

40. *Id.* ¶¶ 78, 86.

41. See Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT’L REV. RED CROSS 69, 72 (2009).

42. *Country watchlist: Bolivia*, ECONOMIST INTELLIGENCE UNIT – BUS. LATIN AM., NOV. 10, 2008, at 13.

43. U.N. Charter art. 2, para. 7.

the peace, or act of aggression.”<sup>44</sup> Acceptable measures include the imposition of sanctions,<sup>45</sup> and “such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”<sup>46</sup> Except for a limited exception discussed below, the Security Council is the only venue the U.N. Charter provides for countries that wish to use force in response to a threat.

Unfortunately, the Security Council is unlikely to become an effective component in the international war on drugs. First, sanctions against narco-states would be useless. In the case of a pure narco-state, the majority of the government’s funding comes from smuggling illegal goods and any further ban on trade would be moot. For similar reasons, non-state actors in a hybrid state would be unaffected by sanctions. Additionally, in hybrid narco-states such as Belize, the sanctions could have the effect of punishing a legitimate government. The Security Council has the power to authorize the use of force, but since the end of the Cold War, it has rarely done so.<sup>47</sup> Even when the Security Council has acted, its response has been sluggish and poorly implemented, as was shown in Somalia, Yugoslavia, and Rwanda.<sup>48</sup> Because narco-states adapt quickly in the face of challenge,<sup>49</sup> it is unlikely the Security Council will provide an effective response to the problems they pose.

#### D. *The Right of Self-Defense*

Article 51 of the U.N. Charter allows self-defense if “an armed attack occurs against a Member of the United Nations.”<sup>50</sup> This right does have limitations, however. First, the right to self-defense may not be used when “the Security Council has taken measures necessary to maintain international peace and security.”<sup>51</sup> In other words, the Security Council of the United Nations may preempt a state’s ability to deal with a perceived threat. Other requirements in the use of self-defense include necessity, proportionality, and immediacy.<sup>52</sup> The exact threshold as to when a state has the right to respond with force according to Article 51 has not been settled, but it is unlikely one can aggregate small incidents in order to trigger the right to respond with force in self-defense.<sup>53</sup>

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44. *Id.* at art. 39.

45. *Id.* at art. 41.

46. *Id.* at art. 42.

47. GIORGETTI, *supra* note 23, at 166.

48. *Id.* at 170; NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 44 (2011).

49. WORLD DRUG REPORT 2010, *supra* note 18, at 245.

50. U.N. Charter, art. 7, para. 51.

51. *Id.*

52. LUBELL, *supra* note 48, at 43–44.

53. *Id.* at 50, 53.



Pure narco-states are unlikely to risk a profitable enterprise by attacking a foreign state on a scale that would trigger the right to self-defense. Pure narco-states may intimidate or kill citizens of a foreign state and the drugs which they distribute may damage another country's social landscape, but this is not enough to trigger the right to self-defense. As an example, in 1988, the U.S. began planning an invasion of Panama.<sup>54</sup> The purpose of this invasion was ostensibly to apprehend Manual Noriega, a former intelligence officer who had risen to power and who had cultivated ties with known Columbian drug traffickers.<sup>55</sup> When the Security Council considered whether it should pass a resolution condemning the subsequent U.S. invasion of Panama, the U.S. argued that its invasion of Panama was an act of self-defense, triggered by the killing of a serviceman, the terrorizing of a U.S. military couple, and the intimidation and instability engineered by Noriega.<sup>56</sup> The U.S. ambassador also described Noriega's "first deal with narcotic peddlers" as an act of war due to the deleterious effects of drugs on the nation's youth.<sup>57</sup> The resolution condemning the U.S. invasion of Panama received ten favorable votes out of fourteen.<sup>58</sup> This lack of support for a broad interpretation of Article 51 renders it unlikely that the right to self-defense could be extended to cover the problems created by pure narco-states.

Because conflict is more likely without high-level corruption,<sup>59</sup> non-state actors in hybrid narco-states may engage in acts of violence that could reach the threshold of triggering self-defense under Article 51. The ICJ has ruled that self-defense may not be invoked in response to a non-state actor,<sup>60</sup> though the Court in later cases raised questions about this ruling.<sup>61</sup> Given state practice and the rising prevalence of non-state actors on the world stage, as well as the events of September 11, 2001, it would seem Article 51 would apply to armed attacks by non-state actors.<sup>62</sup> Regardless, this issue is still unresolved.<sup>63</sup> Due to the lack of legal certainty and the high threshold to trigger its application, Article 51 provides a poor remedy for

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54. RONALD H. COLE, OPERATION JUST CAUSE: THE PLANNING AND EXECUTION OF JOINT OPERATIONS IN PANAMA 7 (1995).

55. *Id.* at 6, 7. Panama was also considered an essential military asset because the Panama Canal would allow naval ships to move quickly between the Pacific and Atlantic in the event there was a conflict in Western Europe or the Middle East. *Id.* at 5.

56. U.N. SCOR, 45th Sess., 2902d mtg. at 9–10, U.N. Doc. S/PV.2902 (1989).

57. *Id.*

58. *Id.* at 18–20. The four votes in opposition were all veto votes, however, rendering the resolution moot. *Id.*

59. WORLD DRUG REPORT 2010, *supra* note 18, at 244.

60. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9, 2004).

61. LUBELL, *supra* note 48, at 33.

62. *Id.* at 34.

63. *Id.*

countries looking to implement armed forces in response to non-state actors in hybrid narco-states.

Narco-states present a unique challenge for the international community. They are a distortion of traditional statehood and they present tremendous obstacles to legitimate state objectives. Though it is posited as a document designed to promote international peace and security, the U.N. Charter creates numerous obstacles for countries looking to employ all necessary means to combat drug trafficking. Thus, to develop a legal framework that could provide that basis for a military intervention in a narco-state, countries must look elsewhere.

## II. INTERNATIONAL HUMANITARIAN LAW

As demonstrated above, the U.N. Charter does not provide state actors with effective tools to confront Drug Trade Organizations (DTOs) outside their borders. Fortunately, few countries are pure narco-states and even those with a substantial drug trade still have a legitimate core to their government. In these situations, the legitimate governments of hybrid narco-states may represent the best opportunity for reducing drug-trafficking. These countries may resort to their domestic laws to confront drug-traffickers, but there is another body of law that applies to all states. Called International Humanitarian Law (IHL), or alternately the law of war, this body of law is derived from the customary practices of nations and has been codified to some extent in the Geneva Conventions and its related protocols. IHL determines the ability of the state-actor to respond to threats and, when a situation rises to the level of an armed conflict, IHL grants the state-actor broad latitude in dealing with those threats.

This part will use Mexico as an example of a hybrid narco-state torn by drug-fueled violence but which has a legitimate government that is opposed to the drug trade. Because it is plagued by violence but is still involved in the fight to end drug trafficking, Mexico serves as an ideal example of a hybrid narco-state that would benefit from the application of IHL. This part will start with an examination of the DTOs functioning in Mexico along with some explanation of the effects they have had on the country. It will then examine the sources of IHL including some of the treaty law as well as customary international law. Then this part will apply IHL, specifically the law of non-international armed conflict, to the conflict between state actors and DTOs. Finally, this part will show how IHL provides Mexico with the right to use military action to confront DTOs, subject to certain limitations.

## A. *The Conflict with DTOs in Mexico*

### 1. *Organization of DTOs*

Before evaluating the framework of law that applies to the conflict in Mexico, it is useful to examine the actors involved. While the Mexican government is clearly a state actor, the categorization of DTOs is not so easy. State actors are defined by their relationship to a state government and are either a direct branch of the government or an organization that is controlled by the government.<sup>64</sup> Though DTOs occasionally work with other DTOs, they are independent organizations and, as independent organizations, they are not part of a branch of government nor is there any sign that they are controlled by a state-actor.<sup>65</sup> For these reasons, DTOs should be qualified as non-state actors.

Currently, there are seven major DTOs operating in Mexico.<sup>66</sup> These DTOs have elements of organized crime, such as organizing into distinct branches with subordinate cells that operate throughout Mexico and the U.S.<sup>67</sup> DTOs that were once hierarchical and vertical organizations are becoming multi-nodal and horizontal in structure, some operating with independent cell-like structures.<sup>68</sup> Mexican DTOs focus only on wholesale distribution of drugs, leaving retail sales to localized street gangs.<sup>69</sup> In addition to drug trafficking, Mexican DTOs have ties to human trafficking, arms smuggling, auto theft, and kidnapping.<sup>70</sup> To accomplish their goals, DTOs use a combination of violence and bribery.<sup>71</sup>

### 2. *Specific Mexican DTOs*

The Sinaloa DTO is currently the dominant DTO and is estimated to control up to 45% of the drug trade in Mexico.<sup>72</sup> The Sinaloa cartel gained this position after wresting the Gulf Cartel, the previously dominant cartel, from its seat of power in 2003.<sup>73</sup> Sinaloa has a de-centralized structure of linked smaller organizations.<sup>74</sup> While this means that it is more prone to internal conflict, this loose structure allows it to adapt more rapidly to the

64. See LUBELL, *supra* note 48, at 15.

65. See COLLEEN W. COOK, CONG. RESEARCH SERV., RL 34215, MEXICO'S DRUG CARTELS 1 (2007).

66. *Id.*

67. *Id.* at 4–5.

68. BEITTEL, *supra* note 9, at 18.

69. COOK, *supra* note 65, at 6.

70. *Id.*

71. BEITTEL, *supra* note 9, at 4.

72. *Id.* at 8; see Richard Marosi, *Unraveling Mexico's Sinaloa Drug Cartel*, L.A. TIMES, July 24, 2011, <http://articles.latimes.com/2011/jul/24/local/la-me-cartel-20110724> (describing the Sinaloa drug cartel as “Mexico’s most powerful organized crime group”).

73. Marosi, *supra* note 72.

74. BEITTEL, *supra* note 9, at 6.

highly competitive and unstable drug market.<sup>75</sup> More so than the other DTOs, Sinaloa is regarded as having an international presence stretching throughout South America, Europe, and West Africa.<sup>76</sup> Along with other major DTOs, Sinaloa has employed armed groups to conduct assassinations and kidnappings and to collect payments.<sup>77</sup>

The Zetas were once employed by the Gulf Cartel to provide enforcement and security.<sup>78</sup> Originally formed by officers who deserted from the Mexican Special Forces in the late 1990s,<sup>79</sup> the Zetas have expanded to include former federal, state, and local law enforcement personnel.<sup>80</sup> The Zetas operate as a private army and were among the first criminal groups in Mexico to employ military tactics and heavy weapons, including fifty-caliber machine guns, grenade launchers and ground-to-air missiles.<sup>81</sup> In 2009, the Zetas splintered off from their former employers and became an independent DTO.<sup>82</sup> The Zetas have since been involved in back and forth battles with the Gulf Cartel as the Gulf Cartel struggles with a lack of consistent leadership.<sup>83</sup> In addition to the usual abductions and murders, the ensuing battle has created an environment of urban warfare with commando-style raids on state prisons, attacks on military posts, and blockades of major roads.<sup>84</sup>

Perhaps the strangest DTO is La Familia Michoacana (LFM). LFM started as a vigilante group before it moved on to methamphetamine production and smuggling.<sup>85</sup> It also traffics in cocaine, marijuana, and heroin.<sup>86</sup> LFM is known for its use of extreme symbolic violence and the pseudo-ideological or religious justifications for its actions.<sup>87</sup> It has therefore been described as “a hybrid fusion of criminal drug enterprise entity and Christian evangelical beliefs.”<sup>88</sup> LFM has donated food and medicine to the

75. *Id.*

76. *Id.* at 9.

77. COOK, *supra* note 65, at 6, 8.

78. Jeremy Roebuck, *Gulf Cartel, Zetas gang up on each other as their arrangement dies, authorities say*, THE MONITOR, Mar. 9, 2010, available at <http://usmexico.blogspot.com/2010/03/violence-result-of-fractured.html> (last visited Jan. 30, 2013).

79. COOK, *supra* note 65, at 7.

80. *Id.* at 7.

81. Corey Flintoff, *A Look at Mexico's Drug Cartels*, NPR (Apr. 16, 2009), <http://www.npr.org/templates/story/story.php?storyId=103178523>.

82. BEITTEL, *supra* note 9, at 10.

83. Roebuck, *supra* note 78.

84. BEITTEL, *supra* note 9, at 10.

85. *Id.* at 11.

86. *Id.* at 12.

87. *Id.*

88. *Id.* (quoting Robert J. Bunker & John P. Sullivan, *Cartel Evolution Revisited: Third Phase Cartel Potentials and Alternative Futures in Mexico*, 21 SMALL WARS & INSURGENCIES 30, 45 (2010)).

poor.<sup>89</sup> Despite these good deeds, though, LFM is considered Mexico's most violent DTO and often uses the same techniques as the Zetas.<sup>90</sup>

### 3. Mexico's Response

The horror story described in the Introduction is by no means an isolated event. In January 2010, fifteen people, mostly teenagers, were killed at another private party in Ciudad Juárez.<sup>91</sup> In August 2010, seventy-two migrants passing through Mexico were massacred after they refused to transport drugs.<sup>92</sup> Overall, between 2006 and 2011, 45,515 people were killed in Mexico as a result of organized crime and drug trafficking.<sup>93</sup> This number includes 15,273 murders in 2010 alone.<sup>94</sup> Included in that figure are twelve Mexican mayors and a gubernatorial candidate.<sup>95</sup> The Mexican government reports that 90% of the casualties comprise individuals involved in the drug trade, though this figure has been questioned.<sup>96</sup> Though DTO activity has been highly concentrated along drug-trafficking routes and in a small percentage of Mexican cities, DTO-related violence goes far beyond that associated with conventional organized crime.<sup>97</sup>

Most DTO-murders go unsolved because Mexican authorities lack the investigative capacity to solve drug murders.<sup>98</sup> Mexican forces managed 27,000 arrests in 2010,<sup>99</sup> though arrests of DTO members only have a 1–2% chance of leading to a conviction.<sup>100</sup> Some observers already consider parts of Mexico to be lost to DTO control,<sup>101</sup> and public opinion polls suggest that 49–59% of Mexican citizens believe that DTOs are winning the drug war.<sup>102</sup>

Former Mexican President Felipe Calderón acknowledged the dangers that DTOs pose and called drug violence a threat to the Mexican state.<sup>103</sup> To deal with this problem, he deployed more than 50,000 military personnel

89. *Id.*

90. *Id.*

91. Torres, *supra* note 8.

92. BEITTEL, *supra* note 9, at 1.

93. Lourdes Cardenas, *Mexico's Decision 3-day Series: Combating Cartels Top Priority for New Leader*, EL PASO TIMES, June 26, 2012, [http://www.elpasotimes.com/news/ci\\_20937917/combating-cartels-top-priority-new-leader](http://www.elpasotimes.com/news/ci_20937917/combating-cartels-top-priority-new-leader); see Sara Miller Llana, *Mexico Drug War Death Toll Up 60 Percent in 2010. Why?*, CHRISTIAN SCI. MONITOR, Jan. 13, 2011, <http://www.csmonitor.com/World/Americas/2011/0113/Mexico-drug-war-death-toll-up-60-percent-in-2010.-Why>.

94. Miller Llana, *supra* note 93.

95. BEITTEL, *supra* note 9, at 1.

96. *Id.* at 13.

97. *Id.* at 13, 25.

98. See COOK, *supra* note 65, at 15.

99. Miller Llana, *supra* note 93.

100. BEITTEL, *supra* note 9, at 25–26.

101. *Id.* at 2.

102. *Id.* at 23; Miller Llana, *supra* note 93.

103. COOK, *supra* note 65, at Summary.

to confront DTOs.<sup>104</sup> Calderón's supporters maintained that a military-led response was necessary to confront DTOs who are themselves armed with powerful assault weapons.<sup>105</sup> This view is backed by the public, of which 80% still believe that a military-led response is necessary to deal with the DTOs.<sup>106</sup> The U.S. has supplied the Mexican government with \$1.6 billion in aid through the Mérida Initiative, a program designed by the Bush Administration and continued by President Obama that provides the Mexican government with helicopters, surveillance aircraft, and communications technology.<sup>107</sup>

Current Mexico president, Enrique Peña Nieto, has indicated that he would place less reliance on a military response to DTOs than former President Calderón.<sup>108</sup> Instead, he has proposed a soldier-officer police force he calls a "national gendarmerie," though most consider this to be no different than the forces used by President Calderón.<sup>109</sup> A different uniform for government officers will have little impact on the de facto drug war taking place in Mexico's streets. Not surprisingly, analysts expect Mexico to continue its efforts to stamp out DTO-related violence, regardless of whether this effort is led by a civilian police force, the military, or something in between.<sup>110</sup>

### B. Sources of International Humanitarian Law

International Humanitarian Law is a subset of international law.<sup>111</sup> IHL governs states engaged in armed conflict and it is meant to protect persons not engaged in combat as well as limiting the ways in which wars are fought.<sup>112</sup> While it is derived from ancient practices and religion, its universal codification began in the nineteenth century when, at the request of President Abraham Lincoln, Francis Lieber drafted what became known

104. BEITTEL, *supra* note 9, at 2, 18.

105. *Id.* at 19–20.

106. Cardenas, *supra* note 93.

107. BEITTEL, *supra* note 9, at 32; Erin Kelly, *Mexican Election May Change How War on Drugs is Fought*, ARIZ. REPUBLIC, Mar. 9, 2012, at A1 [hereinafter *Mexican Election*].

108. *Mexican Election*, *supra* note 107; Tim Padgett, *Mexico's PRI-vival: How Big a Gamble are Voters Taking?*, TIME, June 29, 2012. Nieto was elected as president of Mexico on July 2, 2012, a result that has been confirmed by Mexico's electoral tribunal despite challenges to the election by his biggest rival, Andres Manuel Lopez Obrador. Lizbeth Diaz, *Mexico's Pena Nieto Confirmed President-Elect, Rival Defiant*, CHI. TRIB., Aug. 31, 2012, [http://articles.chicagotribune.com/2012-08-31/news/sns-rt-us-mexico-electionbre87u156-20120831\\_1\\_mexico-s-pena-nieto-cement-and-livestock-congress-over-economic-reforms](http://articles.chicagotribune.com/2012-08-31/news/sns-rt-us-mexico-electionbre87u156-20120831_1_mexico-s-pena-nieto-cement-and-livestock-congress-over-economic-reforms).

109. Padgett, *supra* note 108.

110. *Mexican Election*, *supra* note 107.

111. INT'L COMM. OF THE RED CROSS ADVISORY SERV., THE DOMESTIC IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW: A MANUAL 13 (2011) [hereinafter IHL MANUAL].

112. *See id.*

as the Lieber Code.<sup>113</sup> This codification of IHL later culminated in the four Geneva Conventions of 1949 which define a significant amount of IHL.<sup>114</sup> There were several later additions to the Geneva Conventions, called Additional Protocols.<sup>115</sup> Additional Protocols I and II were developed in 1977 to protect victims of armed conflict and Additional Protocol III was developed in 2005 to codify the rules surrounding the use of a distinctive emblem by armed forces.<sup>116</sup>

States are only bound to treaties they have ratified, however, so IHL would be incomplete if it only consisted of treaty law.<sup>117</sup> Instead, IHL is complimented by what is known as customary international law.<sup>118</sup> Customary international law is formed by state practice and, in many cases, is more expansive than existing treaty law.<sup>119</sup> Customary international law has also expanded to include non-international armed conflict.<sup>120</sup> Unlike treaty law, all states are expected to abide by customary international law.<sup>121</sup> Modern IHL is thus composed of a complex patchwork of treaties, case law from international tribunals and national courts which have tackled international issues, and customary international law as defined by state practice.<sup>122</sup>

### C. *Application of IHL to Mexico's conflict with DTOs*

Customary international law holds that IHL applies whenever there is an armed conflict.<sup>123</sup> Determining whether there is an armed conflict depends on the facts on the ground as opposed to a formal declaration of

113. 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxxi (Reprinted with corrections 2009).

114. IHL MANUAL, *supra* note 111, at 13.

115. *Id.*

116. *Id.*

117. Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331 ("A treaty does not create either obligations or rights for a third State without its consent."); HENCKAERTS & DOSWALD-BECK, *supra* note 113, at xxxiv ("Treaties apply only to the States that have ratified them.").

118. *See* HENCKAERTS & DOSWALD-BECK, *supra* note 113, at xxxiv-xxxv.

119. *Id.* at xxxv.

120. *Id.*

121. *See* Statute of the Int'l. Court of Justice, art. 38, available at [www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER\\_II](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II) ("The Court . . . shall apply . . . the general principles of law recognized by civilized nations.").

122. *See* Vité, *supra* note 41, at 70-73 (providing background on various treaties and case law regarding war and international conflict).

123. *See, e.g.*, Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516 [hereinafter Fourth Geneva Convention] ("[T]he present Convention shall apply to all cases of declared war or of any other armed conflict."); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 ¶ 25 (July 8, 1996) [hereinafter Legality of Nuclear Weapons] (making "reference to the law applicable in armed conflict."); H CJ 769/02 Public Committee Against Torture in Israel v. State of Israel [2005] H CJ 769/02, ¶ 18 (Isr.) [hereinafter Public Committee Against Torture] ("[H]umanitarian law . . . applies in the case of an armed conflict.").

war.<sup>124</sup> An armed conflict exists whenever there is a resort to armed force between states or “protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>125</sup> IHL thus distinguishes between armed conflict involving two states (international armed conflict), and conflict between a state actor and a non-state actor (non-international armed conflict).<sup>126</sup> Therefore, before IHL would apply to the situation in Mexico, there must be an international armed conflict or a non-international armed conflict.

### 1. *International Armed Conflict*

The traditional definition of war envisioned state actors involved in a military struggle.<sup>127</sup> This rule still applies in modern IHL, though the term “war” has been replaced with international armed conflict.<sup>128</sup> In the case of two conflicted states, international armed conflict takes place whenever military actors in one state are deliberately hostile to another state.<sup>129</sup> International case law suggests that foreign military intervention that only indirectly affects an independent internal armed conflict is sufficient to render that conflict international.<sup>130</sup> International armed conflict has some important limits to its application, however.

Conflict with a non-state actor only becomes an international conflict if certain conditions are met.<sup>131</sup> Conflict with a non-state actor only becomes internationalized when a third-party state assists non-state actors in attacking a legitimate state actor.<sup>132</sup> Conflict does not become internationalized when a third-party state intervenes on behalf of and with the permission of the legitimate state actor.<sup>133</sup> When a third-party state’s involvement has internationalized a conflict, IHL case law has placed an emphasis on third-party involvement that consists of coordination and supervision.<sup>134</sup>

124. Vité, *supra* note 41, at 69, 72.

125. Prosecutor v. Tadic, 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) [hereinafter Tadic Appeal].

126. See Fourth Geneva Convention, *supra* note 123, at art. 2–3.

127. See LUBELL, *supra* note 48, at 94–95 (“Any difference arising between two States and leading to the intervention of armed forces.”); see also James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT’L REV. RED CROSS 313, 316–17 (2003) (explaining the Geneva Convention of 1949 purposefully distinguished between inter-State conflict and internal conflict).

128. See, e.g., Fourth Geneva Convention, *supra* note 123, at art. 2; LUBELL, *supra* note 48, at 94.

129. LUBELL, *supra* note 48, at 95; Vité, *supra* note 41, at 72–73.

130. Stewart, *supra* note 127, at 328.

131. Vité, *supra* note 41, at 72–73.

132. See Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 156 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) [hereinafter Tadic Judgment].

133. Vité, *supra* note 41, at 73.

134. Tadic Judgment, *supra* note 132, ¶ 156.



This creates a high bar for international armed conflict that rules out many situations of combat that do not explicitly involve state actors.

The situation in Mexico would not qualify as an international armed conflict. DTOs are not allied with any state, nor is there any indication that they act on another state's behalf. Even the involvement of the U.S. in the form of financial assistance and manpower does not internationalize the conflict because it is done with Mexico's permission.<sup>135</sup> The purchase of narcotics from DTOs by third-party state actors would also not internationalize the conflict. While the sale of narcotics finances DTO operations, this third-party assistance does not involve coordination and supervision of DTO activities. Thus it is unlikely that third-party states could internationalize the conflict by purchasing narcotics from DTOs.<sup>136</sup> Because DTOs are acting on behalf of third-party states, because U.S. involvement in the fight against DTOs is accomplished with Mexico's approval, and because third-party actors trading in narcotics do not have supervision or control over DTOs, the conflict in Mexico does not qualify as an international armed conflict.

## 2. *Non-International Armed Conflict*

The Additional Protocols to the Geneva Conventions extended the concept of armed conflict so that IHL may be applied to non-international conflicts.<sup>137</sup> In particular, Additional Protocol II expanded the definition of armed conflict to cover conflicts between a state and militarized non-state actors.<sup>138</sup> Internal disturbances, such as riots and isolated, sporadic acts of violence, are not meant to fall within the ambit of Additional Protocol II.<sup>139</sup> While Mexico has not ratified Additional Protocol II,<sup>140</sup> Additional Protocol II's rules regarding non-international armed conflict have become part of customary IHL.<sup>141</sup> As explained above, every state is expected to abide by customary IHL regardless of which treaties a state has chosen to ratify.<sup>142</sup> Thus, Mexico is bound by Additional Protocol II's regulations of non-international armed conflict.

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135. See Vité, *supra* note 41, at 73.

136. See Tadic Judgment, *supra* note 132, ¶ 156.

137. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1(3)–1(4), June 8, 1977, 1125 U.N.T.S. 3 [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 (Protocol II), art. 1(1), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

138. Additional Protocol II, *supra* note 137, at art. 1(1).

139. *Id.* at art. 1(2).

140. *International Humanitarian Law – State Parties / Signatories*, INT'L COMM. RED CROSS, <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=475&ps=P> (last visited May 6, 2011).

141. Tadic Appeal, *supra* note 125, ¶ 117.

142. See *supra* Part II.B.

There are two requirements to determine whether a situation qualifies as non-international armed conflict. First, the conflict must involve protracted armed violence.<sup>143</sup> Second, the forces involved must be sufficiently organized.<sup>144</sup> Determining whether these requirements have been met is difficult, though. Every time a court examining IHL has examined an internal conflict, it has found there was a non-international armed conflict.<sup>145</sup> So there is no bright line between a situation in which IHL applies and one in which the violence does not rise to the requisite level or in which the non-state actor is insufficiently organized. Because there is no contrasting case law, additional factors are useful in determining whether there is a non-international armed conflict. These factors include the duration of hostilities and whether a normal police response is adequate to restore peace and security. Some scholars have also suggested that non-state actors must have an ideological or political agenda, though this is of debatable significance. In sum, these factors all tend to show that the conflict between the Mexican government and DTOs qualifies as a non-international armed conflict to which IHL applies.

#### *a. Threshold of Violence*

The violence of a given conflict must reach a certain threshold, otherwise IHL does not apply.<sup>146</sup> The violence at stake must be high enough to set the conflict apart from internal tensions or disturbances.<sup>147</sup> Some legal scholars have set the threshold application of Additional Protocol II at or near the level of a full-scale civil war; a situation which few countries are willing to admit exists within their borders.<sup>148</sup> As indicated above, though, IHL has not recognized a situation where the violence is so low that the situation does not qualify as armed conflict.<sup>149</sup> So it's unclear at which point there is not enough violence for a situation to qualify as a non-international armed conflict.

Between 2006 and 2011, 45,515 people were killed in Mexico as a result of organized crime and drug trafficking.<sup>150</sup> One could argue that this figure is inflated because it includes the deaths of DTO members. International tribunals examining non-international armed conflict, however, have

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143. Tadic Appeal, *supra* note 125, ¶ 70; Vité, *supra* note 41, at 76.

144. Tadic Appeal, *supra* note 125, ¶ 70; Vité, *supra* note 41, at 76.

145. Vité, *supra* note 41, at 77.

146. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 260 (Apr. 2000) ("Conflicts involving lower-intensity violence that do not reach the threshold of an armed conflict are implicitly distinguished from noninternational armed conflicts.").

147. Vité, *supra* note 41, at 79.

148. Meron, *supra* note 146, at 261 (citing Minimum Humanitarian Standards: Analytical Report of the Secretary-General Submitted Pursuant to Commission on Human Rights Resolution 1997/21, UN Doc. E/CN.4/1998/87, para. 79 (1998)).

149. See Vité, *supra* note 41, at 77.

150. Cardenas, *supra* note 93.

not discounted the deaths of non-state actors participating in the violence.<sup>151</sup> Even if they did, though, that still means more than 4,500 civilians and security personnel have been killed in a four year period using the questionable estimates provided by the Mexican government.<sup>152</sup> In comparison, the Israeli Supreme Court held that Israel was involved in a non-international armed conflict with terrorists when that conflict resulted in the deaths of 900 Israelis, thousands of Palestinians, and wounded thousands on both sides.<sup>153</sup>

Of course, no crude comparison of human suffering will yield a clear answer as to whether there is a non-international armed conflict, but formal sources of IHL have yet to find a situation in which the level of violence is too low for the struggle to qualify as non-international armed conflict. If a court were to find that not enough people have died in Mexico, it would be a first in international law. Such a precedent would set the threshold of violence exceedingly high and prevent the application of IHL in future cases when a conflict had the potential to affect tens of thousands of lives. This result would be directly contrary to the main goal of IHL which is to minimize the impact of violence during times of conflict.<sup>154</sup> Thus, the level of violence in Mexico should allow for the application of IHL, a result that is consistent with the other factors.

#### *b. Organization of the Non-State Actor*

Another requirement of non-international armed conflict is that the non-state actor must be comprised of sufficiently organized forces,<sup>155</sup> though the exact level of organization required is not clear.<sup>156</sup> Some scholars have suggested that the non-state actors must be under responsible, identifiable authority and must be clearly distinguishable from civilians.<sup>157</sup> “Responsible authority” does not mean that the authority in question is acting responsibly. Rather, it means that the armed forces are subject to a system of internal discipline that makes it possible to enforce the law of armed conflicts.<sup>158</sup>

The requirement of responsible authority makes eminent sense—if IHL is to apply to a conflict, then parties to the conflict should be capable of conforming to the rules mandated by IHL. If an organization does not

151. See, e.g., Public Committee Against Torture, *supra* note 123, ¶ 16.

152. See BEITTEL, *supra* note 9, at 22 (explaining that the Mexican government said more than 90% of those killed were involved with the activities of the DTOs).

153. Public Committee Against Torture, *supra* note 123, ¶ 16. Granted, that situation qualified as an international armed conflict, but because it demonstrated a conflict between state actors and non-state actors, it provides a useful yardstick.

154. IHL MANUAL, *supra* note 111, at 13.

155. Tadic Appeal, *supra* note 125, ¶ 70; Vité, *supra* note 41, at 76.

156. See Vité, *supra* note 41, at 77.

157. Stewart, *supra* note 127, at 345.

158. *Id.* at 346.

have the capability to control their members because of insufficient organization, it does not matter whether IHL applies because members are in essence acting as free agents. Along the same lines, the presence of responsible authority allows international tribunals to identify and punish leaders who have violated IHL. On the other hand, placing too much emphasis on whether the authority is identifiable or whether the forces are clearly distinguished from the civilian population ignores the essential reality of many conflicts involving non-state actors. Despite their variance in structure, Mexico's major DTOs fulfill the organizational requirement. Some, such as the Zetas, have a rigid, hierarchical command structure which clearly suffices.<sup>159</sup> Others, such as the Sinaloa DTO are less organized, with a decentralized structure.<sup>160</sup>

This lack of organization should not prevent the Sinaloa and similar DTOs from qualifying as an organized armed group, however. First, Sinaloa and similar DTOs are growing, profitable businesses and all businesses, even illicit ones, must have a certain level of structure in order to grow and be profitable.<sup>161</sup> Second, disqualifying Sinaloa as an organized, armed group would also disqualify the application of IHL to conflicts involving terrorists and insurgent groups with a similar de-centralized structure. This result would be inconsistent with existing IHL, which has found that terrorist groups may be a party to an armed conflict.<sup>162</sup> Finally, though it is decentralized, Sinaloa does have means to enforce discipline. While the discipline employed would likely be violent, Sinaloa *could* require its members to conform to the laws of armed conflict. Thus, even decentralized DTOs like Sinaloa have enough organization to qualify as a party to a non-international armed conflict.

### c. *Duration of the Conflict*

International courts and IHL case law indicate that violence must be protracted for IHL to apply.<sup>163</sup> Again, this is a difficult threshold to define with any certainty because formal sources of IHL have yet to find a situation where the violence has not persisted long enough for the struggle to

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159. Flintoff, *supra* note 81.

160. BEITTEL, *supra* note 9, at 6.

161. See Brian Hill, *The Importance of a Good Organizational Structure*, CHRON.COM, <http://smallbusiness.chron.com/importance-good-organizational-structure-3792.html> (last visited May 6, 2011).

162. See LUBELL, *supra* note 48, at 112–21. Lubell comes to the conclusion that, on the world stage, Al-Qaeda cannot be considered a party to an armed conflict, but *could* be a party to an armed conflict in Afghanistan. See *id.* at 119–21. This does not change the article's analysis since the battle against DTOs more closely resembles the war in Afghanistan as opposed to the global war on terror. Both conflicts share features of localized violence, clear if diffuse organization of the non-state actors, and a greater distinction between belligerents and civilians than that found in the global war on terror. See *id.*

163. Vité, *supra* note 41, at 82; Tadic Appeal, *supra* note 125, ¶ 70.

qualify as non-international armed conflict.<sup>164</sup> For the sake of example, though, the International Criminal Tribunal of Yugoslavia found there was a protracted armed conflict where fighting lasted four years.<sup>165</sup> The Israeli Supreme Court found there was protracted armed violence between the state and terrorist figures where the fighting lasted for three years.<sup>166</sup>

In comparison, DTOs have functioned in Mexico for more than a century, with violence increasing dramatically since the 1980s.<sup>167</sup> Even if one were only to count the last four years that violence has reached unprecedented levels, this is enough to qualify as “protracted violence” under IHL.<sup>168</sup> A comparison here is easier to make than the comparison to determine whether the violence has reached a necessary threshold.<sup>169</sup> A comparison of lives lost from one situation to the next may be challenged by examining the number of deaths relevant to the population or asking whether those killed were innocent civilians or participants in the violence.<sup>170</sup> A comparison of duration is the same anywhere, though, and three or four years of fighting in Israel or Yugoslavia lasts as long as three or four years of fighting in Mexico. Thus, the length of the conflict in Mexico is consistent with the application of IHL.

#### *d. Inadequacy of a Normal Police Response*

Another factor suggested by legal scholars that would tend to show an armed conflict would be the inadequacy of normal police forces in maintaining peace and security.<sup>171</sup> This is especially true when the state is confronting organizations with military capabilities that exceed those of state actors.<sup>172</sup> It is axiomatic in international law that one of the basic functions of a state is to provide peace and security for its citizens and to maintain a monopoly on the legitimate use of force.<sup>173</sup> If a state’s normal police forces are insufficient to combat organized armed groups, resort to the laws of armed conflict may be the only way for a state to maintain its legitimacy. This was envisioned by the drafters of Additional Protocol II, who looked

164. See Vité, *supra* note 41, at 77.

165. See Tadic Appeal, *supra* note 125, ¶ 70.

166. Public Committee Against Torture, *supra* note 123, ¶ 16.

167. See BEITTEL, *supra* note 9, at 3, 5.

168. See Tadic Appeal, *supra* note 125, ¶ 70.

169. See *supra* Part II.C.2.a.

170. Neither of these factors is considered relevant by international bodies when determining whether the threshold of violence is enough to qualify as non-international armed conflict. See, e.g., Tadic Appeal, *supra* note 125, ¶ 70; Public Committee Against Torture, *supra* note 123, ¶ 16. Instead these factors are addressed here to show that it is easier to find that the duration of violence is indicative of an armed conflict than it is to do the same using the level of violence.

171. Vité, *supra* note 41, at 76.

172. Public Committee Against Torture, *supra* note 123, ¶ 21.

173. Verdross, *supra* note 17, at 574 (listing the minimum functions of a state); WEBER, *supra* note 16, at 154.

to apply the law of armed conflict when an organized non-state actor exercised military control over state territory.<sup>174</sup>

Given the current conditions of the conflict and the escalating violence, Mexico would seem to provide a prime example of a situation where its normal police forces are inadequate. Mexico's DTOs have challenged the state's monopoly on the use of force and rule of law.<sup>175</sup> As indicated above, some observers already consider parts of Mexico to be lost to DTO control.<sup>176</sup> Even if Mexico improved its police force and reduced corruption, it is unclear whether it would have the capability to directly confront DTOs armed with military hardware and tactics.<sup>177</sup> Thus, to treat Mexico's government confrontation with DTOs as an internal police matter would ignore the inability of its police forces to maintain peace and security and would, in turn, threaten the Mexican government's ability to maintain its legitimacy.

*e. Ideological or Political Motive*

Some legal scholars have considered that a non-international armed conflict requires that the non-state actor have a political or ideological motive.<sup>178</sup> This would rule out groups of a purely criminal nature.<sup>179</sup> In particular, Noah Feldman has distinguished several criteria that determine whether the law of war (*i.e.* IHL) applies, two of which, intent and identity, imply a political motive requirement.<sup>180</sup> According to him, the actor's identity is important because "[o]ur intuition tells us that states make wars and individuals commit crimes."<sup>181</sup> Feldman also examines the intent of the actor, finding that one who commits war intends to challenge the legitimacy of the state, whereas a criminal "does not deny the state's legitimate right to enact the law that he violates."<sup>182</sup>

The political component is of negligible importance, however, when attempting to determine whether the conflict with DTOs qualifies as non-international armed conflict. First, there is no clear indication for this re-

174. Stewart, *supra* note 127, at 319.

175. BEITTEL, *supra* note 9, at 25.

176. *Id.* at 2.

177. See Flintoff, *supra* note 81.

178. Vité, *supra* note 41, at 78; Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL'Y 457, 459–61 (2002).

179. Vité, *supra* note 41, at 78.

180. Feldman, *supra* note 178, at 459–61. Feldman lists the following criteria as determining whether the law of war applies: the identity of the actor, the jurisdiction wherein the act occurs, the intent of the actor, and the scale of the hostilities. *Id.* The jurisdictional element does not apply because this discussion concerns non-international armed conflict which, by definition, involves armed conflict occurring within the boundaries of the affected state. The scale criterion is analyzed in the discussion regarding the threshold and duration of violence. See *supra* Parts II.B.2.a, II.B.2.c.

181. Feldman, *supra* note 178, at 459.

182. *Id.* at 460.

quirement in international law.<sup>183</sup> Second, it is often difficult to tell whether a group is using criminal methods to fund a political uprising or vice versa.<sup>184</sup> DTOs may have both political and criminal objectives, with one justifying the other. The LFM DTO provides a prime example of this confusion in that it combines an ideology with intensive drug-trafficking operations.<sup>185</sup> Further, the cartels' wide-scale disregard for the rule of law and corruption of public officials does plenty of harm to the legitimacy of the Mexican government, irrespective of the cartels' motives.

More importantly, a motive requirement does not add anything of substance to this analysis. The only value this factor *could* add would be to prevent the application of IHL to internal disturbances and tensions.<sup>186</sup> But the factors listed above (*i.e.* the threshold of violence, the organization of the actor, the duration of the conflict, and the inadequacy of a normal police response) will exclude internal disturbances and tensions that should not come under the rubric of IHL. Instead, a legal regime which draws a clear distinction of when the rules of IHL apply achieves better protection for civilians and combatants alike.<sup>187</sup> Because any motive requirement only muddies the water regarding the application of IHL without adding a discernible benefit, it should not be a contributing factor in making this determination.

The situation in Mexico therefore satisfies the requirements for a non-international armed conflict. It has the requisite level of violence and the non-state actors involved are sufficiently organized. Additionally, the violence is of a "protracted" duration and normal police forces have been inadequate in addressing the threat DTOs pose to Mexican citizens. Despite the insistence on a higher threshold being necessary to find a non-international armed conflict, non-international armed conflict has been found every time there has been a situation of protracted armed violence.<sup>188</sup> Examination of the conflict in Mexico shows that it too warrants the designation of a non-international armed conflict.

#### D. *The Effect of IHL on the Conflict with DTOs*

The application of IHL has a profound change on the nature of any violent conflict. When an armed conflict falls within the jurisdiction of IHL, the laws of peace arguably become irrelevant.<sup>189</sup> Under normal criminal

183. Vité, *supra* note 41, at 78.

184. *See id.*

185. *See* BEITTEL, *supra* note 9, at 12.

186. *See* Additional Protocol II, *supra* note 137, at art. 1(2).

187. Roy S. Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37 N.Y.U. J. INT'L L. & POL. 1, 22 (2004).

188. Vité, *supra* note 41, at 76.

189. Schöndorf, *supra* note 187, at 21; *see also* Additional Protocol I, *supra* note 137, at art. 43(2) ("Members of the armed forces of a Party to a conflict . . . are combatants, that is to say, they have the right to participate directly in hostilities.").

law, a criminal is pursued with the intent to effectuate his capture, whereas pursuit under IHL takes the form of pursuit with the intent to kill.<sup>190</sup> Not only does IHL give legitimate parties a legal right to kill opposing forces, it even allows for collateral damage to civilians.<sup>191</sup> Nonetheless, this conflict does not take place in a legal vacuum. A number of customary principles apply in any armed conflict, including the principles of distinction and proportionality.<sup>192</sup> This section will briefly review these principles and will explain which protections IHL extends to combatants. This section will also show how these principles would apply in Mexico's conflict with DTOs.

### 1. *The Principles of Distinction and Proportionality*

#### a. *The Principle of Distinction*

The principle of distinction is a rule of customary international law that forbids attacks upon civilians.<sup>193</sup> Civilians lose this protection when one of two things occurs: (1) the citizen directly participates in hostilities; or (2) the citizen identifies with the armed group. First, citizens lose the protections of IHL for such time as they take a direct part in hostilities.<sup>194</sup> Direct participation in hostilities means acts that would reasonably be expected to cause harm in the prevailing circumstances.<sup>195</sup> In addition to active, hostile engagement with opposing forces, direct participation includes measures in preparation for acts of hostilities and the deployment to and return from hostilities.<sup>196</sup> A civilian also directly participates in hostilities if he joins an organization involved in internal armed conflict and commits hostilities in the framework of his role with only short rests in between.<sup>197</sup>

Second, a civilian loses the protection of IHL when the civilian joins an organized armed group. When a civilian joins an armed group, he forfeits his citizenship status altogether until he explicitly denounces membership in the organization.<sup>198</sup> This classification only includes those involved in a continuous combat function and excludes recruiters, trainers, financiers, and propagandists.<sup>199</sup> This classification fits within the framework of Additional Protocol II, which distinguishes between members of organized

190. Feldman, *supra* note 178, at 466–68.

191. Meron, *supra* note 146, at 240.

192. Tadic Appeal, *supra* note 125, ¶¶ 105, 110–11.

193. *Id.*

194. Additional Protocol I, *supra* note 137, at art. 51(3).

195. NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 47 (2009) (prepared by Nils Melzer), available at [http://www.aco.nato.int/resources/20/Legal%20Conference/ICRC\\_002\\_0990.pdf](http://www.aco.nato.int/resources/20/Legal%20Conference/ICRC_002_0990.pdf) [hereinafter MELZER].

196. *Id.* at 17.

197. Public Committee Against Torture, *supra* note 123, ¶ 39.

198. MELZER, *supra* note 195, at 25.

199. *Id.* at 34.



armed forces and civilians.<sup>200</sup> This change in classification, from citizen to a member in an organized armed group, is distinct from the example of a citizen directly participating in hostilities. The former looks to the person's identity and association while the latter only examines the citizen's conduct.

In the case of Mexican DTO members, it is more appropriate to view them as members of organized armed forces rather than citizens directly participating in hostilities. Given the general violent nature of DTOs, most, if not all, members would qualify as holding a continuous combat role. Conversely, defining a chain of acts that constitutes direct participation in hostilities would be far more difficult. Further, removing immunity to attack based solely on membership in a DTO would likely have a detrimental effect on DTO membership as a whole. Because DTOs represent a confluence between drugs and violence, DTO members engaged in smuggling should be targeted. Though this would seem incongruent with the definition of a continuous combat role, the whole purpose of a DTO is to smuggle drugs. To ignore these members as targets would ignore the driving force of the violence in Mexico and would greatly diminish any efforts to reduce it.

#### *b. The Principle of Proportionality*

Another way in which customary international law protects civilians is the customary rule of proportionality.<sup>201</sup> An attack must not cause damage that is in excess of the "concrete and direct military advantage anticipated."<sup>202</sup> This is a difficult balancing test, but it must be done.<sup>203</sup> This principle reduces the range of military actions to those which are necessary in order to accomplish a legitimate military purpose.<sup>204</sup> Thus, to accurately determine proportionality, it is important to determine the military value of a target. The goals stated by the Obama Administration in looking to refund the Mérida Initiative provide a good starting point for this balancing process. These goals include: (1) the disruption of organized crime groups; (2) institutionalizing the rule of law; (3) modernizing efforts to prevent drugs from crossing borders; and (4) building strong and resilient communities.<sup>205</sup>

These goals would require the Mexican government to limit civilian casualties to the fullest extent possible, lest they undermine goals (2)–(4). The U.S. invasion of Panama, wherein U.S. forces engaged narco-traffickers, gives some guidelines on how this may be done. In that campaign, efforts to limit civilian casualties were at the very core of the planning pro-

200. *Id.* at 28.

201. Legality of Nuclear Weapons, *supra* note 123, ¶ 20 (separate opinion of Judge Higgins).

202. Additional Protocol I, *supra* note 137, at art. 57(b); *Public Committee Against Torture*, *supra* note 123, at ¶ 45.

203. *Public Committee Against Torture*, *supra* note 123, ¶ 46.

204. MELZER, *supra* note 195, at 79.

205. BEITTEL, *supra* note 9, at 32.

cess.<sup>206</sup> These efforts can be implemented in several ways. First, government forces should show restraint depending on the relative level of control they have over the circumstances and area.<sup>207</sup> This is especially important since DTO-related violence is highly concentrated. Second, government forces should always be willing to accept surrender as an option.<sup>208</sup> Third, even if members of DTOs are not protected from attack, they should be captured alive, assuming that this can be done without additional risk to government forces or to civilians.<sup>209</sup> In the end, the Mexican public's perception of any civilian death toll may be the ultimate arbiter as to whether the principle of proportionality was preserved.<sup>210</sup> Efforts such as those listed above would limit casualties and would therefore increase the chance that the public would approve of military efforts to confront DTOs.

## 2. *Protections Offered to Combatants Through the Application of IHL*

Participants involved in an armed conflict are offered some basic protections. First, they cannot be targeted by weapons designed to inflict unnecessary suffering.<sup>211</sup> Second, and perhaps of greater significance, the application of IHL allows legitimate forces to legally kill the opposition.<sup>212</sup> Further, legitimate military forces are entitled to prisoner-of-war status if captured during hostilities.<sup>213</sup> Thus, while they would still be subject to the principles of distinction and proportionality mentioned above, Mexican armed forces would have the legal right to kill DTO members. If a DTO captured a member of the Mexican armed forces, the DTO would be required by IHL to hold that person as a prisoner of war.

The same protections would not apply to DTO members. Civilians and members of organized armed groups belonging to non-State parties do not have the right to kill and may be prosecuted for their activities during the

206. INVESTIGATIONS SUBCOMM., COMM. ARMED SERV., 102D CONG., THE INVASION OF PANAMA: HOW MANY INNOCENT BYSTANDERS PERISHED? 9 (Comm. Print 1992) [hereinafter INVASION OF PANAMA].

207. See MELZER, *supra* note 195, at 80–81.

208. See *id.* at 82; see also INVASION OF PANAMA, *supra* note 206, at 10.

209. See MELZER, *supra* note 195, at 81–82. In a sense, this combines the traditional response to crime with the options available to parties to an armed conflict. See also Feldman, *supra* note 178, at 457 (arguing that some situations “can plausibly be characterized as both crime and war and that these cases therefore undermine the binary character of the crime/war distinction”). This combination curiously mirrors President Nieto’s concept of a soldier-officer police force. Padgett, *supra* note 108.

210. See INVASION OF PANAMA, *supra* note 206, at 9 (“If future relations are undermined because the Panamanian public feels the civilian death toll was too high . . . the death toll was too high because the result was to undermine one of the political goals of the operation.”).

211. Tadic Appeal, *supra* note 125, ¶ 127.

212. See Additional Protocol I, *supra* note 137, at art. 43(2); see Legality of Nuclear Weapons, *supra* note 123, ¶ 25.

213. Additional Protocol I, *supra* note 137, at art. 45(1).

conflict.<sup>214</sup> Further, in order to qualify as a prisoner of war, one must be commanded by a person responsible for his subordinates, have a fixed distinctive sign recognizable at a distance, carry arms openly, and conduct operations in accordance with IHL.<sup>215</sup> It is inconceivable that DTO members would wear uniforms or openly carry weapons which would, in turn, identify them as targets for the military. Also, given the history of civilian deaths they have caused so far, it is unlikely DTOs can be expected to conform to IHL. As participants in an armed conflict, DTO members can be prosecuted for violations of IHL and other international criminal law.<sup>216</sup> Thus, the application of IHL to the conflict in Mexico would increase the criminal liabilities DTOs face.

#### CONCLUSION

The conflict between legitimate state actors and DTOs has reached dire proportions. The increasing rise in drug-related killings shows no significant signs of abatement, nor does it appear that police forces can deal with the problem alone. Unfortunately, the U.N. Charter creates many barriers for countries who wish to confront these criminal organizations outside their own borders. IHL, on the other hand, opens doors for countries faced with domestic DTOs. In Mexico, it is apparent that the government's conflict with DTOs is a non-international armed conflict for which direct military action is a legal recourse under international law. This paper makes no claim that a military solution is the best or even the ideal solution for dealing with violent, drug-funded gangs. Through the application of IHL, however, government forces are given an expanded toolbox with which to oppose these groups while the DTOs face greater threats in the form of direct military action and greater criminal accountability.

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214. MELZER, *supra* note 195, at 84; Stewart, *supra* note 127, at 320.

215. Geneva Convention Relative to the Treatment of Prisoners of War art. 4(A)(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

216. MELZER, *supra* note 195, at 85.