

# GOOD LAW FOR “BAD HOMBRES”

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## ABSTRACT

This Article responds to President Trump’s proclamation that he may send, with Mexico’s consent, the U.S. military into Mexico to fight drug cartels. It particularly considers whether, during such an expedition, the U.S. military would be constrained by the law of armed conflict, human rights law, or neither. The Article concludes that the law of armed conflict would not apply but human rights law would. In support of this conclusion, the Article examines why the drug cartel violence in Mexico cannot legally be considered an armed conflict. The Article then explains why human rights law, on the other hand, would apply to any U.S. military action inside the territory of Mexico. In doing so, the Article discusses the U.S. government’s historical position that the United States has no extraterritorial human rights legal obligations. This Article argues to the contrary—that the United States does have extraterritorial human rights legal obligations within the specific scenario of a U.S. military expedition into Mexico because of both treaty and customary international law. This Article is important because it examines topical issues: the Mexican drug war, the possible involvement of the U.S. military, and the application of the law of war and human rights law to hybrid conflicts.

## INTRODUCTION

The United States and Mexico share a border, are trading partners, and have a mutual interest in each other’s stability.<sup>1</sup> It is not surprising, then, that the United States views the illicit Mexican drug trade, and its attendant violence, as an increasingly cancerous threat to U.S. security.<sup>2</sup> Since 2006, the Mexican government has made defeating the drug cartels behind the illicit trade a priority. Still, their progress has been slow and President Trump said he

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\* Matthew Neely is an active duty United States Marine. The opinions expressed in this Article are solely the opinion of the author and do not portray or presume to portray any opinions of either the U.S. Department of Defense, U.S. Navy, or U.S. Marine Corps. I want to express my gratitude for my family’s support. I love you guys.

<sup>1</sup> JUNE BEITTEL, CONG. RES. SERV., R41576, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS, at 3 (2015).

<sup>2</sup> *See id.*

might, with Mexico's consent, deploy the U.S. military to help defeat these "bad hombres."<sup>3</sup>

As a candidate, President Trump criticized recent uses of the U.S. military as having been too "politically correct."<sup>4</sup> President Trump further claimed the targeting and killing of civilians is appropriate in some circumstances,<sup>5</sup> but later clarified "the U.S. is bound by laws and treaties and [he] will not order our military or other officials to violate those laws . . . ."<sup>6</sup> President Trump's rhetoric makes ascertaining what law applies to a potential U.S. military engagement with Mexican drug cartels important for two reasons. First, the United States is founded on democratic principles and a respect for the law, and the United States' failure to identify and follow applicable law would undermine its own legitimacy.<sup>7</sup> Second, the United States' security and prosperity hinges in part on a rules-based international order; therefore, the United States should use its power to underwrite that international order rather than erode its relevance.<sup>8</sup>

Concerns over *jus ad bellum* international legal issues are immediately dispensed with because, under my proposed scenario, the U.S. military would enter Mexico with Mexico's consent.<sup>9</sup> *Jus ad bellum* is the body of international law that guides state behavior vis-à-vis the use of force.<sup>10</sup> *Jus ad bellum* protects the principle of state sovereignty.<sup>11</sup> When one state consents to another state's use of force within its own territory, as is proposed in this Article, the issues of sovereignty and *jus ad bellum* become moot.<sup>12</sup> What

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<sup>3</sup> Anna Giaritelli, *Trump: Mexican President "Very Willing" to Accept US Troops in Drug Cartel Fight*, WASH. EXAMINER (Feb. 5, 2017), <http://www.washingtonexaminer.com/trump-mexican-president-very-willing-to-accept-us-troops-in-drug-cartel-fight/article/2613982>; Vivian Salama, *Trump to Mexico: Take Care of "Bad Hombres" or US Might*, AP NEWS (Feb. 2, 2017), <https://apnews.com/0b3f5db59b2e4aa78cddbfb008f27fb49>.

<sup>4</sup> Tom LoBianco, *Donald Trump on Terrorists: 'Take Out Their Families'*, CNN (Dec. 3, 2015), <http://www.cnn.com/2015/12/02/politics/donald-trump-terrorists-families/index.html>.

<sup>5</sup> *Id.*

<sup>6</sup> Kristina Wong, *Trump: "I Will Not Order a Military Officer to Disobey the Law"*, THE HILL (Mar. 4, 2016), <http://thehill.com/policy/defense/271823-trump-says-he-wont-order-military-to-violate-laws>.

<sup>7</sup> See Harold Koh, *Why Do States Obey International Law?*, 106 YALE L.J. 2599, 2628 (1997).

<sup>8</sup> See John B. Emerson, U.S. Ambassador to Germany, *The Importance of a Rules-Based International Order*, 14th Berlin Security Conference: Euro-Atlantic Partnership; Firm Anchor in a Turbulent World (Nov. 17, 2015), available at <https://de.usembassy.gov/the-importance-of-a-rules-based-international-order/>.

<sup>9</sup> Giaritelli, *supra* note 3.

<sup>10</sup> LAURIE R. BLANK & GREGORY P. NOONE, *INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR* 15 (2013).

<sup>11</sup> *Id.* at 16.

<sup>12</sup> See *id.* at 17.

remains is identifying the law that governs the military's conduct once inside Mexico.

Is it international humanitarian law (IHL) (*i.e.*, *jus in bello* or law of armed conflict)? If there is no armed conflict in Mexico, then IHL is not applicable.<sup>13</sup> Is it international human rights law (IHRL)? The U.S. government holds the position, as discussed *infra*, that it has no treaty-based IHRL obligations in territories where it is not the controlling governmental authority. If neither IHL nor IHRL applies, the military could be ordered to conduct operations in a manner that is not too “politically correct” for President Trump.

This Article concludes that there is no armed conflict in Mexico, so IHL would not apply, but that the U.S. military would be bound by IHRL while conducting operations against Mexican drug cartels. To that end, Part I of this Article provides background facts concerning the Mexican campaign against drug cartels. Part II considers why the Mexican drug cartel violence is not an armed conflict and why IHL is accordingly not applicable. Part III examines why IHRL is applicable. Part IV discusses how U.S. domestic law requires the President, and by extension the military, to follow IHRL. Part V offers concluding analysis.

## I. BACKGROUND ON MEXICAN “DRUG WAR”

Part I(A) examines the drug cartel violence in Mexico. Part I(B) discusses the organizational structures of the drug cartels.

### A. Violence

In 2006, Mexican President Felipe Calderón “declared war on the [drug] cartels.”<sup>14</sup> President Calderón increased the number of Mexican soldiers tasked with fighting the drug cartels from 20,000 to 50,000.<sup>15</sup> The Mexican drug cartels have violently resisted President Calderón's crackdown. It is estimated that the ensuing violence resulted in a minimum of 80,000 deaths between 2006 and 2015.<sup>16</sup> The violence has spread, existing between cartels themselves

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<sup>13</sup> *Id.* at 83.

<sup>14</sup> Ashley Fantz, *The Mexico Drug War: Bodies for Billions*, CNN (Jan. 20, 2012), <http://www.cnn.com/2012/01/15/world/mexico-drug-war-essay/index.html>.

<sup>15</sup> Christopher Woody, *After a Decade Fighting the Cartels, Mexico May Be Looking for a Way to Get Its Military Off the Front Line*, BUS. INSIDER (Feb. 13, 2017), <http://www.businessinsider.com/mexican-military-role-in-fighting-drug-war-and-cartels-2017-2>.

<sup>16</sup> BEITTEL, *supra* note 1, at 2.

and between the government and the cartels.<sup>17</sup> It is predominantly marked by “shootouts” often involving the use of high caliber rifles and automatic weapons, the use of grenades, and sporadic use of car bombs.<sup>18</sup> It has also included “coordinated attacks against the Mexican military” and, in one notable instance, the “downing of a military helicopter.”<sup>19</sup> The violence can be gratuitous, as the drug cartels are known to dismember their murdered victims and attach messages to them. For example, “criminal groups and their allies deposited 14 headless bodies in front of the city hall” and “have left 18 dismembered bodies in vans near Lake Chapala, an area frequented by tourists and U.S. retirees outside Guadalajara. They used a dump truck to unload 49 more corpses, missing not only heads but also feet and hands, outside Monterrey, Mexico’s main industrial city.”<sup>20</sup>

In 2011, the Mexican political scientist Eduardo Guerrero-Gutiérrez identified two types of drug cartel violence.<sup>21</sup> The first is “drug-trafficking violence,” and the second is “mafia ridden violence.”<sup>22</sup> Drug-trafficking violence intends “to maintain or gain control over drug-trafficking routes, points of entry and exit, and distribution markets.”<sup>23</sup> Mafia-ridden violence is “kidnapping, extortion and executions” motivated by profit or to “keep or gain control over a limited territory (a few blocks of a neighborhood) in which the organization could run its illegal activities.”<sup>24</sup>

In December 2012, Enrique Peña Nieto assumed the Office of the President of Mexico. Since then, the rate of drug cartel violence-related deaths has slowly declined.<sup>25</sup> The cartels have instead, “furthered their expansion into other illegal activities, such as extortion, kidnapping, and oil theft, and the organizations now pose a multi-faceted organized criminal challenge to

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<sup>17</sup> *Mexico Travel Warning*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/passports/en/alertswarnings/mexico-travel-warning.html/> (last visited Nov. 13, 2017).

<sup>18</sup> Robert Beckhusen, *The Tools of Mexico’s Drug Cartels, From Landmines to Monster Trucks*, WIRED (Nov. 30, 2012), <https://www.wired.com/2012/11/cartel-weapons/>; *Mexico Drug War Fast Facts*, CNN, <http://www.cnn.com/2013/09/02/world/americas/mexico-drug-war-fast-facts/index.html> (last visited Nov. 13, 2017).

<sup>19</sup> BEITTEL, *supra* note 1, at 27.

<sup>20</sup> William Booth, *Mexico’s Two Major Crime Cartels Now at War*, WASH. POST (May 24, 2012), [https://www.washingtonpost.com/world/mexicos-two-major-crime-cartels-now-at-war/2012/05/24/gJQAUhKImU\\_story.html?utm\\_term=.c198112c0dea](https://www.washingtonpost.com/world/mexicos-two-major-crime-cartels-now-at-war/2012/05/24/gJQAUhKImU_story.html?utm_term=.c198112c0dea).

<sup>21</sup> EDUARDO GUERRERO-GUTIÉRREZ, SECURITY, DRUGS, AND VIOLENCE IN MEXICO: A SURVEY (2011), available at <http://fsi.stanford.edu/sites/default/files/93.securitydrugs.pdf>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> BEITTEL, *supra* note 1, at 1–2.

governance in Mexico . . . .”<sup>26</sup> This suggests that “mafia ridden violence” is on the rise while “drug-trafficking violence” is on the decline. Indeed, the drug cartels’ expansion into other illegal activities can be understood as an adaptive means to achieve the cartels’ central aim: making money. Accordingly, “drug cartels are similar to legitimate profit-making enterprises. They seek to fill market demand or stimulate new demand for their products.”<sup>27</sup>

The use of the Mexican military to combat the drug cartels has not been without criticism.<sup>28</sup> The Mexican Defense Minister insists the military is not the right instrument for the anti-drug cartel campaign.<sup>29</sup> The Defense Minister explains that the military is being used against the drug cartels to “chase criminals,” which is a mission for the police.<sup>30</sup> The Defense Minister also claims it was a mistake to deploy the Mexican military against the drug cartels in the first place.<sup>31</sup> The Defense Minister has also implied that the military is being used only because the Mexican police are so poorly trained.<sup>32</sup> In other words, an assessment of the poor capabilities of the police appears to be the impetus for the use of the Mexican military against the drug cartels rather than the nature of the threat posed by the drug cartels themselves.

### *B. Mexican Drug Cartels’ Organization*

It is also necessary to understand how the drug cartels are organized to properly analyze whether Mexican drug cartel violence is an armed conflict under international law. In 2015, the Congressional Research Service identified nine “major” Mexican drug cartels.<sup>33</sup> These cartels generally appear to have an organizational structure that reflects a tiered hierarchy.<sup>34</sup> At the top of this

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<sup>26</sup> *Id.*

<sup>27</sup> Paul Kan, *The Border Wall: Making Mexican Drug Cartels Great Again*, WAR ON THE ROCKS (Feb. 2, 2017), <https://warontherocks.com/2017/02/the-border-wall-making-mexican-drug-cartels-great-again/> (citation omitted).

<sup>28</sup> *Mexican Defense Minister: It’s “Unnatural” to Send the Military to Fight Drug Traffickers*, BUS. INSIDER (Dec. 9, 2016), <http://www.businessinsider.com/afp-unnatural-for-mexican-military-to-fight-drug-trafficking-minister-2016-12>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Christopher Woody, *Mexico’s Defense Chief: “We Have Committed Errors” in the War on Drugs*, BUS. INSIDER (Mar. 31, 2016), <http://www.businessinsider.com/mexico-defense-chief-we-have-committed-errors-in-drug-war-2016-3>.

<sup>32</sup> *Mexican Defense Minister: It’s “Unnatural” to Send the Military to Fight Drug Traffickers*, *supra* note 28.

<sup>33</sup> BEITTEL, *supra* note 1, at 13–26 (These “major” cartels are the: Tijuana/Arellano Felix Organization, Sinaloa, Juárez/Carrillo Fuentes Organization, Gulf, Los Zetas, Beltrán Leyva Organization, La Familia Michoacana, Knights Templar, and Cartel Jalisco-New Generation.).

<sup>34</sup> *Id.*; see also Matt Dickenson, *Leadership Transitions and Violence in Mexican Drug Trafficking*

hierarchy are the “bosses,” followed by “specialized operators such as lawyers and accountants,” then come the “logistics operators,” and at the “lowest level is the operative base, composed by drug dealers, drivers and drug smugglers.”<sup>35</sup> The exceptions to this common hierarchal structure are the Sinaloa and Los Zetas drug cartels. The Sinaloa cartel is comprised of semi-autonomous branches operating under a single top leader who can pool together these branches when necessary.<sup>36</sup> Los Zetas’ organization is believed to be similar to a franchise, or affiliated independent cells, rather than the classic tiered-hierarchy structure.<sup>37</sup>

## II. APPLICABILITY OF IHL

Part II(A) examines the applicability of IHL generally. Part II(B) explains why IHL is not applicable to the Mexican drug cartel violence discussed above in Part I. Before proceeding, however, a cursory understanding of the differences between IHL and IHRL is necessary. Their differences in the treatment of taking lives and the arresting or imprisoning of individuals are the most germane and illustrative. The use of force to take the life of an enemy combatant is lawful as a first resort under IHL.<sup>38</sup> IHL further accepts and even expects such use of force will cause a certain amount of collateral damage, including the death of innocent civilians.<sup>39</sup> IHL also permits the detention of combatants for the duration of hostilities<sup>40</sup> or non-combatants when “the security of the Detaining Power makes it absolutely necessary.”<sup>41</sup> IHRL, on the other hand, regulates the use of force to take a life as an “exceptional” measure used only as a last resort in response to an imminent threat to the lives of others.<sup>42</sup> Arrest or imprisonment must be done on the basis of individualized,

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*Organizations, 2006–2010* (2012) (unpublished manuscript), available at <https://ssrn.com/abstract=2001405> (extrapolating that the larger cartels will have a “somewhat more formal and hierarchical leadership structure” by comparing the cartels to known Mexican criminal organizational structures).

<sup>35</sup> GUERRERO-GUTIÉRREZ, *supra* note 21.

<sup>36</sup> Dickenson, *supra* note 34.

<sup>37</sup> BEITTEL, *supra* note 1.

<sup>38</sup> 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3, 25 (2005), available at <https://www.icrc.org/eng/resources/documents/publication/pcustom.htm>.

<sup>39</sup> *Id.* at 46.

<sup>40</sup> Geneva Convention Relative to the Treatment of Prisoners of War arts. 21 and 118, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Convention III].

<sup>41</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 42, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Convention IV].

<sup>42</sup> See G.A. Res. 34/169, Code of Conduct for Law Enforcement Officers, art. 3, U.N. Doc. A/RES/34/169 (Dec. 17, 1979).

non-arbitrary judgment<sup>43</sup> (*i.e.*, conduct-based deprivations as opposed to IHL’s status-based deprivations).<sup>44</sup>

### A. *Applicability of IHL Generally*

Before analyzing IHL’s applicability to the Mexican drug cartel violence, it is first necessary to discuss the application of IHL generally. IHL is applied in the event of either an international armed conflict (IAC) or, in a more limited manner, a non-international armed conflict (NIAC). An IAC exists if the conditions of Article 2 common to all four Geneva Conventions (CA 2) are satisfied.<sup>45</sup> CA 2 requires either a declared war or an armed conflict between two states.<sup>46</sup> In the case of a NIAC, the conditions of Article 3 common to all four Geneva Conventions (CA 3) must be fulfilled.<sup>47</sup> CA 3 is triggered by an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”<sup>48</sup>

The Geneva Conventions are universally adopted, thereby alleviating CA 3’s requirement that a NIAC occur “in the territory of one of the High Contracting Parties.”<sup>49</sup> It is also established that “not of an international character” describes an armed conflict that is not between two states.<sup>50</sup> Left unsettled is the meaning of “armed conflict.” This section examines its meaning as understood by (1) the International Committee of the Red Cross

<sup>43</sup> See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 9, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

<sup>44</sup> Chris Jenks, *Reimagining the Wheel: Detention and Release of Non-State Actors Under the Geneva Conventions*, in *DETENTION OF NON-STATE ACTORS ENGAGED IN HOSTILITIES* 93, 103 (Gregory Rose & Bruce Oswald eds., 2016).

<sup>45</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Convention II]; Convention III, *supra* note 40, art. 2; Convention IV, *supra* note 41, art. 2 (Common Article 2); see *How is the Term “Armed Conflict” Defined in International Humanitarian Law?*, INT’L COMMITTEE OF THE RED CROSS (Mar. 2008), <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> [hereinafter ICRC Armed Conflict].

<sup>46</sup> Convention I, *supra* note 45; Convention II, *supra* note 45; Convention III, *supra* note 40, art. 2; Convention IV, *supra* note 41, art. 2.

<sup>47</sup> Convention I, *supra* note 45, art. 3; Convention II, *supra* note 45, art. 3; Convention III, *supra* note 40, art. 3; Convention IV, *supra* note 41, art. 3.

<sup>48</sup> Convention I, *supra* note 45, art. 3; Convention II, *supra* note 45, art. 3; Convention III, *supra* note 40, art. 3; Convention IV, *supra* note 41, art. 3.

<sup>49</sup> Convention III, *supra* note 40, art. 3.

<sup>50</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 562 (2006); ICRC Armed Conflict, *supra* note 45.

(ICRC) commentary to CA 3;<sup>51</sup> (2) Article 1 of Additional Protocol II of 1977 (AP II)<sup>52</sup> and the ICRC's commentary to AP II;<sup>53</sup> and, (3) the International Criminal Tribunal for the former Yugoslavia (ICTY).

### 1. ICRC Commentary to CA 3

The ICRC has twice published commentaries to CA 3, once in 1952 and again in 2016. The 2016 commentary references the 1952 commentary's criteria in addressing the threshold issue of identifying what violence triggers CA 3's applicability and otherwise largely discusses the international criminal tribunals' approach to this threshold issue.<sup>54</sup> Because this Article similarly addresses the international jurisprudence, its scope is limited to discussing the 1952 commentary.

The 1952 ICRC commentary explains that an "armed conflict" is not "a mere act of banditry or an unorganized and short-lived insurrection."<sup>55</sup> The ICRC's commentary provides four non-binding criteria to help distinguish between an armed conflict and these examples.<sup>56</sup> The criteria are indicia of an armed conflict and need not all be satisfied for an armed conflict to exist. Taken together, the criteria suggest two predicate factual conditions for an armed conflict to legally exist. First, the non-state actor's violence is endeavored upon (in whole or in part) to create a new or rival government to the *de jure* government. Second, the violence has seized the international community's attention. The non-binding criteria are:

- (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.

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<sup>51</sup> ICRC, 1 THE GENEVA CONVENTIONS OF 12 AUGUST 1949 COMMENTARY 49–50 (Jean S. Pictet ed. 1952), [https://www.loc.gov/rr/frd/Military\\_Law/pdf/GC\\_1949-I.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf) [hereinafter Pictet].

<sup>52</sup> 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, June 8, 1977, 1125 U.N.T.S. 609, 611 [hereinafter Protocol II].

<sup>53</sup> ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 1307 (Yves Sandoz et al. eds. 1987), [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Commentary\\_GC\\_Protocols.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf) [hereinafter Sandoz].

<sup>54</sup> *Treaties, States Parties and Commentaries*, ICRC, <https://ihl-databases.icrc.org/ihl/full/GCi-commentary> (The 2016 commentaries are published electronically, side-by-side with the prior 1952 version).

<sup>55</sup> Pictet, *supra* note 51, at 49.

<sup>56</sup> *Id.* at 49–50.



- (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 organization 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.<sup>57</sup>

The existence of the first predicate condition—that the non-state actor is using violence to create a rival government—is supported by criterion one, criterion two, and subsections (a), (b), and (c) of criterion four. The use of “means” within criterion one suggests the existence of a system or procedure to adjudicate violations of the Convention. CA 3 explicitly prohibits the sentencing of individuals for violations of the Conventions unless the sentence is adjudged by a “regularly constituted court” capable of “affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>58</sup> Therefore, the first criterion is likely appropriating CA 3’s defined judicial protections as indicia that an armed conflict legally exists in the first place. The second criterion suggests the *de jure* government’s presence in part of its national territory is only achieved through the exercise of military force against the “insurgents”<sup>59</sup> who are otherwise in control of that territory. Subsection (a) of the fourth criterion requires the insurgents “have the characteristics of a State.” The four characteristics of a state most commonly accepted by international law are: (1) a permanent population; (2) a defined

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<sup>57</sup> *Id.*

<sup>58</sup> Convention I, *supra* note 45, art. 3; Convention II, *supra* note 45, art. 3; Convention III, *supra* note 40, art. 3; Convention IV, *supra* note 41, art. 3.

<sup>59</sup> An “insurgent” is defined as “[a] person fighting against a government or invading force; a rebel or revolutionary.” *Insurgent*, OXFORD ENGLISH DICTIONARY, <https://en.oxforddictionaries.com/definition/insurgent> (last visited Nov. 13, 2017) (online edition). A “revolutionary” is defined as “[a] person who advocates or engages in political revolution.” *Revolutionary*, OXFORD ENGLISH DICTIONARY, <https://en.oxforddictionaries.com/definition/revolutionary> (last visited Nov. 13, 2017) (online edition).

territory; (3) a government; and (4) the ability to enter into relations with other nations.<sup>60</sup> Subsection (b) of the fourth criterion first establishes the non-state actor's "civil authority" as a point of consideration while subsection (c) elevates the importance of considering the civil authority by subordinating the insurgents' military branch to its civil authority. Subsections (a), (b), and (c), considered together, imply that the non-state actor is not only resisting the *de jure* government's civil and police authority but is also exercising civil authority over a defined territory in a way that prejudices the *de jure* government's ability to do the same.

The second implied predicate condition—that the conflict has demanded the international community's attention—is evidenced by the third criterion and subsections (c) and (d) of the fourth criterion. The third criterion requires either the non-state actor party to the conflict to claim "belligerent" status or that the state actor party to the conflict label them as such. This is tantamount to recommending that a party to the conflict has invoked international law as applicable. The third criterion also considers whether the U.N. Security Council or General Assembly has taken notice of the violence as a "threat to international peace, a breach of the peace, or an act of aggression."<sup>61</sup> Subsections (c) and (d) of the fourth criterion suggest the non-state actor is willing to both adhere to international law by "observ[ing] the ordinary laws of war" and "be bound by the provisions of the [Geneva Conventions]."<sup>62</sup> These criteria suggest that the non-state actor's struggle is, at least in part, to legally enter and be recognized by the international community.

## 2. *Additional Protocol II of 1977*

A second authoritative source on the meaning of "armed conflict" is AP II. Mexico and the United States are not parties to AP II, and AP II's terms only apply to territories of parties to the Protocol. Nonetheless, "[m]any provisions of [AP II] can now be regarded as declaratory of existing rules or as having crystallized emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles."<sup>63</sup> The U.S. Department of Defense cites to AP II's test for "[d]istinguishing Armed Conflict From

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<sup>60</sup> Montevideo Convention on the Rights and Duties of States, *opened for signature* Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19.

<sup>61</sup> Pictet, *supra* note 51, at 49–50.

<sup>62</sup> *Id.*

<sup>63</sup> Prosecutor v. Tadić, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 117 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

Internal Disturbances and Tensions.”<sup>64</sup> The United States also agrees that customary international law is part of the larger corpus of the law of armed conflict that the United States must obey.<sup>65</sup> Therefore AP II’s definition of a NIAC is very persuasive, if not authoritative.

AP II adopts a narrower definition of a NIAC by creating three requirements in addition to CA 3’s. AP II requires that the conflict be between “[1] armed forces and dissident armed forces or other organized armed groups which, [2] under responsible command, [3] exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [AP II].”<sup>66</sup> Because AP II’s requirements are in addition to, rather than in place of, CA 3’s, it is possible to have an armed conflict for the purposes of CA 3 but not for AP II. Additionally, AP II rejects “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature” as being armed conflicts.<sup>67</sup> The ICRC commentary to AP II explains that “internal tensions” can include “internal disturbances, without being an armed conflict, when the State uses armed force to maintain order; there are internal tensions, without being internal disturbances, when force is used as a preventive measure to maintain respect for law and order.”<sup>68</sup>

AP II’s requirement for such control of territory permitting the implementation of AP II’s provisions is its most significant additional requirement. For example, Article 4 of AP II requires, *inter alia*, the non-state actor to educate children in the territory under its control.<sup>69</sup> Article 5 requires, *inter alia*, the non-state actor to maintain and operate detention facilities in which males and females are housed separately to ensure that those detained receive adequate medical treatment and spiritual assistance.<sup>70</sup> Finally, Article 6 requires, *inter alia*, the non-state actor to set up a penal system with some minimum levels of due process for the adjudication of crimes their detainees may have committed.<sup>71</sup> These requirements are illustrative of the tremendous resources, organization, and commitment that is required of the non-state actor

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<sup>64</sup> U.S. DEP’T OF DEFENSE, DEPARTMENT OF DEFENSE LAW OF WAR MANUAL 83 (2016), <https://www.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>.

<sup>65</sup> *Id.* at 8.

<sup>66</sup> Protocol II, *supra* note 52, art. 1.

<sup>67</sup> *Id.*

<sup>68</sup> Sandoz, *supra* note 53.

<sup>69</sup> Protocol II, *supra* note 52, art. 4.

<sup>70</sup> *Id.* art. 5.

<sup>71</sup> *Id.* art. 6.

to implement AP II. They also suggest that, for a NIAC to exist under AP II, the non-state actor must exercise some competence in governing people within a territory.

### 3. *The International Criminal Tribunal for the former Yugoslavia*

A third authoritative source for defining “armed conflict” is international case law developed by the ICTY. The ICTY Appeals Chamber in *The Prosecutor v. Dusko Tadić (Tadić)* found a CA 3 “armed conflict exists whenever there is . . . protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>72</sup> Subsequent treatment of “protracted” has turned on measuring the “intensity” of the conflict.<sup>73</sup> For example, the *Tadić* Trial Chamber focused “on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict.”<sup>74</sup> These “intensity” and “organization” prongs are used to legally differentiate an internal disturbance from an armed conflict.<sup>75</sup>

*Tadić* also offers “terrorist activities” as a third example of what is not an “armed conflict” but otherwise fails to identify the thresholds that satisfy its two-prong test. The *Tadić* Trial Chamber commends the ICRC commentary’s non-binding criteria (discussed above) as relevant to making this threshold determination on a case-by-case basis. The *Tadić* tribunal noted the following circumstances as relevant to its finding that an “armed conflict” legally existed in Yugoslavia: the conflict was between organized political parties; the party in “revolt against the *de jure* government” controlled territory; the violence was protracted and involved “artillery bombardments” that lasted up to three days at a time, resulting in the whole destruction of villages; and the intensity of the violence “ensured the continuous involvement of the Security Council.”<sup>76</sup> These circumstances seem to mirror consideration of the ICRC commentary’s non-binding criteria.

After *Tadić*, in the 2005 case *Prosecutor v. Fatmir Limaj*, the ICTY Trial Chamber noted that the ICRC commentary’s criteria are non-binding and instead relied on other factors indicative of the “intensity of a conflict and the

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<sup>72</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Judgment of the Appeals Chamber, para. 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

<sup>73</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Judgment of the Trial Chamber, para. 562 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997); *see also* *Abella v. Argentina (Tablada Base Case)*, Case 11.137, Inter-Am. Comm’n H.R., Report 55/97, OEA/Ser.L/V/II.95, doc. 7 rev. (1997).

<sup>74</sup> *Tadić*, Case No. IT-94-1-AR72, Judgment of the Trial Chamber, para. 562.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* paras. 563–68.

organization of the parties.”<sup>77</sup> The court explained that these factors relate to “factual matters which need to be decided in light of the particular evidence and on a case-by-case basis.”<sup>78</sup> In the 2012 *Prosecutor v. Ramush Haradinaj, Idriz Balaj, and Lahi Brahimaj (Brahimaj)* decision, the ICTY Trial Chamber cited a list of factors the ICTY had developed since *Limaj* to “assess the intensity” of a conflict.<sup>79</sup> These factors include:

the distribution of weapons among both parties to the conflict; involvement of the UN Security Council; number of civilians forced to flee from the combat zones; types of weapons used, particularly heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blockading or besieging of towns and heavy shelling of towns; the extent of destruction and number of casualties caused by shelling or fighting; the quantity of troops and units deployed; existence and change of front lines between the parties; the occupation of territory, towns and villages; the deployment of government forces to the crisis area; closure of roads; cease fire orders and agreements.<sup>80</sup>

In applying these factors to the facts before it, the *Brahimaj* tribunal notably held that despite the “shelling of villages,” the requisite level of “intensity” had not been satisfied and therefore there was legally no “armed conflict” during the time relevant to the tribunal’s consideration.<sup>81</sup> These factors, considering the manner that the *Brahimaj* tribunal applied them, suggest the “intensity” prong is a high bar to overcome.

In the 2008 ICTY case *Prosecutor v. Ljube Boškosi and Johan Tarculovski (Boškosi)*, the ICTY reviewed how the “organizational” prong must be considered. *Boškosi* articulates five different factors for consideration: (1) whether the group is organized into a military command structure (e.g., squad, platoon, company, battalion, brigade); (2) whether the group is able to conduct operations in an organized manner; (3) whether the group has a logistical capacity to support military operations; (4) whether the group has an internal disciplinary system and the ability to adhere to IHL; and (5) whether the group can “speak with one voice.”<sup>82</sup> These factors suggest a

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<sup>77</sup> *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment of the Trial Chamber, paras. 85, 90 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

<sup>78</sup> *Id.*

<sup>79</sup> *Prosecutor v. Haradinaj (Brahimaj)*, Case No. IT-04-84bis-T, Judgment of the Trial Chamber, para. 394 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2012).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* paras. 404, 410–11 (emphasis added).

<sup>82</sup> *Prosecutor v. Boškosi (Boškosi)*, Case No. IT-04-82-T, Judgment of the Trial Chamber, paras. 199–203 (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008), *aff’d*, *Boškosi et al.*, IT-04-82-T,

lower bar for the “organization” prong because they largely do not require actual organizational fidelity but merely require the potential to do so—for example, the “ability to determine a unified military strategy” rather than having actually determined a unified military strategy.<sup>83</sup>

### *B. Application of IHL to Mexican Drug Cartel Violence*

The above authorities guide the analysis of IHL’s applicability to Mexican drug cartel violence. First, it is evident that Mexican drug cartel violence is “not of an international character” as the conflict is not between two states. The issue remains whether the violence is an “armed conflict.” Part (1) of this section applies the ICRC commentary to CA 3’s analysis to the facts concerning the Mexican drug cartel violence. Part (2) is an AP II analysis of the drug cartel violence. Part (3) is a comparison of the drug cartel violence to the ICTY’s treatment. Part (4) compares the drug cartel violence to the examples of what is not an “armed conflict”.

#### *1. Application of ICRC’s Commentary to CA 3*

There is no evidence that satisfies the ICRC criteria’s first predicate condition: that the non-state actor is attempting, through violence, to create a new or rival government to the de jure government. For example, the drug cartels have not established a system of justice to ensure their conduct is in accordance with CA 3. The drug cartels do not possess territory over which they exercise civil authority, nor do the drug cartels purport to have any of the characteristics of a state. Lastly, Mexican military officials do not feel “obliged” to respond to the drug cartels with military force. Some may argue otherwise, pointing to the actual use of Mexican military against the cartels as evidence that it is so “obliged.” The Defense Minister’s statements largely characterizing the use of the military against the drug cartels as a folly weigh heavily against this argument. The statements are persuasive evidence that Mexico is not bound by the circumstances to use its military but has instead chosen to do so only for practical expediency. Therefore, the first, second, and fourth ICRC criteria, as applied here, suggest that the violence is not an armed conflict.

The second predicate condition—that the conflict has demanded the international community’s attention—is similarly left unsatisfied by the facts.

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Judgement of the Appeals Chamber, para. 23 (Int’l Crim. Trib. for the Former Yugoslavia May 19, 2010).

<sup>83</sup> Bošković, Case No. IT-04-82-T, Judgment of the Trial Chamber, para. 200.

The violence has not entered the international plane. No party is reported as declaring the drug cartels “belligerents.” Neither the U.N. General Assembly nor U.N. Security Council is involved with the Mexican drug cartel violence, and the drug cartels have evidenced no willingness to observe IHL.

Reference to the ICRC commentary therefore suggests that the Mexican drug cartel violence is not a NIAC. It follows that IHL would not be applicable. Yet, the ICRC commentary is persuasive but not controlling authority. It is therefore worthwhile to continue the analysis of whether an armed conflict exists in Mexico.

## 2. *Application of AP II*

The first two requirements of AP II are satisfied by the facts surrounding the Mexican drug cartel violence. First, the violence is, at least in part, between a state actor and a non-state actor. Second, the drug cartels’ organizational hierarchy satisfies the “responsible command structure” requirement. With respect to the third criterion, the coordinated and, at times, successful nature of the “shootouts” against the Mexican military demonstrates the cartels’ ability to carry out sustained and concerted military operations. Nonetheless, the third criterion is not satisfied, as the cartels have not exercised such control over territory to implement the requirements of AP II.<sup>84</sup> For example, there is no indication that the drug cartels can perform the functions concerning the education of children, the detention of prisoners, the medical treatment of prisoners, or the establishment of a penal system. As one report from Mexico poignantly stated, “none interviewed could point to a single public work, school or hospital built or funded by [a drug cartel kingpin].”<sup>85</sup> The elements for finding an “armed conflict” pursuant to AP II are not all satisfied, and the application of IHL to the violence would be baseless within the AP II framework.

## 3. *Comparison to ICTY’s Treatment of CA 3*

An examination of the ICTY’s jurisprudence concerning CA 3 confirms the conclusion that there is not an armed conflict in Mexico. Consider the *Tadić* test where both the “intensity of the conflict and the organization of the

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<sup>84</sup> Protocol II, *supra* note 52.

<sup>85</sup> Deborah Bonello, *In His Hometown, Fugitive Mexican Drug Lord ‘El Chapo’ is a Hero to Many*, L.A. TIMES (Aug. 10, 2015), <http://www.latimes.com/world/mexico-americas/la-fg-mexico-culiacan-guzman-20150810-story.html>.

parties to the conflict” determine the existence of an “armed conflict.”<sup>86</sup> First, the “organization” prong, as clarified by *Boškoski*,<sup>87</sup> is satisfied by the “major” drug cartels. The “intensity” prong, however, is not satisfied. Having already referenced the ICRC’s commentary as recommended by *Tadić*, attention must next be given to the *Tadić* progeny’s treatment of “intensity.”

The balance of the *Brahimaj* factors weigh in favor of finding the Mexican drug cartel violence does not satisfy the “intensity” prong. Although the violence has exacted significant numbers of casualties and many troops have been engaged, the remaining considerations cut in the other direction. For example, the military is calling for a reduced (if not eliminated) role; neither the U.N. Security Council nor the General Assembly are involved in the situation; the use of artillery, tanks, and other heavy vehicles is not reported; towns are not besieged; towns are not shelled; “front lines” are not established and changed; and there are no ceasefire orders and agreements. No single *Brahimaj* factor is required to answer the threshold question, and an international tribunal considering their aggregate weight would find the balance in favor of determining that the Mexican drug cartel violence is an internal disturbance. The ICTY jurisprudence, therefore, also suggests IHL is not applicable.

#### 4. Comparison to Negative Examples of an “Armed Conflict”

The Mexican drug cartel violence is also more akin to the examples of what is not an armed conflict. Specifically, as noted above, banditry, unorganized or short-lived insurrections, acts of terrorism, and situations of internal disturbances and tensions cannot legally be considered “armed conflicts.” Banditry is the plural of bandit, or “a robber or outlaw belonging to a gang and typically operating in an isolated or lawless area.”<sup>88</sup> An “insurrection” is “[t]he action of rising in arms or open resistance against established authority or governmental restraint . . . .”<sup>89</sup> Mexican drug cartel violence is centered on creating lawlessness and is therefore similar to the disavowed “banditry.” On the other hand, the drug cartel violence is organized and protracted—it is directed at the government and also occurs between the

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<sup>86</sup> *Tadić*, Case No. IT-94-1-AR72, Judgment of the Trial Chamber, para. 562.

<sup>87</sup> *Boškoski* Trial Chamber, Case No. IT-04-82-T, Judgment of the Trial Chamber, paras. 199–203.

<sup>88</sup> *Bandit*, OXFORD ENGLISH DICTIONARY, <https://en.oxforddictionaries.com/definition/bandit> (last visited Nov. 13, 2017) (online edition).

<sup>89</sup> *Insurrection*, OXFORD ENGLISH DICTIONARY, <https://en.oxforddictionaries.com/definition/insurrection> (last visited Nov. 13, 2017) (online edition).



drug cartels. In this light, the drug cartel violence might be an “armed conflict” as compared to the “short-lived insurrection” example.

The “terrorist activities” example given by *Tadić* appears to lend more credibility to the conclusion that the drug violence is not legally an armed conflict.<sup>90</sup> Yet using “terrorist activities” for comparison purposes is nebulous for two reasons: first, because “terrorism” is widely defined, and second, because the U.S. War on Terror might contradict the premise that “terrorist activities” are still a valid example of what is not an armed conflict. Nonetheless, two international instruments have defined terrorism and serve as persuasive authorities for how “terrorism” is understood by international law. First, the International Convention for the Suppression of the Financing of Terrorism in 1999, to which 188 states are parties, defines terrorism as:

act[s] intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.<sup>91</sup>

Second, U.N. Security Council Resolution 1566 defines terrorism as:

[c]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism . . . .<sup>92</sup>

Using these definitions, the pattern of drug cartel violence trending towards the sort characterized as “mafia ridden” suggests the violence is not an “armed conflict.” Instead, the drug cartel violence is understood as intending to “intimidate [the Mexican] population” or to “compel [the Mexican] government . . . to abstain from [enforcing its drug laws].”<sup>93</sup> In this respect, the drug cartel violence is the same kind of violence associated with terrorism as

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<sup>90</sup> *Tadić*, Case No. IT-94-I-AR72, Judgment of the Trial Chamber, para. 562.

<sup>91</sup> Int’l Convention for the Suppression of the Financing of Terrorism art. 2, U.N. Doc. A/RES/54/109 (Dec. 9, 1999).

<sup>92</sup> S.C. Res. 1566, ¶ 3 (Oct. 8, 2004).

<sup>93</sup> *See id.*

defined by the International Convention for the Suppression of the Financing of Terrorism and Security Council Resolution 1566.

Additionally, the U.S. War on Terror provides counterexamples of when terrorist activities can be considered part in parcel to an “armed conflict,” but it does not operate to entirely discredit the use of “terrorist activities” as an example of what an armed conflict is not. The War on Terror is distinguishable from the Mexican drug cartel violence in at least two ways. First, the Mexican drug cartel violence presents a transnational issue, whereas the War on Terror presents an international issue.<sup>94</sup> Second, the United States and Al Qaeda have each recognized the existence of an armed conflict between each other.<sup>95</sup> The use of the “terrorist activities” example therefore supports the conclusion that the drug cartel violence is not an armed conflict.

Lastly, consideration of AP II’s proscription of “situations of internal disturbances and tensions” from being a legal armed conflict<sup>96</sup> confirms the conclusions that there is no NIAC in Mexico. The drug cartel’s violence is intended to deconstruct law-abiding behavior in Mexico so that illicit business may succeed. This has created a strained state between the proponents of this lawlessness, the cartels, and Mexico. Furthermore, and as noted above, the ICRC’s commentary to AP II establishes that the military forces may be used in certain instances to maintain respect for law and order without violence being considered an armed conflict.<sup>97</sup> Mexican military officials’ statements demonstrate the use of the military as a law enforcement tool against “criminals.” The Mexican drug cartel violence, although significant, is consequently a Mexican “internal disturbance.”

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<sup>94</sup> See S.C. Res. 1377 (Nov. 12, 2001) (“Transnational issue” used here means the drug cartel violence is embedded in Mexico but at times transcends its borders, whereas “international issue” used here means it has seized the attention of the U.N. Security Council and therefore exists on a level above the states as independent sovereigns).

<sup>95</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); Dominic Tierney, *The Twenty Years’ War*, THE ATLANTIC (Aug. 23, 2016), <https://www.theatlantic.com/international/archive/2016/08/twenty-years-war/496736/>; see also Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>96</sup> Protocol II, *supra* note 52, art. 1.

<sup>97</sup> Sandoz, *supra* note 53, at 1319–1320.

### III. INTERNATIONAL HUMAN RIGHTS LAW

Although IHL should not govern the conduct of a potential U.S. military intervention into Mexican drug cartel violence, the United States still has legal obligations under IHRL. The United States is a party to seventeen human rights treaties.<sup>98</sup> The International Covenant on Civil and Political Rights (ICCPR), however, is the most relevant. Part III(A) considers the application of the ICCPR to the potential use of military force in Mexico. Part III(B) considers the implications of the United States signing (but not ratifying) the American Convention on Human Rights (American Convention). Finally, Part III(C) considers human rights as customary international law.

#### A. *The ICCPR*

The ICCPR articulates several individual human rights. Article 6(1) promulgates a non-derogable right to life comprised of three separate, but related, conditions: (1) everyone has the right to life; (2) that right must be protected by law; and (3) no one can be arbitrarily deprived of life.<sup>99</sup> Article 6(1) thus establishes a foundational right to life that is mutually supported by a “positive obligation” of governments to protect that right and a “negative obligation” preventing that right from being arbitrarily taken. With respect to rights concerning arrest or imprisonment, Article 9 provides that “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”<sup>100</sup> Therefore, the ICCPR constrains the U.S. military in Mexico to not arbitrarily: (1) take life; and (2) arrest or imprison people. The U.S. executive branch does not, however, share this conclusion, as discussed above.

The ICCPR also provides for how these rights will be ensured by the treaty’s parties. Article 2(1) states “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . .”<sup>101</sup> Article 5(1) qualifies the general statement of Article 2(1) by providing:

[n]othing in the present Covenant may be interpreted as implying for any State . . . any right to engage in any activity or perform any act

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<sup>98</sup> *Ratification of International Human Rights Treaties - USA*, UNIV. MINN. HUM. RTS. LIBR., <http://hrlibrary.umn.edu/research/ratification-USA.html> (last visited Nov. 13, 2017).

<sup>99</sup> International Covenant on Civil and Political Rights (ICCPR) arts. 4(2) and 6(1), Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>100</sup> *Id.* art. 9(1).

<sup>101</sup> *Id.* art. 2(1).

aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.<sup>102</sup>

In other words, Article 2(1) creates an affirmative obligation to protect human rights within the United States' territory and jurisdiction while Article 5(1) prohibits the United States from taking actions that destroy the rights of anyone beyond the United States' territory and jurisdiction. The Human Rights Committee (HRC),<sup>103</sup> in General Comment Thirty-One, similarly concluded:

Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant . . . . This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.<sup>104</sup>

The U.S. government's executive branch rejects the legal conclusion that the ICCPR imposes limits on its extraterritorial actions.<sup>105</sup> In March 2014, before the HRC, the United States affirmed the position it has held since 1995: "the [ICCPR] applies only to individuals both within its territory *and* within its jurisdiction . . . ."<sup>106</sup> In November 2014, the United States moved closer to, but not congruent with, the HRC's effective control test when it announced that its obligations under the Convention Against Torture (as opposed to the ICCPR) "apply in places outside the United States that the U.S. government controls as a governmental authority."<sup>107</sup>

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<sup>102</sup> *Id.* art. 5(1).

<sup>103</sup> *Id.* Part IV details the make and functions of the Human Rights Committee. *Id.* arts. 28–45. The drafting and promulgating general comments regarding the ICCPR is not necessarily an obvious function of the committee from the articles of the ICCPR; the Committee has nonetheless made it a practice. Off. of the U.N. High Comm'r for Hum. Rts., Civil and Political Rights, Factsheet No. 15 (Rev. 1) 15 (2005), <http://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>.

<sup>104</sup> U.N. Hum. Rts. Comm., General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, art. 2(1), CCPR/C/21/Rev.1/Add13.

<sup>105</sup> Charlie Savage, *U.S., Rebuffing U.N., Maintains Stance That Rights Treaty Does Not Apply Abroad*, N.Y. TIMES (Mar. 13, 2014), <https://www.nytimes.com/2014/03/14/world/us-affirms-stance-that-rights-treaty-doesnt-apply-abroad.html>.

<sup>106</sup> *Id.* (emphasis added) (quoting Mary McLeod, Acting Legal Adviser, U.S. Department of State).

<sup>107</sup> Press Release, Bernadette Meehan, Spokesperson, National Security Council, U.S. Presentation to the Committee Against Torture (Nov. 12, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/12/statement-nsc-spokesperson-bernadette-meehan-us-presentation-committee-a>.

Using either of the executive branch's interpretations, the U.S. military would not be constrained by either IHL or IHRL in Mexico and, thus, legally free to arbitrarily kill or arrest and imprison Mexicans. In the face of a manifestly absurd or unreasonable interpretation of a treaty, Article 32 of the Vienna Convention on the Law of Treaties provides recourse to "supplementary means of interpretation" of a treaty's text.<sup>108</sup> In 2010, the Office of the Legal Adviser at the Department of State drafted a legal opinion that did resort to supplementary means of interpretation.<sup>109</sup> In this opinion, the Legal Adviser concluded that, in light of "(1) the [ICCPR's] language in context; (2) object and purpose; (3) negotiating history; (4) U.S. positions; (5) interpretations of other States Parties; (6) interpretations of the Human Rights Committee; and (7) ICJ rulings,"<sup>110</sup> the United States is obligated to "respect rights under its control in circumstances in which the [United States] exercises authority or effective control over a particular person or context without regard to territory."<sup>111</sup> Should the issue become justiciable, the 2010 Legal Adviser's Opinion presents a strong argument that is supported by the HRC's General Comment Thirty-One. Furthermore, a plain reading of ICCPR's Articles 2(1) and 5(1) support concluding that the ICCPR has (at least some) extraterritorial regulatory effect. It is therefore likely a Court would find the U.S. military bound by the ICCPR to respect the human rights of individuals in Mexico who find themselves under the U.S. military's effective control.

### *B. The American Convention*

The American Convention separately sets forth binding IHRL obligations. These obligations often mirror those traced to the ICCPR. For example, Article 4(1) of the American Convention states: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."<sup>112</sup>

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<sup>108</sup> Vienna Convention on the Law of Treaties art. 32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; The United States is not a party to this treaty but considers it representative of customary international law. Vienna Convention on the Law of Treaties, U.S. DEP'T OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Nov. 13, 2017).

<sup>109</sup> U.S. DEP'T OF STATE OFF. OF THE LEGAL ADVISER, MEMORANDUM OPINION ON THE GEOGRAPHIC SCOPE OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (2010), <https://www.documentcloud.org/documents/1053853-state-department-iccpr-memo.html> [hereinafter DEP'T OF STATE LEGAL ADVISER].

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* (emphasis omitted).

<sup>112</sup> American Convention on Human Rights art. 4(1), Nov. 21, 1969, 1144 U.N.T.S. 143.

Convention Article 7(3) provides, *inter alia*, that “[n]o one shall be subject to arbitrary arrest or imprisonment.”<sup>113</sup>

Mexico is a party to the American Convention.<sup>114</sup> The United States has signed, but has not ratified, the American Convention, and therefore has a customary international legal obligation to not defeat the treaty’s object and purpose.<sup>115</sup> There are several tests used to determine whether a state has defeated the object and purpose of a treaty. By almost every measure discussed below, the United States cannot take action that the American Convention prohibits Mexico from taking without defeating the American Convention’s object and purpose.

The first measure is the “essential elements test,” which requires a signatory to “comply with the most important parts” of the treaty.<sup>116</sup> It cannot be successfully argued that the right to not have your life arbitrarily taken and the right to be free from arbitrary arrest and imprisonment are not “important parts” of the American Convention. Every other right a person might enjoy under the American Convention presupposes they are alive and free to enjoy it. Therefore, these two rights are “important parts” of the treaty, and the United States taking action that violates their protections would defeat the object and purpose of the American Convention.

A second test is the “impossible performance test.” This test holds that the “object and purpose is defeated if subsequent performance of the treaty becomes impossible or ‘meaningless.’”<sup>117</sup> If a state arbitrarily kills an individual, then performance of the treaty *vis-à-vis* that individual is impossible because the right to life is an individual human right rather than a collective right. The same cannot be said with respect to arbitrary arrest or imprisonment because the individual who is arbitrarily arrested or imprisoned can be subsequently released and, thus, performance of the treaty remains possible.

The final two tests are similar and worth discussing at once. They are the “bad faith test” and the “manifest intent test.” The “bad faith test” holds that “a

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<sup>113</sup> *Id.* art. 7(3).

<sup>114</sup> *American Convention on Human Rights “Pact of San Jose, Costa Rica” (B-32)*, ORG. AM. STATES, [http://www.oas.org/dil/treaties\\_B-32\\_American\\_Convention\\_on\\_Human\\_Rights\\_sign.htm](http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm) (last visited Nov. 13, 2017).

<sup>115</sup> *Id.*; VCLT, *supra* note 108.

<sup>116</sup> David S. Jonas & Thomas N. Sanders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 VAND. J. TRANSNAT’L L. 565, 596 (2010).

<sup>117</sup> *Id.* at 598.

state violates [the object and purpose of a treaty] if its actions are unwarranted or condemnable, while under the manifest intent test, the actions need only ‘seem unwarranted and condemnable . . . regardless of actual proof of bad faith.’”<sup>118</sup> With respect to the “bad faith test,” it is difficult to imagine how the use of military force to arbitrarily kill and arrest or imprison individuals for prolonged periods would be done in good faith. The bad faith test would therefore likely find actions taken to kill and arrest or imprison drug cartel members, on the sole basis of their membership in a drug cartel, as running afoul of the object and purpose of the American Convention. Under the “manifest intent test,” the use of military force outside the context of an armed conflict to arbitrarily kill and detain Mexicans would seem unwarranted and condemnable and are, thus, repugnant to the object and purpose of the American Convention.

Some may argue, however, that the “bad faith” and the “manifest intent” tests conclude the opposite. This argument would be premised on a belief that there is a legitimate security basis for killing or arresting and imprisoning drug cartel members given the nature of their criminal activity and the threat they pose. The argument would follow that using lethal force against or arresting and imprisoning drug cartel members is therefore not arbitrary or in bad faith. This argument hinges on whether a state’s legitimate security basis satisfies the American Convention’s proscription against the “arbitrary” taking of life and the “arbitrary arrest or imprisonment.”

This argument fails on its face with respect to the American Convention’s non-derogable right to life. Article 27(1) of the American Convention disavows any legitimate security basis for the suspension of the right to life.<sup>119</sup> In other words, the U.S. military cannot have a good faith basis to use lethal force in Mexico against drug cartel members solely because of their membership in a drug cartel. The only good faith basis under the American Convention for using lethal force is if a drug cartel member presents an imminent threat to others (*i.e.*, just because that individual has violated the law does not give license to the United States to use lethal force).

With respect to arbitrary arrest or imprisonment of an individual, pursuant to Articles 27(1) and 27(2) of the American Convention, an arrest or imprisonment based on an individual’s membership in a drug cartel (as opposed to their suspected violation of the law) can only be done in good faith

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<sup>118</sup> *Id.* at 602 (quoting Jan Klabbers, *How to Defeat a Treaty’s Object and Purpose Pending Entry into Force: Toward Manifest Intent*, 34 VAND. J. TRANSNAT’L L. 283, 330 (2001)).

<sup>119</sup> American Convention on Human Rights, *supra* note 112, arts. 27(1), 27(2).

if there is a nexus between the arrest or imprisonment and exigent circumstances that threaten the “independence *or* security” of Mexico.<sup>120</sup> Given the context, it is likely that the United States would argue that the drug cartel members threaten the “security” of Mexico. Convention Article 27(2)’s coordinated conjunction between “independence” and “security” (*i.e.*, the independence and security of Mexico are equally important) requires, however, that the security risk be comparable in gravity to the loss of Mexico’s continued independence. As established above in Part II(B), the Mexican drug cartels present a significant security risk but not to the extent that they threaten the independence of Mexico. It is therefore unlikely that this argument would succeed as applied to derogations of the right to be free from arbitrary arrest or imprisonment. If, however, the arrest or imprisonment of individuals was not arbitrary (*i.e.*, based on their suspected conduct in violation of established law rather than on their membership in a drug cartel), then the U.S. military would likely be acting in compliance with IHRL and not frustrating the object and purpose of the American Convention.

### C. Customary International Law

In addition to the treaty law, there is a body of “customary international law” that would control U.S. military conduct in Mexico.<sup>121</sup> Customary international law is created through the practice of states and *opinio juris* (state practices are implemented because states believe they are required by international law). A state may not be required to observe customary international law if the state has been a “persistent objector.”<sup>122</sup> To qualify as a persistent objector, a state must have dissented from a practice as that practice ripened into customary international law.<sup>123</sup> Once the practice subsequently matures into customary international law, any state that persistently objected to it is exempt from it.<sup>124</sup>

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<sup>120</sup> *Id.* (emphasis added).

<sup>121</sup> Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 178 (June 27).

<sup>122</sup> Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L.J. 457, 458 (1985).

<sup>123</sup> *Id.* (“A state that has persistently objected to a rule is not bound by it, so long as the objection was made manifest during the process of the rule’s emergence.”).

<sup>124</sup> *Id.*



The Universal Declaration of Human Rights (UDHR) is accepted,<sup>125</sup> at least in relevant part, as articulating customary international law.<sup>126</sup> Article 3 of the UDHR states simply, and without territorial limitations, “[e]veryone has the right to life, liberty and security of person.”<sup>127</sup> It is well established that, as a corollary to this right, it is a violation of customary international human rights law for a state to carry out extrajudicial killings unless as a necessary act in exigent circumstances—for example, a police officer acting in self-defense of himself or others.<sup>128</sup> Article 9 of the UDHR prohibits the arbitrary arrest or detention of any individual.<sup>129</sup> Customary international human rights law has accordingly been interpreted as prohibiting detention of individuals in a manner “incompatible with the principles of justice or with the dignity of the human person.”<sup>130</sup>

The U.S. opposition to extraterritorial application of the ICCPR could be argued to make the United States a persistent objector to the extraterritorial application of the ICCPR’s obligations that can also be traced to customary international human rights law. Assuming *arguendo* that the U.S. objection to extraterritorial application of *treaty*-based human rights law is relevant for purposes of becoming a persistent objector to customary international human rights law, the argument still fails because the United States has not been persistent in its objections. In 1980, the United States filed a brief, as *amicus curiae*, in the matter of *Filartiga v. Pena-Irala* before the Second Circuit, arguing that “certain fundamental human rights are now guaranteed to individuals as a matter of customary international law.”<sup>131</sup> In 1980, the United States also filed a written proceeding in the *Case Concerning United States Diplomatic & Consular Staff in Tehran* before the International Court of Justice (ICJ) arguing that states must “respect and observe” the rights enumerated in the UDHR and “corresponding portions of the [ICCPR]” for “nationals and aliens alike.”<sup>132</sup> In the same brief, the United States specifically

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<sup>125</sup> *Digital Record of the UDHR*, U.N. OFF. OF THE HIGH COMM’R FOR HUM. RTS. (Feb. 2009), <http://www.ohchr.org/EN/NEWSEVENTS/Pages/DigitalrecordoftheUDHR.aspx> (explaining that the UDHR has “become the international standard of human rights.”).

<sup>126</sup> Richard Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT’L & COMP. L. 1, 2 (1995).

<sup>127</sup> UDHR, *supra* note 43, art. 3.

<sup>128</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (AM. LAW INST. 1987).

<sup>129</sup> UDHR, *supra* note 43, art. 9.

<sup>130</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (AM. LAW INST. 1987).

<sup>131</sup> Memorandum for the United States as *Amicus Curiae*, at 6, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090).

<sup>132</sup> Memorial of the Government of the United States of America, *Case Concerning U.S. Diplomatic & Consular Staff in Tehran* (U.S. v. Iran), 1982 I.C.J. Pleadings 121, 182 (Jan. 12, 1980).

identified Articles 3 and 9 of the UDHR as deserving such treatment by states.<sup>133</sup> Additionally, between 1980 and 1993, three separate U.S. federal courts found the UDHR to be “an authoritative statement of customary international law.”<sup>134</sup>

Furthermore, the first time the United States made any objection to extraterritorial *treaty*-based application of human rights law was in 1995.<sup>135</sup> The 2010 Office of Legal Adviser’s memo, discussed above in Part III(A), illustrates that the United States did not object to extraterritorial application of the ICCPR “(1) at the time of signature and transmittal of the Covenant in 1978; (2) upon Senate advice and consent to the Covenant in 1991, or (3) at the time [sic] ratification in 1992.”<sup>136</sup> In 1994, having occasion to do so, the United States again failed to make a territorial objection in its report to the HRC concerning the applicability of the ICCPR.<sup>137</sup> The United States, having come late to its position on the matter, cannot now avail itself of “persistent objector” status to the existence of customary international law that it accepted as early as 1980.

#### IV. PRESIDENT’S DUTY TO OBEY IHRL

The U.S. Constitution requires the President to “take Care that the Laws be faithfully executed.”<sup>138</sup> The Supremacy Clause of the U.S. Constitution makes treaties the supreme law of the land.<sup>139</sup> The President therefore has a constitutional duty to direct the military in a manner that conforms to treaty-based human rights law.<sup>140</sup> The President is additionally bound by customary international human rights in two respects. Part IV(A) discusses the President’s obligation to faithfully execute customary international human rights law generally. Part IV(B) discusses the U.S. Constitution’s structural bounds, or lack thereof, on the President’s authority to order the military to act against Mexican drug cartels in a manner that violates customary international human rights law.

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<sup>133</sup> *Id.* n. 36.

<sup>134</sup> *Phaidin v. U.S.*, 28 Fed. Cl. 231, 234 (Fed. Cl. 1993); *see also* *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 719 (9th Cir. 1992); *Filartiga v. Pena-Irala*, 630 F.2d 876, 882 (2d Cir. 1980).

<sup>135</sup> DEP’T OF STATE LEGAL ADVISER, *supra* note 109, at 30.

<sup>136</sup> *Id.* at 25.

<sup>137</sup> *Id.* at 29.

<sup>138</sup> U.S. CONST. art. II, § 3.

<sup>139</sup> U.S. CONST. art. VI, cl. 2.

<sup>140</sup> *But see* *Medellin v. Texas*, 552 U.S. 491, 508 (2008) (holding Article 94 of the U.N. Charter was not self-executing and thus not judicially enforceable by Article III courts whereas the present issue concerns the duty to faithfully execute under Article II).

### A. *Duty to Faithfully Execute Customary International Human Rights Law*

Applications of the U.S. Constitution's Take Care Clause requirements to customary international human rights law are nuanced. The "law" the Take Care Clause charges the President with faithfully executing is left unqualified by the Clause's text. Elsewhere, however, the U.S. Constitution's text twice qualifies its use of the word "law." Article I recognizes both the "Law of the Nations" (customary international law) and "the Laws of the Union."<sup>141</sup> Thus, a plain reading of the U.S. Constitution requires the President to faithfully execute all law, including customary international law, because the Take Care Clause's textual use of "law" is left general, whereas elsewhere the constitutional text qualifies the general with the specific.

The Take Care Clause's drafting history supports this conclusion. An early draft of the Clause included a qualifier that care be taken only with respect to "national laws."<sup>142</sup> Subsequent draft language qualified the Take Care Clause as only applicable to "the laws of the United States."<sup>143</sup> This qualifier was subsequently deleted and the final adopted version simply read "take Care that the Laws be faithfully executed."<sup>144</sup>

The courts have also concluded that customary international law is part of U.S. domestic law. In 1900, the U.S. Supreme Court held in *The Paquete Habana* that customary international law is U.S. law where "there is no treaty and no controlling executive or legislative act or judicial decision."<sup>145</sup> This holding confirms customary international law is part of U.S. federal common law but also suggests the President or Congress can violate it through some other exercise of power.<sup>146</sup> Customary international law as a part of U.S. domestic law is therefore a "gap" filler to be applied when no other controlling law exists.<sup>147</sup> It would appear, then, that customary international law is part of Article II's Take Care Clause but not part of Article VI's Supremacy Clause.<sup>148</sup>

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<sup>141</sup> U.S. CONST. art. I, § 8.

<sup>142</sup> 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 63 (Max Farrand ed., 1911).

<sup>143</sup> 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 185 (Max Farrand ed., 1911).

<sup>144</sup> *Id.* at 660.

<sup>145</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900).

<sup>146</sup> *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880-81 (2d Cir. 1980) (explaining that customary international law is a surviving vestige of federal common law following *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)).

<sup>147</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 (AM. LAW INST. 1987).

<sup>148</sup> U.S. CONST. art. VI, cl. 2.

It follows that the President, otherwise bound to faithfully execute customary international law by operation of the Supremacy Clause, must have a countervailing constitutional authority for taking executive action to displace customary international law. Three circuit courts have generally adopted this conclusion.<sup>149</sup> The U.S. Supreme Court, in *Banco Nacional de Cuba v. Sabbatino*, suggested that the President's constitutional authority as chief executive of foreign affairs could supersede any duty to faithfully execute customary international law.<sup>150</sup> *Sabbatino* explains that the chief executive authority vests the President with a responsibility not only to simply interpret customary international law, but also to advocate for changes in customary international law when he believes it is necessary to do so.<sup>151</sup> The argument would follow that the advocacy role permits the President to take unilateral action (*i.e.*, without congressional approval) that violates customary international law as part of a bid to create or change customary international law to benefit the nation.

The argument is misapplied in this instance because the rights to life and to be free from prolonged arbitrary detention are each considered *jus cogens*.<sup>152</sup> The norms of *jus cogens* are "accepted and recognized by the international community as a norm from which no derogation is permitted."<sup>153</sup> Thus, the rights to life and to be free from arbitrary detention are not malleable customary international human rights laws. It is therefore beyond the President's unilateral authority, assuming *arguendo* it exists at all, to violate these norms under the pretense of shaping customary international law.

### B. Constitutional Structural Limits on Presidential Power

The U.S. Constitution places structural constraints on the exercise of presidential authority. In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson issued an influential concurring opinion to assess presidential power through a tri-partite analysis, which divides presidential power into three categories based on what Congress has or has not done.<sup>154</sup> Category one includes presidential acts taken pursuant to an expressed or implied

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<sup>149</sup> See, e.g., *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1451 (9th Cir. 1995); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1454–55 (11th Cir. 1986); *Gisbert v. U.S. Att'y Gen.*, 988 F.2d 1437, 1448 (5th Cir. 1993).

<sup>150</sup> *Sabbatino*, 376 U.S. at 432–33.

<sup>151</sup> *Id.*

<sup>152</sup> *Jus cogens* are principles that form the norms of international law that cannot be set aside. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (AM. LAW INST. 1987).

<sup>153</sup> *Jus Cogens*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>154</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

authorization of Congress. When acting in this category, the President has maximum authority.<sup>155</sup> Category two presidential actions are done in the absence Congress's approval or denial. This is a "gray" area of presidential authority.<sup>156</sup> Category three are presidential actions incompatible with the expressed or implied will of Congress.<sup>157</sup> This is the lowest presidential authority and, to be constitutional, it must be only "his own constitutional powers minus any specific constitutional powers of Congress over the matter."<sup>158</sup>

While it is true that "the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast *share* of responsibility for the conduct of our foreign relations.'"<sup>159</sup> Nonetheless, unilaterally ordering the U.S. military to Mexico to address the drug cartels would encroach upon the exclusive Article I congressional authority to regulate foreign commerce,<sup>160</sup> as well as the following shared constitutional powers: the war powers,<sup>161</sup> the power to send ambassadors,<sup>162</sup> and the treaty-making power.<sup>163</sup> Therefore, without congressional acquiescence, the President cannot send the military to Mexico without violating customary international human rights law.<sup>164</sup>

In foremost support of this conclusion is Congress's expansive authority to regulate foreign commerce.<sup>165</sup> The Eleventh Circuit found this authority includes "at least the power to regulate the . . . 'instrumentalities' of commerce between the United States and other countries."<sup>166</sup> The President's use of the military as the instrument to stop the Mexican drug trade from crossing the U.S. border would encroach on Congress's exclusive and expansive commerce

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<sup>155</sup> *Id.* at 635–37.

<sup>156</sup> *Id.* at 637.

<sup>157</sup> *Id.* at 637–38.

<sup>158</sup> *Id.* at 637.

<sup>159</sup> *American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11(1952) (Frankfurter, J., concurring)) (emphasis added).

<sup>160</sup> *Youngstown*, 343 U.S. at 587.

<sup>161</sup> U.S. CONST. art. I, § 8, cl. 11–13 (granting Congress the power to declare war and "make Rules concerning Captures," "to raise . . . Armies," and to "maintain a Navy . . ."); U.S. CONST. art. II, § 2 (naming the President the Commander-in-Chief of the armed forces).

<sup>162</sup> U.S. CONST. art. II, § 2, cl. 2 (granting the President the power to appoint Ambassadors with the advice and consent of the Senate).

<sup>163</sup> *Id.* (granting the President the power to make treaties with the advice and consent of the Senate).

<sup>164</sup> *See Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981).

<sup>165</sup> U.S. CONST. art. I, § 8, cl. 3; *see U.S. v. Clark*, 435 F.3d 1100, 1113 (9th Cir. 2006).

<sup>166</sup> *U.S. v. Baston*, 818 F.3d 651, 668 (11th Cir. 2016).

clause power. If done through unilateral presidential action, it would be an unconstitutional exercise of power.

Consider also the “war powers.” Article II, § 2 makes the President Commander-in-Chief of the Armed Forces. Article I, § 8, Clause 11 of the U.S. Constitution gives Congress the power to “declare War” and “make Rules concerning Captures on Land and Water.”<sup>167</sup> This clause vests Congress with the authority to initiate armed conflict and to define what property may be subsequently taken by the military.<sup>168</sup> It operates as a direct congressional limit on the “Commander-in-Chief” authority.<sup>169</sup> Congress enacted the War Powers Act over presidential veto to clarify how these shared authorities over the military should operate.<sup>170</sup> The Act requires the President to report to Congress any introduction of U.S. armed forces, *inter alia*, anytime he introduces substantially large numbers of the Armed Forces into a foreign country, if those armed forces are “equipped for combat.”<sup>171</sup> The scope, scale, and violent nature of the drug cartels’ operations—and President Trump’s rhetoric—signal that this requirement would also be satisfied. The Act further requires, without regard to the quantity of troops introduced, reporting to Congress in any case where armed forces are introduced “into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”<sup>172</sup> This provision would be triggered if the President introduced armed drones into Mexico because the armament carried by such drones would be *prima facie* evidence of their imminent involvement in hostilities. After receiving a report from the President, Congress may exercise a supervisory function over that deployment and, by a concurrent resolution, order the removal of those armed forces.<sup>173</sup> There is some, albeit limited, “historical gloss” suggesting the War Powers Act requires congressional oversight of presidential orders deploying the military to a foreign state for the purpose of restoring law and order. On “February 25, 2000, President Clinton reported to Congress ‘consistent with the War Powers Resolution’ that he had authorized the participation of a small number of U.S. military personnel” to assist in maintaining “law and order” in East Timor.<sup>174</sup> On March 2, 2001, President George W. Bush continued the

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<sup>167</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>168</sup> Ingrid Wuerth, *The Captures Clause*, 76 U. CHI. L. REV. 1683, 1740 (2009).

<sup>169</sup> *Id.* at 1743.

<sup>170</sup> 50 U.S.C.S. § 1541 (1973).

<sup>171</sup> 50 U.S.C.S. § 1543 (1973).

<sup>172</sup> *Id.*

<sup>173</sup> 50 U.S.C.S. § 1544 (1973).

<sup>174</sup> BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2016 (2016).

precedent and reported to Congress his continued commitment of U.S. military to support law and order in East Timor.<sup>175</sup>

Next, consider the shared power over appointing and sending ambassadors.<sup>176</sup> The U.S. Constitution requires the Senate to provide its advice and consent for the appointment of ambassadors.<sup>177</sup> Ambassadors are the head of a diplomatic mission to another state.<sup>178</sup> A diplomatic mission is understood to be, *inter alia*, the representation of the sending state's interests and the promotion of friendly relations between the receiving state and the sending state.<sup>179</sup> Therefore, the Senate has a shared power with the President over the way the United States conducts relations with Mexico, which would necessarily include whether the United States violates the human rights of Mexicans.

Finally, Congress has not been silent in its views concerning the U.S. military's observance of human rights; therefore, the prospect of presidential action to send the military unconstrained by customary international human rights law to Mexico would be a *Youngstown* category three exercise of power. In Congress's declaration of policy concerning the use of the U.S. military in foreign assistance, codified in 22 U.S.C.S. §§ 2301–2305, Congress stated that the use of the military will be congruent with the United States' "principal goal . . . to promote the increased observance of internationally recognized human rights . . . ."<sup>180</sup> Congress has further stated: "It is the policy of the United States . . . to affirm fundamental freedoms and internationally recognized human rights in foreign countries, as reflected in the [UDHR] and the [ICCPR], and to condemn offenses against those freedoms and rights as a fundamental component of United States foreign policy . . . ."<sup>181</sup> It is, accordingly, inescapable that Congress has articulated a position incompatible with ordering the U.S. military to Mexico without the constraints of customary international human rights law. Under Justice Jackson's oft-cited *Youngstown* analysis, any executive action doing so would be unconstitutional.

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<sup>175</sup> *Id.*

<sup>176</sup> U.S. CONST. art. II, § 2.

<sup>177</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>178</sup> Vienna Convention on Diplomatic Relations, arts. 1, 3, 14, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (entered into force Dec. 13, 1972).

<sup>179</sup> *Diplomatic Mission*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>180</sup> 22 U.S.C.S. § 2304 (1961).

<sup>181</sup> 22 U.S.C.S. § 8202 (2007).

## CONCLUSION

President Trump has suggested both that the U.S. military should go fight Mexican drug cartels and that, but for controlling legal authorities, the U.S. military should in some circumstances kill civilians.<sup>182</sup> The latter suggestion seems to lament the existence of IHL protections against military abuses. The situation in Mexico is not, however, an armed conflict. The drug cartels' use of violence is for business purposes, designed to create chaos ripe for a criminal enterprise's exploitation. There is no indication that the drug cartels seek to govern or control territory beyond what is necessary for their criminal purposes. Applying these facts to an analysis of the ICRC's commentary and to the requirements of AP II—in addition to comparing them to the ICTY's jurisprudence—results in a conclusion that the drug cartels' violence does not trigger CA 3's application of IHL.

Perhaps, then, the President might be emboldened by the inapplicability of IHL to the drug cartel violence as he endeavors to confront them. Yet, as the commentary to AP II cautions, “this does not mean that there is no international legal protection applicable to such situations, as they are covered by universal and regional human rights instruments.”<sup>183</sup> The ICCPR is one such instrument whose protections are rightly considered to apply to Mexicans against U.S. military actions. Even if the President rejects, as previous administrations have, the extraterritorial reach of the ICCPR, customary international law exists separately from treaty-based law and is also controlling. Thus, IHRL, whether operating through the ICCPR, the American Convention, customary international human rights law, or all three, binds the U.S. military's actions while operating inside of Mexico.

The President, and by extension the U.S. military, is obligated to adhere to these international legal authorities under U.S. domestic law. The President has a constitutional duty to faithfully execute the ICCPR. His obligation to faithfully execute the law also extends to customary international human rights law because, in this instance, there is no offsetting of constitutional authority relieving him of this duty. Unless Congress decides otherwise, the “bad hombres” of the Mexican drug cartels are entitled to certain legal human rights protections from the U.S. military. The President should welcome, rather than bemoan, this conclusion as a demonstration of fidelity to our nation's founding

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<sup>182</sup> LoBianco, *supra* note 4; Wong, *supra* note 6.

<sup>183</sup> Sandoz, *supra* note 53, at 1356.



principles and as support to a rules-based international order through which the United States might, over time, find greater security and prosperity.