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Mexico's "War on Drugs" – Real or Rhetorical Armed Conflict?

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Mexikos Kampf gegen Drogenkartelle wird oftmals als „Drogenkrieg“ bezeichnet. Der Autor untersucht, ob die Auseinandersetzungen zwischen Militär und Drogenkartellen als bewaffneter Konflikt einzustufen sind, womit sie dem humanitären Völkerrecht unterliegen würden. Angesichts mehrerer weitreichender Entscheidungen sowie unter Berücksichtigung moderner, sogenannter „anarchischer“ Konflikte liegt es nahe, von einem bewaffneten Konflikt zu sprechen. Doch eine solche Einordnung wäre unzutreffend, da die Drogenkartelle nicht die erforderliche Organisationsstruktur aufweisen. Insofern handelt es sich bei Mexikos „Drogenkrieg“ eher um einen rhetorischen als um einen tatsächlichen bewaffneten Konflikt.

The author considers Mexico's "drug war" to determine if the ongoing violence between authorities and drug cartels can be classified as an armed conflict, which would make the situation subject to International Humanitarian Law (IHL). Looking at several influential decisions that determined the existence of an armed conflict as well as a consideration of modern, so-called "anarchic" conflicts, the current crisis seems well suited for such a categorisation. However, classifying Mexico's situation as an armed conflict would be inappropriate. Though sophisticated in some respects, these groups lack the organisation requirement and the violence unique to this crisis make this "drug war" a rhetorical war rather than a real armed conflict.

1. Introduction

"It's a serious fight," Mexico's President Felipe Calderón declared of his government's battle against illegal narcotics and their purveyors. "It's a war!"¹

Though no one doubts the so-called war on drugs has been a "serious fight", the better question is whether it is actually a "war". Colloquially the situation in Mexico has been referred to in military terms for decades and recently it has started to look less like a metaphorical war and more like an actual armed conflict in the sense of International Humanitarian Law. The military has been engaged, casualties have mounted and violence has spread. The nation's conservative leader even struck a martial pose by donning a military uniform for a trip to the front lines.² But as the means, methods and actors (not to mention the vernacular) have become more warlike, has the situation actually become an armed conflict by international legal standards?

A war waged (at least partly) by criminals tends to be an awkward match with the rules that have developed for the classification of internal armed conflict. This is mainly because the law was written with the stated intention of excluding "plain banditry"³ and "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."⁴ Even so, the conditions in existing jurisprudence do not discount criminals and instead place the emphasis on two criteria – the intensity of the conflict and organisation of the parties.⁵

This paper will argue that Mexico's unique situation makes it poorly suited for an armed conflict paradigm. Though there are many convincing arguments that the situation is in fact an armed conflict – which this paper will present – the groups wreaking havoc in the territory still fall short in several respects. First, the nature of the "conflict" makes intensity very hard to gauge. For example, how to measure the casualties when the cartels are "warring" with both the state and one another? Is the state-versus-cartels a single armed conflict or does it represent multiple wars? If the latter is recognised, then is every inter-cartel conflict a "war" as well?

Secondly, these groups are generally – though arguably not entirely – unable to comply with the norms of International Humanitarian Law. Furthermore, unlike many other disordered armed groups, these syndicates generally lack a stable chain of command and in some cases have only loose control over their "armed forces". What's more, (though the point is mostly theoretical) it is extremely difficult to tolerate a situation where drug gangs' tactics are measured by military necessity.

For all of these reasons, this paper will argue that the current crisis in Mexico is not an armed conflict for the purposes of International Humanitarian Law.

2. War vs. "Plain Banditry"

There is no shortage of historical precedence of wars staffed by gangsters. In the Middle Ages, armed forces were frequently a loose combination of trained professionals mixed with provisional, informal and irredeemably criminal elements.⁶ Historians observe that as stronger states established

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¹ L. Diaz, Four Americans Die in Drug-Smuggling Mexican Area, in: Reuters, 19 May 2008, <http://www.reuters.com/article/email/idUSN1954747020080519> (31 March 2011).

² S. Miller Llana, With Calderón in a New War on Mexico's Mighty Drug Cartels, in: The Christian Science Monitor, 22 January 2007, <http://www.csmonitor.com/2007/0122/p01s04-woam.html>.

³ J. Pictet, Commentary on the Geneva Conventions of 12 August 1949, Vol. III, Geneva 1960, p. 35.

⁴ Article 1 (2), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) (8 June 1977) 1125 UNTS 609, entered into force 7 December 1979.

⁵ ICTY, Prosecutor v. Duško Tadić (Decision on the Defence Motion Appeal for Interlocutory Appeal on Jurisdiction) ["Tadić Appeal on Jurisdiction"] IT-94-AR72, Appeal Chamber (2 October 1995), para. 70.

⁶ J. Mueller, *The Remnants of War*, Ithaca 2004, p. 24.

a permanent, professional and disciplined military class, authority merged to fewer powers, which facilitated the emergence of the state system as the sole proprietors of "legitimate violence."⁷

As power consolidated around states, the laws of armed conflict were designed with an obvious bias towards them – essentially excluding non-state actors like rebels, insurgents and criminal gangs. Early international agreements on war share a noteworthy characteristic, namely that only armed conflict between states was considered legitimate, leaving civil wars subject exclusively to domestic laws.⁸ What few international rules applied to civil wars were nebulous at best and depended largely on a state's improbable willingness to recognise its antagonists as belligerents.⁹

The International Committee of the Red Cross (ICRC) had long warned of the dangers of leaving internal armed conflict unregulated.¹⁰ In the 1920s, some unexceptional agreements were forged to establish simple considerations for the victims of internal armed conflict.¹¹ Yet following World War II, the ICRC worked through several drafts of a provision promoting principles to be respected during civil war that eventually took the form of Article 3 common to the four Geneva Conventions of 12 August 1949.¹² This provision, better known as common Article 3, imposes basic humanitarian obligations on both the government and non-state actors during civil war.¹³ The Article lays down a prohibition on violence to life and person; the taking of hostages; "outrages upon personal dignity" and "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court".¹⁴ It also requires that the wounded and sick be cared for and that humanitarian bodies, such as the ICRC, "may offer its services to parties to the conflict."¹⁵

States expressed fears that common Article 3 was too broad and would confer legitimacy to small bands of disorganised rebels or worse – mere outlaws.¹⁶ Governments argued that there existed "a risk of ordinary criminals being encouraged to give themselves a semblance of organisation as a pretext for claiming the benefit of the Convention, expressing their crimes as 'acts of war', in order to escape punishment for them."¹⁷

Armed groups fighting their governments tend to suffer a number of labels including rebels, traitors, insurgents, outlaws or freedom fighters. Any may accurately apply. Common Article 3 states that, "the application of the preceding provisions shall not affect the legal status of the Parties to the conflict."¹⁸ Unlike combatants in an international armed conflict, rebels may still be prosecuted domestically for challenging the state's authority, so these groups must straddle an uncomfortable status as both soldiers and criminals.¹⁹

A Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), was established to clarify the regulations enshrined in the Geneva Conventions. However, it set a high threshold for applicability,²⁰ namely those conflicts between armed forces that are under responsible command, control territory to a degree that they can "carry out sustained and concerted military operations and to implement this Protocol."²¹ Additional Protocol II also explicitly excludes "situations of internal disturbances

and tensions, such as riots, isolated and sporadic acts of violence (...) as not being armed conflicts."²²

The prohibitively elevated threshold is one possible reason why "international bodies have applied Protocol II much less frequently than common Article 3."²³

Yet outside the restricted ambit of Additional Protocol II, problems in knowing when to apply International Humanitarian Law remain. Distinguishing armed conflict from ordinary criminality – especially "at the lower end"²⁴ – can be difficult. Violence may be rife in Detroit, Johannesburg or Naples, yet it would be hard to argue there is an armed conflict occurring in these places.

During the drafting of common Article 3, a handful of delegations sought to develop objective criteria for a situation to be deemed an armed conflict²⁵ – rather than "any form of anarchy, rebellion or even plain banditry."²⁶ The effort to create a checklist of conditions for internal armed conflicts was abandoned, though the draft conditions are still viewed as helpful indicators to determine when common Article 3 should apply.²⁷ Among the *indicia* were: the armed party against the state "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."²⁸

Features that were also considered include the recognition of belligerency from the rival state; that the group demonstrate state-like attributes and that it agrees to the Geneva Conventions – all of which set the bar fairly high.²⁹ Yet some of these criteria, such as the element that armed opposition groups

⁷ *Id.*, p. 29.

⁸ A. Cassese, *International Law*, 2nd ed., Oxford 2005, p. 400.

⁹ L. Moir, *The Law of Internal Armed Conflict*, Cambridge 2002, pp. 21-22.

¹⁰ F. Kalshoven/L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, Geneva/Switzerland 2001, p. 28.

¹¹ L. Moir, *supra* note 9, p. 22.

¹² *Id.*, p. 23.

¹³ M. Griffin, *Ending the Impunity of Perpetrators of Human Rights Atrocities: A Major Challenge for International Law in the 21st Century*, in: *International Review of the Red Cross* 838 (2000), p. 369.

¹⁴ Article 3 common to the four Geneva Conventions of 12 August 1949, 75 UNTS 135, entered into force 21 October 1950 (hereafter referred to as "common Article 3").

¹⁵ Common Article 3.

¹⁶ L. Moir, *supra* note 9, p. 24.

¹⁷ J. Pictet, *supra* note 3, p. 32.

¹⁸ Common Article 3.

¹⁹ L. Zegveld, *The Accountability of Armed Opposition Groups in International Law*, 2nd ed., Cambridge 2003, pp. 37-38.

²⁰ F. Kalshoven/L. Zegveld, *supra* note 10, pp. 138-139.

²¹ Additional Protocol II, *supra* note 4.

²² *Ibid.*

²³ L. Zegveld, *supra* note 19, p. 143.

²⁴ Inter-American Commission on Human Rights, *Juan Carlos Abella v. Argentina* ["Tablada Case"] Case No. 11.137, (18 November 1997), para. 153.

²⁵ L. Moir, *supra* note 9, pp. 35-36.

²⁶ J. Pictet, *supra* note 3, p. 35.

²⁷ L. Moir, *supra* note 9, p. 36.

²⁸ *Ibid.*

²⁹ *Ibid.*

demonstrate a degree of organisation; have since become commonly accepted standards for the existence of an armed conflict.³⁰

The exclusion in Additional Protocol II of "situations of internal disturbances and tensions" means many armed conflicts meet the limit for common Article 3 to apply, without bringing the regulations of Additional Protocol II into effect,³¹ unless those rules are customary.³² A recent study by the ICRC argues that the majority of the rules of customary law regarding international armed conflict are now customary for internal armed conflict as well.³³

The Appeals Chamber for the International Criminal Tribunal for the former Yugoslavia (ICTY) reached a workable definition of armed conflict in its landmark *Tadić* decision on jurisdiction.³⁴ The Tribunal established that, "an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."³⁵ This definition was included in the Rome Statute of the International Criminal Court³⁶ and has been reinforced by experts.³⁷

Despite emphasising two main factors – the level of hostilities ("protracted armed violence") and the organisation of the parties ("organised armed groups") – the decision still lacks specific tests or *indicia* for when to apply International Humanitarian Law. Mob wars may feature intense violence and high levels of organisation but the law of armed conflict was never meant to cover skirmishes "on the order of the Hatfields versus the McCoys."³⁸

Yet in light of some notoriously chaotic contemporary conflicts, the drug cartels at the centre of Mexico's current crisis may seem obsessively organised by comparison. One-time internecine gun battles between rival gangs have grown to include gory acts of "narco-terror" against government agents and officials.³⁹ Examples include the grisly display of soldiers' heads in plastic bags, messages for authorities scrawled into mutilated corpses⁴⁰ to say nothing of the high profile terror killings of judges, prosecutors and police.⁴¹

The threshold for violence to reach the status of armed conflict has long been crossed, according to some independent benchmarks. For example, the Uppsala Conflict Data Program considers a conflict that surpasses 1,000 deaths per year as "war" for the sake of "intensity level".⁴² Yet, between 2006, when President Calderón declared his "war on drugs", and mid-2010, more than 28,000 people have been killed.⁴³ However, to incorporate drug gangs into an International Humanitarian Law model turns many principles of IHL on its head. What little relevance reciprocity maintains in modern non-international armed conflict⁴⁴ would be completely lost in the context of criminal narco-syndicates. Furthermore, despite stunning levels of collaboration with state entities in some instances,⁴⁵ these groups seem to have little interest in assuming control of the state, other than to create a situation that allows them to function unmolested.⁴⁶ Their primary goals are to control supply routes and the largest share of the drug market along with other illegal enterprises.⁴⁷ Essentially, "their very aim is incompatible with [International Humanitarian Law]."⁴⁸

Nevertheless, the law only seeks to prevent banditry from being classified as an armed conflict⁴⁹ and does not explicitly

exclude bandits from being one of the parties to an armed conflict. This is implicit in the Yugoslavia Tribunal's statement that "the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organisation of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant."⁵⁰

2.1. Mexico's "War" – But is it an Armed Conflict?

If one were to classify the situation in Mexico as an armed conflict (or conflicts), the most appropriate classification would be non-international – both with regards to the cartels vs. the state or within the competing cartels. Though the United States is involved materially in the situation, the support goes to the Mexican state in order to enforce the law.⁵¹

³⁰ *Ibid.*

³¹ L. Moir, *supra* note 9, p. 104.

³² M. Sassóli, Transnational Armed Groups and International Humanitarian Law, in: Program on Humanitarian Policy and Research 6 (2006), p. 13.

³³ *Id.*, p. 40. Though the author regards this report as "optimistic", p. 19.

³⁴ A.P.V. Rogers, *Law on the Battlefield*, 2nd ed., Manchester 2004, p. 218.

³⁵ *Tadić Appeal on Jurisdiction*, *supra* note 5, para. 70.

³⁶ Article 8 (2) lit. f), Rome Statute of the International Criminal Court (last amended January 2002), A/CONF. 183/9, 17 July 1998.

³⁷ See: International Law Association, The Hague Conference (2010), Final Report on the Meaning of Armed Conflict in International Law, p. 2; International Committee of the Red Cross, How is the Term "Armed Conflict" Defined in International Humanitarian Law, Opinion Paper, March 2008.

³⁸ "War", Stanford Encyclopaedia of Philosophy, 4 February 2000, <http://plato.stanford.edu/entries/war/>.

³⁹ A. Guillermprieto, Days of the Dead: The New Narcocultura, in: The New Yorker, 10 November 2008, http://www.newyorker.com/reporting/2008/11/10/081110fa_fact_guillermprieto.

⁴⁰ M. Lacey, In Drug War, Mexico Fights Cartel and Itself, in: The New York Times, 30 March 2009, <http://www.nytimes.com/2009/03/30/world/americas/30mexico.html>.

⁴¹ *Ibid.*

⁴² Definitions, the Uppsala Conflict Data Program, <http://www.pcr.uu.se/research/ucdp/faq/>. However, the centre also counts conflicts with 25 related deaths per calendar year as an "armed conflict". Deaths, of course, are not the only consideration. This is only mentioned as one independent yardstick to measure the scale of violence.

⁴³ BBC News, Mexico says 28,000 killed in drugs war since 2006, 4 August 2010.

⁴⁴ D. Schindler, Significance of the Geneva Conventions for the Contemporary World, in: *International Review of the Red Cross* 836 (1999), pp. 715-929.

⁴⁵ M. Lacey, *supra* note 40.

⁴⁶ S.E. Cornell, Narcotics and Armed Conflict: Interaction and Implications, in: *Studies in Conflict and Terrorism* 30 (2007), p. 210.

⁴⁷ A. Guillermprieto, *supra* note 39.

⁴⁸ M. Sassóli, The Implementation of International Humanitarian Law: Current and Inherent Challenges, in: *Yearbook of International Humanitarian Law* 10 (2007), p. 59. The author in the reference was discussing terrorism.

⁴⁹ ICTY, Prosecutor v. Milosevic (Decision on Motion for Judgement of Acquittal) IT-02-54-T, Trial Chamber (16 June 2004), para. 26; Prosecutor v. Duško Tadić (Judgement) ["Tadić Trial Chamber Judgement"] IT-94-1-T, Trial Chamber (7 May 1997), para. 562.

⁵⁰ International Criminal Tribunal for the Former Yugoslavia (ICTY), Prosecutor v. Fatmir Limaj et al. ["Limaj Trial Chamber Judgement"] (Judgement) IT-03-66-T, Trial Chamber (30 November 2005), para. 170.

⁵¹ S. Hanson, Mexico's Drug War, Council on Foreign Relations, 2008, <http://www.cfr.org/publication/13689/>.

Also, while there is some reputed collaboration between Mexican drug cartels and other international criminal syndicates,⁵² it would be hard to make the case that any of these factions are under the effective control of a foreign state, as would be necessary for the conflict to be international.⁵³ Moreover, though gun battles linked to Mexican cartels have occurred in the United States, common Article 3 applies even when the violence crosses borders.⁵⁴

Yet, as stated earlier, among the informal indicators of a non-international armed conflict is the resort to use of the military over the police or other law enforcement agencies⁵⁵ – which has occurred in Mexico since the 1990s and increased under the Calderón administration.⁵⁶

It has also been said above that the *Tadić* definition – the core purpose of which is to “distinguish an armed conflict from banditry”⁵⁷ – stressed the protracted nature of the conflict and the level of organisation among the parties.⁵⁸ However, these two factors deserve further inspection. As one court pointed out, “from the examinations which the ICTY and other international criminal tribunals conduct, it is clear that these two criteria sub-divide further, depending on the factual scenario.”⁵⁹ When considering the intensity of the conflict in Kosovo, the ICTY considered the “seriousness and increase in armed clashes”; “the spread of clashes over the territory”; “increase in the number of governmental forces” and “weapons used by both parties.”⁶⁰

Using these indicators, Mexico makes a fairly good case for an armed conflict. Violence has increased and drug barons have hired their own paramilitary forces. Clashes have also spread and recovered arms caches include guns, grenades, rocket launchers, dynamite and hundreds of thousands of rounds of ammunition.⁶¹

Cartels may even be said to control territory – or at least the state can be said to have lost control of territory.⁶² Reportedly up to 30 percent of Mexico’s arable terrain is used for illicit crops⁶³ and in early 2009 there were allegedly more than 200 “zones of impunity” for criminality.⁶⁴ In some cases, gangs even take on a quasi-governmental presence, imposing taxes, setting up roadblocks and enforcing their own laws.⁶⁵

With respect to the protracted nature of the conflict, the past four decades have seen a number of anti-drug operations.⁶⁶ Most are symptomatic of national security or law enforcement operations (i.e. border security, seizure of funds and crop eradication) than military action.⁶⁷ But Calderón’s intensification of the “drug war” and inclusion of the military has seen violence rise and the increasing use of guerrilla tactics. Nevertheless, assessing a conflict’s duration in its midst has never been an exact science. In 1989, in response to the takeover of the La Tablada military barracks by a small band of armed leftists in Argentina, the military led a high-powered siege using tanks, armoured vehicles and even incendiary weapons.⁶⁸ Reacting to a number of alleged human rights violations, including the right to life, humane treatment and judicial protection, the Inter-American Commission on Human Rights deliberated whether the 30-hour standoff between the military and the 42 attackers qualified as a non-international armed conflict.⁶⁹ In deciding that it did, bringing common Article 3 into effect, the Commission pointed to the “direct involvement of governmental armed forces” and “the concerted nature of the hostile acts.”⁷⁰

However, critics of the Tablada decision point out that the Commission appeared to turn to another legal regime because it found its own human rights instrument wanting.⁷¹ The Commission lamented that “the American Convention contains no rules that either define or distinguish civilians from combatants and other military targets, much less specify when a civilian can be lawfully attacked or when civilian casualties are a lawful consequence of military operations.”⁷² But as one author pointed out – neither does common Article 3.⁷³

Furthermore, it is a firmly agreed upon principle that human rights law does not cease once armed conflict commences.⁷⁴ The Commission may have just as easily considered a violation of the right to life using human rights as the prevailing legal regime⁷⁵ instead of turning to IHL and viewing portions of the complaint through the lens of direct participation in hostilities.⁷⁶

It is this point that could be seen as the danger of “over-classification”.⁷⁷ A rush to categorise a situation as an armed

⁵² A. Guillermprieto, *supra* note 39.

⁵³ A.P.V. Rogers, *supra* note 34, p. 219.

⁵⁴ L. Zegveld, *supra* note 19, p. 136.

⁵⁵ L. Moir, *supra* note 9, p. 35; M. Sassóli, *supra* note 32, p. 6.

⁵⁶ S. Hanson, *supra* note 51.

⁵⁷ Prosecutor v. Milosevic (Decision on Motion for Judgement of Acquittal), *supra* note 49, para. 26; Tadić Trial Chamber Judgment, *supra* note 48, para. 562.

⁵⁸ Tadić Appeal on Jurisdiction, *supra* note 5, para. 70; M. Sassóli, *supra* note 32, p. 6.

⁵⁹ United Kingdom: Asylum and Immigration Tribunal/Immigration Appellate Authority, KH (Article 15 lit. c) Qualification Directive) Iraq v. Secretary of State for the Home Department, CG [2008] UKAIT 00023, 25 March 2008, para. 80.

⁶⁰ Prosecutor v. Milosevic (Decision on Motion for Judgement of Acquittal), *supra* note 49, paras. 26-32.

⁶¹ M. Lacey, *supra* note 40.

⁶² Not that this is necessary for Common Article 3 to take effect, according to Zegveld, *supra* note 19, p. 136.

⁶³ A. Guillermprieto, *supra* note 39.

⁶⁴ M. Lacey, *supra* note 40. Though this figure was actually reported as good news since only a year earlier the government claimed there were as many as 2,204.

⁶⁵ *Ibid.*

⁶⁶ A. Guillermprieto, *supra* note 39.

⁶⁷ S. Hanson, *supra* note 51.

⁶⁸ Tablada Case, *supra* note 24, para. 9.

⁶⁹ *Id.*, para. 147.

⁷⁰ *Id.*, para. 155.

⁷¹ L. Zegveld, The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the Tablada Case, in: International Review of the Red Cross 324 (1998), p. 505.

⁷² Tablada Case, *supra* note 24, para. 161.

⁷³ L. Zegveld, A Comment on the Tablada Case, *supra* note 71, p. 505.

⁷⁴ ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Rep. 136 (9 July 2004); ICJ, The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Rep. 2 (8 July 1996).

⁷⁵ L. Zegveld, *supra* note 71, p. 505.

⁷⁶ Tablada Case, *supra* note 24, para. 189.

⁷⁷ M. Sassóli, *supra* note 48, p. 50.

conflict risks turning a “rhetorical” war⁷⁸ into a literal one. Much as the so-called “war on terror” is criticised, a war on drugs is potentially an even more awkward application of IHL “to a situation for which it was not designed.”⁷⁹ Sassóli writes, “[Over-classification] deprives persons of the better protection they would benefit from under the law of peace, in particular against the use of force and deprivation of freedom.”⁸⁰

Theoretically, armed opposition groups are bound by the same principles of proportionality and distinction as state armies in an international armed conflict.⁸¹ It is truly chilling to imagine a scenario where civilian casualties in a “drug war” are measured against “military necessity”.

Furthermore, as the Inter-American Commission on Human Rights recognised, the involvement of government armed forces does not *ipso facto* make a confrontation an armed conflict.⁸² The Commentary on Additional Protocol II states that “internal disturbances,” not covered by common Article 3, include, “situations, which do not necessarily degenerate into open struggle, [when] the authorities in power call upon extensive police forces, or even *armed forces* to restore internal order.”⁸³

That the Mexican government has turned to its military is more reflective of the fact that its local and federal police forces are incompetent and corrupt, than evidence of intensity.⁸⁴ Yet the subject of intensity also presents a conundrum. Can the state-versus-cartels body count be seen as a single armed conflict or does each cartel represent a unique party to a different armed conflict? How then to measure the inter-cartel killings? These are all factors that create deep complications in classifying the situation an armed conflict.

It could be worth trying to distinguish cartels’ financial and technological sophistication from their military organisation. Rather than a coherent chain of command, Mexico’s drug gangs seem to be a muddle of large syndicates, fragmented former cartels, gangs and gangsters-for-hire as well as other non-aligned freelancers.⁸⁵ Many specialists even point out that the term “cartel” is incorrect in light of the way these increasingly fractured narco-groups are organised. A US Congressional Research Service report on Mexico commented, “The term drug cartel remains the term used colloquially and in the press, but some experts disagree with this because ‘cartel’ often refers to price-setting groups and it is not clear that Mexican drug cartels are setting illegal drug prices.”⁸⁶ Some organisation may distinguish itself in the future and force Mexico into a recognised armed conflict, perhaps in a particular state. However, as it is currently ordered, the situation is not ideal for such a classification.

2.2. Mexico and “Anarchic Conflicts”

Yet, if the groups make a credible case as a party to an armed conflict, it may be precisely because other modern wars are so chaotic. Many lawless contemporary crises have challenged analysts to find a suitable regime when dealing with myriad parties engaged in unruly violence. These situations are informally known as “anarchic conflicts”.⁸⁷

Somalia, for example, has essentially existed without the presence of an effective state since the corrupt US-backed regime of Mohammed Siad Barre collapsed in 1991 and

competing warlords took up arms to fill the vacuum.⁸⁸ When analysing how the nature of an armed conflict can influence who is considered organised enough to be a party – Somalia is an inevitable illustration. It is one of the unfortunate poster cases for so-called “anarchic conflicts”.⁸⁹

The types of wars characterised as “anarchic” go beyond clear rebellions or use of force against the state. They involve “the implosion of national institutions, authority, law and order, in short the body politic as a whole.”⁹⁰ This may include situations where a titular government remains in place though in effect exercises very little control or also to circumstances where order – even among the warring factions – breaks down.⁹¹ This produces a crisis for humanitarian organisations that depend on leaders with some semblance of command.⁹² After all, “IHL can only be implemented by and with *parties* to armed conflict” which implies a minimum degree of organisation.⁹³

Yet despite the situation being decried as “chaos” by the then-UN Secretary General, the Security Council passed a resolution urging, “all Somali parties, including movements and factions, immediately cease and desist from all breaches of international humanitarian law.”⁹⁴ This resolution was directed at roughly 30 different armed groups “lacking any real power”.⁹⁵

⁷⁸ This term is often used to describe the drug war. Among them: G. Neuman, Real Security Concerns, in: Boston Review (December 2002/January 2003), <http://bostonreview.net/BR27.6/neuman.html>; Y.-K. Heng, Unravelling the ‘War’ on Terrorism: A Risk-Management Exercise in War Clothing?, in: Security Dialogue 33 (2002), p. 227.

⁷⁹ M. Sassóli, *supra* note 48, p. 51.

⁸⁰ *Ibid.*

⁸¹ L. Zegveld, *supra* note 19, p. 82.

⁸² Tablada Case, *supra* note 24, para. 150.

⁸³ International Committee of the Red Cross Commentary on the Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, <http://www.icrc.org/ihl.nsf/COM/475-760004?OpenDocument>, para. 4475 (Emphasis added).

⁸⁴ A. Guillermprieto, *supra* note 39.

⁸⁵ E. Vulliamy, Life and Death in Juárez, the World’s Murder Capital, in: The Observer, 4 October 2009, <http://www.guardian.co.uk/world/2009/oct/04/mexico-drugs-death-squads-juarez>.

⁸⁶ U.S. Congressional Research Service Report for Congress, Mexico’s Drug Cartels, 16 October 2007, p. 1; M. Lacey, Drug Wars: When a Cartel Really Isn’t, in: The New York Times, 21 September 2009, <http://economix.blogs.nytimes.com/2009/09/21/drug-wars-when-a-cartel-really-isnt/>.

⁸⁷ ICRC, Armed Conflicts Linked to the Disintegration of State Structures (Preparatory Document for the First Periodical Meeting on International Humanitarian Law), 1998.

⁸⁸ J. Mueller, *supra* note 6, p. 105; Country Profile: Somalia, Rule of Law in Armed Conflicts Project, http://www.adh-geneva.ch/RULAC/state.php?id_state=204.

⁸⁹ ICRC, *supra* note 87.

⁹⁰ *Ibid.*; D. Thürer, The ‘Failed State’ and International Law, in: International Review of the Red Cross 836 (1999), p. 731.

⁹¹ ICRC, *supra* note 87; D. Thürer, *supra* note 90, p. 731.

⁹² ICRC, *supra* note 87.

⁹³ M. Sassóli, *supra* note 32, p. 11.

⁹⁴ Res. 814 para. 13 (26 March 1993) quoted in L. Zegveld, *supra* note 19, p. 139.

⁹⁵ L. Zegveld, *supra* note 19, p. 139.

Zegveld posits two possible interpretations to the Security Council's decision to refer to these ragtag bands as parties to an armed conflict. The first suggests that once violence has crossed a certain threshold any group in the territory of the war is subject to common Article 3 as a "party to the conflict" regardless of organisation or authority.⁹⁶ This view "poses no requirements as to the organisation or factual authority of the groups subjected to this article."⁹⁷ It essentially shifts the emphasis to the level of violence.

The second interpretation proposes that the Council deemed at least one group to be of sufficient power and organisation to qualify as a party to an armed conflict bringing common Article 3 into effect and thus effectively binding "all inhabitants of the territorial state, both individuals and groups."⁹⁸ Zegveld, however, adds that, "the text of common Article 3 supports only the first interpretation" since no mention is made of the rules being relevant to anyone other than parties to the conflict.⁹⁹

Both the International Criminal Court and the Yugoslavia Tribunal have said that armed groups only require "some degree of organisation."¹⁰⁰ However, Zegveld argues that the Somali groups only had the ability to comply with the most basic proscriptions such as cruel treatment, torture and murder.¹⁰¹

This piecemeal method – which suggests that an armed group may be subject only to the rules that it is capable of complying with – has been called the "functional approach" towards qualifying an armed group a subject of International Humanitarian Law.¹⁰² Sassóli writes: "One can adopt a functional approach and consider any group to be subject to some rules formulated in terms of absolute prohibitions (such as the prohibition of torture), while not necessarily also to rules requiring a minimum degree of organization (such as respect of judicial guarantees)."¹⁰³

This raises many of the points that arose during common Article 3's drafting. Sassóli, however, writes: "This approach may be appropriate once an armed conflict already exists. However it defies logic if it is used to determine whether at least two groups have the necessary degree of organization to make a situation an armed conflict, as IHL cannot only partly apply in a situation. For that purpose, I argue it is preferable to require from an armed group the minimum degree of organization necessary to comply with all the rules of IHL of non-international armed conflicts – which are, in any event, mostly formulated in prohibitory terms."¹⁰⁴

This view would necessitate an analysis of the most organised groups to gauge their levels of organisation. If they are organised enough, the situation would be an internal armed conflict and then conceivably "[o]ne [could] adopt a functional approach and consider any group to be subject to some rules formulated in terms of absolute prohibitions."¹⁰⁵

An analysis of each syndicate would be beyond the scope of this paper but it is worth briefly looking at the structure of a few of these groups.

Cartels are said to be large, sophisticated, and mainly horizontal organisations with multiple movable parts.¹⁰⁶ They reportedly work with or employ "gatekeepers" who control the transshipment points and/or manage territories under their control.¹⁰⁷ It is a functional hierarchy that enables the groups to fill vacancies quickly, as frequent turnover is inevitable in an industry largely regulated by violence.¹⁰⁸

The Gulf Cartel employed a paramilitary force – Los Zetas – which was originally recruited as muscle for the cartel, but then branched out to lead its own criminal operation.¹⁰⁹ The two organisations have subsequently collaborated as "The Company", with three leaders from Los Zetas and the Gulf Cartel at the helm – though this has been described as a "loose cooperation that developed (...) as largely a matter of convenience."¹¹⁰ The Company, however, did not interfere with both groups' abilities to continue operating as autonomous entities.¹¹¹

The cartels occasionally form alliances¹¹² to repel encroachments of one group into another's territory, but these partnerships tend to be short-lived. For example, La Familia was formerly allied to the Gulf Cartel and Los Zetas but then set out on its own.¹¹³ Its independence from the Gulf and Sinaloa gangs has been speculated to be a means of remaining "neutral in the face of the violent confrontations among various elements of those cartels."¹¹⁴

La Familia bears many hallmarks of an organised armed group. According to the United States Drug Enforcement Administration, La Familia employs a propaganda specialist, requires members to go through three-to-six month training camps and uses some of its funds to hand out bibles and support schools in Michoacán.¹¹⁵ However, even if La Familia is organised enough to be a party to an armed conflict with the

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ *Id.*, pp. 139-140.

¹⁰⁰ International Criminal Tribunal for Rwanda (ICTR), Prosecutor v. Thomas Lubanga Dyilo (Decision on the Confirmation of Charges) ICC-01/04-01/06, Trial Chamber I (29 January 2007), para. 233; Limaj Trial Chamber Judgement, *supra* note 50, para. 89.

¹⁰¹ L. Zegveld, *supra* note 19, p. 140.

¹⁰² M. Sassóli, *supra* note 32, p. 13.

¹⁰³ *Id.*, pp. 13-14.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ F. Burton, The Price of Peace in the Cartel Wars, 2 May 2007, http://www.stratfor.com/mexico_price_peace_cartel_wars.

¹⁰⁷ Stratfor Staff, Mexico: The Vital Role of Gatekeepers in the Smuggling Business, 23 December 2006, <http://www.stratfor.com>; US Department of Justice National Drug Intelligence Center (April 2008) South Texas High Intensity Drug Trafficking Area Drug Market Analysis; US Department of Justice National Drug Intelligence Center (March 2009) West Texas High Intensity Drug Trafficking Area Drug Market Analysis; US Department of Justice National Drug Intelligence Center (March 2009) Arizona High Intensity Drug Trafficking Area Drug Market Analysis 2009.

¹⁰⁸ F. Burton, *supra* note 106.

¹⁰⁹ United States Department of Justice, Alleged Mexican Cartel Leaders – Associates Targeted in Newest Effort to Combat Drug Trafficking Organizations, Press Release, 20 July 2009, <http://www.justice.gov/opa/pr/2009/July/09-crm-703.html>.

¹¹⁰ J. Roebuck, Criminal Cooperation, The Monitor, 2 July 2009, <http://www.themonitor.com/articles/mexican-28169-criminal-trafficking.html>.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Drug Enforcement Administration, La Familia Michoacana Fact Sheet, October 2009, <http://www.usdoj.gov/dea/pubs/pressrel/pr102209a1.pdf>.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

Mexican state, has the violence between the state and La Familia been sustained or intense enough to make the situation an armed conflict? Despite paroxysms of bloodshed, the answer is probably not.

This raises the question of organisation again. The Yugoslavia Tribunal confronted the issue when considering war crimes charges against several members of the Kosovo Liberation Army (KLA). Significant features included the backing of a political party,¹¹⁶ civil society representation¹¹⁷ and identifiable leaders.¹¹⁸ The fact that the KLA had headquarters scattered throughout Kosovo was also considered significant,¹¹⁹ as was the internal organisation, chain of command and¹²⁰ alleged (albeit rarely enforced) disciplinary structure.¹²¹ That non-governmental organisations and foreign missions were generally baffled as to who was in charge, or how authority was exercised, did not disqualify the KLA as an organised party.¹²² Rather the Chamber decided it "reflects the conditions under which the KLA operated at the time."¹²³

The Trial Chamber sided with the view that the KLA was organised enough to be a party to an armed conflict.¹²⁴ Some of the *indicia* – headquarters and disciplinary structure – could just as easily have been said about any number of the cartels (or the Gambino crime family in New York City for that matter). Yet Mexico's narco-syndicates do not seem to have a comparable organisational stability. At the very least, it could be presumed that insurgent groups are supposed to have more control over their armed factions than the Gulf Cartel had over Los Zetas. One could analyse the paramilitary groups – or other syndicates like La Familia, which may actually demonstrate civil society representation – to assess whether they are organised enough to make the situation an armed conflict. But the violence perpetrated by individual groups is too sporadic and too dispersed to reach the threshold of intensity.

Nevertheless, the government continues to prove that it is not a "war" against particular groups because as cartels are broken apart and reassemble, the "hostilities" continue regardless of how the enemy is organised. Subsequently the Mexican state finds itself battling a phantom not embodied in most of the forms usually assumed by armed opposition groups. In other words, it is exactly what one might expect an ultra-violent "war on drugs" to look like.

3. Conclusion

Attempts to establish that a situation is an armed conflict is never an exact science. Whether one measures the "direct involvement of governmental armed forces" and "the concerted nature of the hostile acts"¹²⁵ as the preeminent factors, the criteria are always context-specific. They are not one-size-fits-all formulas as the ICTY recognised by saying, "the determination of the intensity of a conflict and the organisa-

tion of the parties are factual matters which need to be decided in light of the particular evidence and on a case-by-case basis."¹²⁶

It is not beyond the realm of imagination that a state could find itself in a proper war with a criminal syndicate. This may depend on the unity of the groups – or stature of a single group – that the state is contending with. It could also depend on the strength – or even the existence – of the state and its ability to maintain some control over the situation. Chaos could necessitate the recognition of armed conflict, even if the parties do not fit neatly into what is traditionally defined as a party to an armed conflict. The *Tadić* decision emphasises the organisation of the groups and the threshold of violence, though some may argue that exceptional circumstances could require greater emphasis on one or the other as seems to have happened in Somalia.

The situation in Mexico may yet someday necessitate such a classification. In the future (potentially the very near future) some group may distinguish itself and/or the violence may actually threaten the existence of the state. Yet as it's currently configured, Mexico would not make a good case for armed conflict. Rather Sassóli's warnings of over-classification seem very appropriate to Mexico and its role in the wider "war on drugs". Terms like military targets and military necessity are inappropriate when it comes to the kinds of law enforcement operations that are required for anti-narcotics manoeuvres (and wholly unacceptable when it comes to syndicates' tactics).

Though it is largely only a theoretical point, the military cannot be legitimate targets for the cartels. The reverse is also true: alleged drug traffickers, manufacturers or hit men, are not legitimate military targets for killing, but are instead criminal suspects, subject to arrest, prosecution and prison. Furthermore, it may be far preferable to ensure that citizens in Mexico benefit from the better protections that are in effect in "under the law of peace".

The "war on drugs" in Mexico may have gotten nastier, more violent and alarming in recent years – but it should not yet be confused for an armed conflict. Thus, when leaders in Mexico proclaim a "war on drugs" they should be aware they are speaking rhetorically. ■

¹¹⁶ Limaj Trial Chamber Judgment, *supra* note 50, para. 41.

¹¹⁷ *Id.*, para. 45.

¹¹⁸ *Id.*, para. 97.

¹¹⁹ *Id.*, para. 104.

¹²⁰ *Id.*, para. 112.

¹²¹ *Id.*, paras. 113-117.

¹²² *Id.*, para. 131.

¹²³ *Id.*, para. 132.

¹²⁴ *Id.*, para. 134.

¹²⁵ Tablada Case, *supra* note 24, para. 155.

¹²⁶ Limaj Trial Chamber Judgment, *supra* note 50, para. 90.