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New Members Announced Harvey Rishikof Appointed Chair Al Harvey Appointed Advisory Committee Chair

ABA President William Robinson has asked current Chair Harvey Rishikof and Advisory Committee Chair Al Harvey to continue as chair of the ABA’s Standing Committee on Law and National Security and Advisory Committee respectively.

Harvey is currently senior policy advisor for the Office of the Director of National Intelligence and served as Professor of Law and National Security Studies at the National War College, where he chaired the Department of National Security Strategy.

Major General Al Harvey, USMC (ret.) is in private practice in Memphis and a former member of the ABA Board of Governors and former President of the Tennessee Bar Association. He serves as a member of the ABA House of Delegates.

New appointments to the Committee for a three-year term include: Pauline Schneider, partner and head of the Public Finance Group of the Washington office of Orrick Herrington & Sutcliffe and former member of the White House Office for Intergovernmental Affairs; Charles Weiss, Partner at Bryan Cave LLP and former member of the ABA House of Delegates and Lynn Wise, a member of the legal department at Northrop Grumman. Suzanne Spaulding, former Chair and newly named Deputy Under Secretary for the National Protection and Programs Directorate (NPPD), will serve as special advisor to the committee.

Other members of the Committee to continue their appointments include: Chief Judge James Baker, U.S. Court of Appeals for the

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Are Mexican Cartels a Threat to National Security?

By Sylvia Longmire, author of *Cartel: The Coming Invasion of Mexico’s Drug Wars*

When the average American hears the term “national security” or hears discussions about threats to national security, two things tend to come to mind—terrorism and espionage. What could threaten our sense of security more than domestic airliners crashing into the World Trade Center and the Pentagon? And what could make our stomachs sink faster than knowing a foreign government might have stolen

some of our most heavily guarded national secrets?

These are clear examples, but as world history has demonstrated—particularly in the last decade—sometimes threats to our national security can’t be so clearly defined. For approximately the last eight years or so, a violent war over control of

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New Members Announced, from page 1

Armed Forces; James Dockery, Associate Vice Chancellor for Human Resources and EEO, N. Carolina Central University; Susan Ginsburg, U.S. Civil Security, LLC; Jessica Herrera-Flanigan, partner, Monument Policy Group, LLC; Judge William Sessions, partner at Holland and Knight and former Director of the Federal Bureau of Investigation; Professor Ruth Wedgwood, Johns Hopkins University School of Advanced International Studies and Lee Wolosky, partner, Boies, Schiller & Flexner, and former Director of Transnational Threats, National Security Council.

Appointments to the Advisory Committee include: Professor William Banks, Syracuse University College of Law, John Bellinger, Arnold & Porter; Laurie Blank, Emory University School of Law; Joel Brenner, Cooley LLP; Angeline Chen, Marinette Marine Corporation; Professor Robert Chesney, The University of Texas at Austin; Mary DeRosa, Representative of the US to the 66th Session of the General Assembly of the UN; Laura Donohue, Georgetown University Law Center; General Charles Dunlap, Duke University School of Law; Professor Michael Greenberger, The University of Maryland; Professor Amos Guiora, University of Utah; George Jameson, retired CIA; Colonel Tia Johnson, US Department of Defense, Office of the Secretary; James McPherson, National Association of Attorneys General; Ben Powell, WilmerHale; Paul Rosenzweig, Red Branch

Consulting PLLC; Mark Sessions, Strasburger & Price LLP; John Shenefield, Morgan Lewis; Corin Stone, Office of the Director of National Intelligence; Judge John Tunheim, US District Court of Minnesota and Clark Walton, Assistant Attorney General, Charlotte, NC.

We wish to acknowledge and thank outgoing Committee and Advisory committee members Tonya Hagmaier, Stephen Lynch, Deborah Pearlstein, Sergio Daniel Ponce, Peter Raven-Hansen, Nicholas Rostow, Cynthia Ryan, Jane Stromseth and Edwin Williamson for their hard work and dedication and welcome them to our 'alumni club.'

The Advisory Committee is also aided by Special Advisors to the Advisory Committee Stewart Baker, M.E. "Spike" Bowman, Jill Rhodes and Scott Silliman. Counselors to the Committee include Richard Friedman, Secretary John Marsh, Professor John Norton Moore, Dean Elizabeth Rindskopf Parker, Judge William Webster and James Woolsey.

New liaisons to the Committee include Lauren Bean Buitta, Law Student Division; Carrie Newton Lyons, International Law Section; General John Altenburg, Jr., Standing Committee on Armed Forces Law; Ehsan Zaffar, Young Lawyers Division, Joe Whitley, Administrative Law Section; Dennis Lehr, Business Law Section; and special thanks to our returning Board of Governors liaison, Mary Smith. ■

THE ABA NATIONAL SECURITY LAW REPORT

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OCTOBER 28 BREAKFAST PROGRAM 2011—Ten Years Later

On September 28, 2001, the ABA Standing Committee on Law and National Security hosted a breakfast program, just as it does each month. At this particular event, however, there were no scheduled speeches. The room was full. The purpose was to identify legal issues that would arise in the aftermath of 9/11, as the United States came to grips with the threat of domestic terrorism. In attendance were numerous individuals who would have to grapple with these issues on behalf of the US Government and, consequently, the American people.

The event occurred even before the War in Afghanistan had begun. The Authorization for Use of Military Force (AUMF), giving the President congressional approval to pursue those responsible for September 11 and “prevent any future acts of international terrorism against the United States,” was only days old. The PATRIOT Act was then swiftly working its way through Congress. As a result, those present were just beginning to examine the issues that would challenge and confound us for years to come.

One participant that day declared that while “action” against terrorists was certain to come, “our decision-makers must never cut the legal process where one exists.” Furthermore, as those best equipped to safeguard that process, lawyers “must not get out of the way at this time, but assert themselves” to achieve lasting solutions consistent with the rule of law.

On September 15, 2011, the Committee held another breakfast program to address the issues that demand further analysis and continue to generate debate among national security lawyers, policymakers, and the general public. Remarkably, many of the issues that were raised at the September 2001 breakfast were at the very forefront of the 2011 discussion as well.

Governmental Structure

Clearly one of the biggest ongoing issues is how our national security apparatus should be structured to deal effectively with the threat of terrorism. At the time of the 2001 breakfast, the Department of Homeland Security had just been created. Though Governor Tom Ridge had been selected to head DHS, the precise contours of the office had yet to be determined, and partici-

pants understandably wondered what its responsibilities and powers would be. Today, DHS is still a work in progress. Paul Rosenzweig, former Deputy Assistant Secretary for Policy at DHS, observed that “homeland security” was not part of our vocabulary on September 10, 2001. After suddenly springing into existence, it became an “amalgam” of many different substantive areas and persists in that very state. Rosenzweig said that it remains to be seen whether DHS will still exist a decade from now. Whether “homeland security” is a suitable paradigm will be determined by the extent to which it integrates and adds value to these substantive areas and does not merely another layer of bureaucracy. Some aspects of the organization—such as the integration of border security, customs, and agricultural inspection—represent positive developments while other areas are still functionally segregated.

Intelligence reform and increased information sharing continue to be hot topics. Ben Powell, currently a partner at Wilmer Hale and former General Counsel of the Office of the Director of National Intelligence (ODNI), jokingly remarked that intelligence reform had “great potential and always will.” At present, there are 17 federal organizations in the official Intelligence Community (IC), but the level of cooperation among them is an ongoing source of concern. Intelligence reform is “an old issue,” said Powell, who argued that “we need comprehensive legislation” to adequately address the need for better information sharing. Moreover, basic questions about ODNI’s proper role remain unanswered. Its authority and responsibilities are “highly ambiguous” and “highly dependent on the personalities in that office,” which Powell said required fixing.

“*Intelligence reform and increased information sharing continue to be hot topics.*”

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Ultimately, Powell tied this uncertainty regarding structure and duties to fundamental uncertainty about terrorism itself. The correct approach to the mission depends on whether we consider the problem one of intelligence, criminal law enforcement, or war. Kate Martin, Director of the Center for National Security Studies, reinforced this point. Echoing Michael Leiter, former Director of the National Counterterrorism Center, she said, “The country hasn’t really come to grips with what kind of domestic security enterprise we want.” In short, one of the enduring questions from 2001 until today is how we conceptualize “national security,” particularly as it relates to terrorism. Without a clearer understanding of the challenge, our national security apparatus will continue to take shape in a chaotic fashion.

Judith Miller, former General Counsel in the Department of Defense, provided another key insight on government structure. Namely, as we work to increase interagency information sharing, we will have to do so “strategically” due to the fiscal austerity that will undoubtedly hit the DOD and the rest of the national security apparatus.

The Role of Congress

A separate discussion examined the role that Congress will have to play in intelligence reform. The need for a more active Congress is, in fact, a theme that came up frequently in the second breakfast program. At the time of the first program, Congress was heavily steeped in the PATRIOT Act, but Congress’ voice was also needed on other major subjects, even at that time. Interestingly, several participants in 2001 wondered whether and when the prevailing law enforcement phase would terminate or give way to a military phase in the “war” on terrorism. In other words, they were looking at the same paradigmatic question of law enforcement vs. war, only from a reverse angle. The inquiry continued further: what would happen if a principal terrorist were captured? One attendee mentioned the possibility of using military commissions to try terrorist suspects. One participant asked whether terrorist acts could be considered “war crimes.” He also raised the thorny subject of evidence in terrorist prosecutions: to what extent could raw intelligence be made operational—differentiable, useful, and admissible—in a subsequent criminal prosecution? Achieving this objective while protecting

sensitive intelligence and upholding the basic requirements of due process would prove to be a vexing challenge in the coming years.

As we know one decade later, lawmakers subsequently took a backseat while the President made a series of decisions on detention and terrorist prosecution. Between the AUMF in September 2001 and the Military Commissions Act of 2006, the Executive branch was steering law and policy on these two weighty issues. Several participants in the recent breakfast program were critical of Congress’ passive role on national security matters. General Thomas Hemingway, former Legal Adviser to the Appointing Authority, Office of Military Commissions in the Department of Defense, said he believed the executive branch could form and conduct military commissions post-9/11 but also thought that Congress should have gotten involved. Congress, however, was “AWOL” for the “first three years of [his] job,” which he said was their “huge mistake” as well as the President’s. In the same vein, Army Colonel and Judge Advocate Tia Johnson reminded participants that the sparsely worded AUMF is now ten years’ old. Our fight against terrorism, in other words, has evolved significantly, and the scope of the congressional mandate therefore requires updating. Critical input was also needed to bridge the “gap” in our detention policies.

Suzanne Spaulding, who was Chair of the Committee at the time of the first breakfast program and former General Counsel of the Senate Select Committee on Intelligence, said that Congress’ “dysfunctional[ity]” was emblematic of our country’s loss of common purpose, comity, and mutual respect with regard to national security matters. She described Congress’ current state as “distressing” but called on all participants to resist resignation. “The temptation is to simply give up on Congress,” she said, “but we can’t do that. It’s a critical part of our system of checks and balances. . . .” In sum, the need for meaningful congressional input on national security matters remains as great as ever.

Civil Liberties and National Security

The relationship between national security and civil liberties came up repeatedly in both discussions. Looking back on the September 2001 breakfast, Spaulding observes, “We had a great discussion. I think what people understood

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that morning was that there would be tremendous pressure on civil liberties.”

Ten years later, Spaulding would write, “The traditional mantra about ‘balancing national security and civil liberties’ is misleading. It assumes that these are mutually exclusive values on opposite sides of a scale; if you subtract from one, you necessarily add to the other. In reality, security and liberty are reinforcing values. As the *National Strategy* states, ‘The power and appeal of our values enables the United States to build a broad coalition to act collectively against the common threat posed by terrorists, further delegitimizing, isolating and weakening our adversaries.’”¹

The need for *both* strong national security and strong civil liberties has become such a common refrain that it goes almost unnoticed these days. Indeed, participants repeatedly invoked this dual need throughout both programs. But just how much have civil liberties actually changed in the post 9/11 era? And do civil liberties and national security truly form a synergistic relationship, or is some form of “balancing” required? These questions were left largely unexplored by the participants in the recent breakfast program but have drawn attention in the wider media of late.

With respect to changes in civil liberties, Adam Liptak of the *New York Times* suggests that there are two different stories to tell: in domestic criminal law, there were “civil liberties tremors, not earthquakes,” whereas our detentions, extraordinary renditions, and interrogations “all tested the limits of the appropriate exercise of government power in wartime.”² Even in the latter case, however, what changed were not the laws themselves. The PATRIOT Act “was, in truth, tinkering at the margins and nothing compared with the responses of other developed democracies, where preventive detention and limitations on subversive speech became commonplace.” What really changed, he argues, was “how law enforcement conceived its mission” and thus utilized the legal tools that had already been made available. As Kate Martin pointed out during the recent program, thousands of people have been jailed on the basis of immigration laws, material support charges, and other preexisting devices. But one area that does represent a significant departure, Liptak writes,

is electronic surveillance, where legal changes combined with technological progress “have allowed the government broad ability to gather information.”

On the issue of “balance” between civil liberties and national security, Benjamin Wittes of the *Brookings Institution* writes on *Lawfare* blog, “We seldom stop and ask the question of whether and when our surveillance programs are really coming at the expense of liberty at all; or whether the relationship might be more complicated than that—indeed, whether some of these programs might even *enhance* liberty. We should ask these questions.”³ In other words, Wittes also rejects the notion of “balancing,” though for a different reason: while Spaulding argues that less investigation and hence greater privacy does not necessarily result in less national security, Wittes argues that more surveillance may actually lead to greater liberty.

The basic point, in the end, is that disagreements persist over the extent to which civil liberties have been compromised and the nature of the relationship between civil liberties and national security. These debates are bound to survive long into the future, particularly as technological advancement further sharpens the legal tools already in place and complicates the national security landscape.

Looking Ahead

The recent breakfast program offered a tremendous opportunity to reflect upon the preeminent issues in the field of law and national security. It is remarkable, and in some cases unsettling, to see how several major concerns have endured ever since September 11, 2011. As we look ahead to the next ten years of this ongoing challenge, it is worth noting several key insights from the recent program. Participants made a couple points related to continual technological change and the difficulty that it presents to this field. Richard Burge asked whether policymakers’ conventional means of addressing problems were sufficient to keep pace with technological change. “Certainly with biological weapons, it is not,” he said. Presumably, this means that national security lawyers will again find themselves in the fog of law, as unexpected events occur and responsible actors attempt to

1. http://www.americanbar.org/content/dam/aba/administrative/law_national_security/09_fterror.authcheckdam.pdf

2. <http://www.nytimes.com/2011/09/07/us/sept-11-reckoning/civil.html?pagewanted=all>

3. <http://www.lawfareblog.com/2011/09/against-a-crude-balance/>

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develop legal responses in real time. Given this inevitable uncertainty, Stewart Baker, former Assistant Secretary for Policy at DHS, called for collective “humility.” He said that humility was necessary to prepare for a “cyber war”—or whatever the next great national security challenge may be—and only with that prerequisite met should lawyers be asked for their contributions.

Another requirement will be the ability to work in high-pressure situations without compromising one’s obligations to the rule of law. Back in September 2001, Suzanne Spaulding discussed the “vague line between permissible and impermissible activity,” which “carries the risk of over-reaching or under-

achieving.” Navigating through this unfamiliar legal territory, however, is the work of the national security lawyer. The pressure is unavoidable, but, according to Judge James E. Baker of the Court of Appeals for the Armed Forces, pressure is “no excuse to bend.” He contends that it is a mistake to think that lawyers today face any greater pressure than in times past. And the ability to deal with that pressure is “part of the essential skill-set of the national security lawyer. The core competencies remain the same....” In the words of Ruth Wedgwood, Professor of International Law and Diplomacy at Johns Hopkins University, there is no substitute for “good judgment.” ■

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drug smuggling routes into the United States has been raging in Mexico. While the cartel wheeling and dealing and associated carnage have been largely limited to Mexico, there have been some cases where drug-related violent incidents have occurred on US soil. There is an ever-present concern among US homeland security and law enforcement agencies that the drug war will spill over into the southwest border states and beyond.

While our federal, state, and local agencies debate over what constitutes border violence spillover and whether or not it’s happening, there is a bigger question at hand. Can the perpetrators of this unprecedented violence—currently considered simply criminals by both the US and Mexican governments—be equated with terrorists and spies in the list of threats to our national security?

Defining “national security” as a concept is a complicated task. What our government has taken it to mean has changed over the last century. The Macmillan dictionary defines it simply as “the protection or the safety of a country’s secrets and its citizens.” After World War II, various statesmen and philosophers have added on the concepts of freedom from foreign dictation, freedom from attacks on our values, and not having to resort to war to protect our national interests.

In 1983, Harold Brown—US Secretary of Defense during the Carter Administration—defined national security as “the ability to preserve the nation’s physical integrity and territory; to maintain its economic relations with

the rest of the world on reasonable terms; to preserve its nature, institution, and governance from disruption from outside; and to control its borders.”¹ The last requirement in Brown’s definition is the most interesting, and one that will be revisited in this article.

The US Department of Defense expanded further on the concept, with a definition coined in 2001 that was validated in 2010. It views national security as “a collective term encompassing both national defense and foreign relations of the United States. Specifically, the condition provided by: a. a military or defense advantage over any foreign nation or group of nations; b. a favorable foreign relations position; or c. a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.”²

One can see that no matter how these definitions have evolved, they still remain generalized and rather vague. To add to the fog, different nations, entities, and individuals acknowledge different aspects of national security, like

1. Watson, Cynthia Ann, *U.S. national security: a reference handbook*, Contemporary world issues (2 (revised) ed.), ABC-CLIO, 2008, pp. 281, accessed on July 20, 2011.

2. “National security,” US NATO Military Terminology Group, JP 1 (02) “Dictionary of Military and Associated Terms,” 2001 (As amended through 31 July 2010), Pentagon, Washington: Joint Chiefs of Staff, US Department of Defense, 2010, p. 361, accessed July 20, 2011.

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national power, political security, and military security. There are also non-military aspects of national security to consider. In 1993, Joseph Romm of the Council on Foreign Relations listed these as security from narcotic cartels, economic security, environmental security, and energy security.³

With all the different facets of what comprises national security, it's a subjective endeavor to determine under which category to potentially place Mexican drug cartels. But before taking that step, it's important to understand the breadth of illegal activities in which they are involved on both sides of the border and beyond.

Drug trafficking has been prevalent in Mexico for decades, but truly hit a turning point in the late 1980s and early 1990s with the demise of the Cali and Medellín drug cartels in Colombia. Drug smuggling routes through the Caribbean into Florida, New York, and the rest of the Eastern Seaboard became less practical, so Colombian suppliers had to find other ways to get cocaine and other illicit drugs out of the country. The Mexican cartels stepped in to fill that void. They actually became so successful at smuggling drugs out of Colombia and into the United States that they started dictating terms to their Colombian suppliers.

The United Nations estimates that Mexican cartels bring in between \$8 billion and \$39 billion from drug trafficking alone. While those are already staggering numbers, Mexican cartels have expanded well beyond being mere drug pushers; they derive a growing slice of their income from other illegal activities. Some experts on organized crime in Latin America, like Edgardo Buscaglia, say that cartels earn just half their income from drugs.⁴

Mexican cartels used to kidnap rivals, informants and incompetent subordinates to punish, exact revenge or send a message. Now that they have seen that people are willing to pay heavy ransoms, kidnapping has become their second-most-lucrative venture, with the targets ranging from businessmen to migrants. Another new source of cartel revenue is oil theft, long

a problem for the Mexican government. The national oil company, Pemex, loses hundreds of millions of dollars' worth of petroleum every year to bandits and criminal gangs. They tap into pipelines and siphon it off, working with associates north of the border to sell the oil to American companies at huge markups.⁵

Cartels are also moving into the market in pirated goods in Latin America. The field, once dominated by terrorist groups like Hezbollah and Hamas, is being overtaken by Mexican cartels, which already have so much control over the sale of pirated CDs, DVDs and software that many legitimate companies no longer even bother to distribute their full-price products in parts of Mexico. The Motion Picture Association of America estimates that American film companies are losing as much as \$300 million to \$600 million per year to cartels like Los Zetas and La Familia Michoacana that engage in this practice.⁶

Cartels are also moving into extortion. A cartel representative will approach the owner of a business—whether a pharmacy or a taco stand—demanding a monthly stipend for “protection.” If those payments aren't made on time, the business is often burned to the ground, or the owner is threatened, kidnapped or killed. A popular cartel racket involves branded products. For example, a cartel member—most often from Los Zetas and La Familia Michoacana—will tell a music-store owner that he has to sell CDs with the Zetas logo stamped on them, with the cartel taking a 25 percent cut of the profits. Noncompliance isn't an option.⁷

Then there is the grisly business of the violent terrorist-style tactics being employed by the cartels to punish wrongdoers and intimidate rivals and the police. Beheadings and the sight of decapitated bodies hanging from bridges have become the norm. Cartel members routinely target police chiefs and mayors for assassination when they don't follow cartel orders. Mass graves are being discovered across northern Mexico containing an alarming number of “civilians” who refused to work for the cartels.

5. Ibid.

6. Longmire, Sylvia, “Mexican TCOs Literally Leaving Their Mark on American Media,” *Homeland Security Today*, Correspondents Watch, July 18, 2011, accessed on July 24, 2011.

7. Longmire, *New York Times*.

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While the bulk of this brutality has been limited to Mexico, that hasn't made the United States completely immune to violent cartel activity. In late 2008, a six year-old child was abducted from his Las Vegas home while his parents were duct-taped and held at gunpoint, all because his grandfather owed a Mexican cartel over a million dollars. In late 2009, five Mexican nationals were brutally tortured, electrocuted, and had their throats slit in northern Alabama safe house because they owed the Gulf cartel money. Also in 2009, 17 members of Los Palillos, a San Diego gang working for the Tijuana cartel, were indicted for kidnapping and murdering nine people in San Diego County; in two cases, their bodies were dissolved in vats of acid.

It's obvious that Mexican drug cartels are involved in a bevy of nefarious activities, and are comprised of some of the world's most heartless killers. According to the National Drug Intelligence Center, they have a presence in over 270 US cities, and they use our extensive highway system to transport illegal drugs into virtually every state in the Union. They also routinely use US-based gangs as proxies to sell drugs in our communities, and are even bringing Mexican nationals across the border to grow marijuana in our national parks and forests. Cartels even use American gun laws against us, legally purchasing a variety of pistols, rifles, and assault weapons at US gun shops and illegally transporting them south for use by cartel killers.

But does all this make them a true threat to our national security, or merely a serious crime problem that needs to be dealt with in a more traditional anti-crime manner?

Because of the historical fluidity of the definition of national security, the answer isn't as clear cut as many would like it to be. However, taking a look at some of the definitions listed earlier, a case can be made that they do.

First, there are several examples that Mexican cartels pose a threat to the safety of our citizens. Hundreds of US citizens and illegal immigrants are kidnapped by the cartels on US soil by individuals working for Mexican cartels, and often taken to Mexico to be tortured and held for ransom. Often, the family members paying the ransom are US citizens born in Mexico, and who now live in various parts of the United States. There are also countless testimonials from American ranchers living in Arizona and Texas who complain about drug and human smugglers traipsing across their private property and burglarizing their homes.

Second, there are examples where our federal government has not been able to protect our territorial integrity from incursions by armed drug traffickers. Parts of national parks and wildlife refuges along the southwest border have either been closed to the American public because of the danger posed by traffickers. Millions of acres of our national parks and forests—particularly in California—are being defended by Mexican nationals with guns who are protecting fields of marijuana, and federal agents are woefully incapable of stopping them. Border Patrol and Bureau of Land Management agents have had to erect barriers in some parts of the southwest border in the hopes that smugglers will just go around some environmentally sensitive areas because there aren't enough agents to actually stop and arrest them.

Third, Mexican cartels are having a negative impact on our economy and financial system. Their involvement in media piracy is costing US businesses hundreds of millions of dollars every year. They are actively using US banks to launder drug money—including giants like Wachovia Bank and Bank of America—and buying VISA gift cards for the same purpose. La Familia Michoacana, one of the larger cartels, is even involved in real estate fraud north of the border.

Even the Department of Defense's definition can be applied to Mexican cartels, as they clearly have a hostile intent towards US authorities—exemplified by numerous attacks (some deadly) against US law enforcement agents—and they have engaged in destructive activity north of the border. While, for various reasons, they shouldn't be considered purely terrorist or insurgent groups, Mexican cartels have engaged in activities common to both groups. They may not be interested in using those tactics on US soil, but they clearly have these capabilities.

The real challenge now becomes how to respond to Mexican cartels that clearly pose a threat to our national security. Our federal government is pouring an unprecedented amount of money into border security, but is still treating the drug war as a mere crime problem. Until it truly realizes the gravity of the situation—perhaps one close to being on par with the threat posed by terrorism—then the drug war will continue to expand on both sides of the border. ■

What is the Customary Law of War or Does that Even Matter?

By Clifford Ashcroft-Smith, Attorney and Founding Partner of the law firm Ashcroft-Smith

Should a Yemeni citizen—who joined a group of foreign volunteers traveling to Afghanistan to assist the Taliban in defeating the Northern Alliance in 2001—be detained indefinitely by the United States in Guantánamo? No treaty will provide a definitive answer to that question. Maybe customary international law (CIL) will? Not according to the D.C. Circuit, for now.

In *Al-Bihani v. Obama*, the D.C. Circuit offered a surprisingly dismissive interpretation of CIL, which fueled an already growing discussion in this area of the law. 590 F.3d 866, *en banc rehearing denied*, 619 F.3d 1 (D.C. Cir. 2010). Legal experts have expounded on the various intricacies of this case, including speculation on why the Supreme Court has refused to hear any of the detainee cases since 2008. What has yet to be explored is the much broader and far-reaching impact this case likely has on national security law. To that end, the question answered in this article is: What are the real consequences of the *Al-Bihani* interpretation of CIL in relationship to the exercise of U.S. national security power?

In the wake of the terrorist attacks of September 11, 2001, Congress enacted the Authorization for the Use of Military Force (AUMF). Under this legislation, the *Al-Bihani* majority construed CIL as having no bearing on the interpretation of the government's authority to detain alleged unprivileged enemy belligerents. This interpretation is problematic for a number of reasons, stretching beyond the excellent points raised by leading scholars in this publication several months ago.

To begin with, it stands contrary to the Supreme Court's binding interpretation of CIL in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-732 (2004). *Sosa* offered key insight to the Supreme Court's modern interpretation of the traditional understanding of CIL's role in U.S. jurisprudence absent express incorporation by Congress. A strong majority of Justices concluded that under very narrow circumstances, CIL provides authority for judicial resolution of issues. Specifically, *Sosa* concluded that where a CIL norm has matured to a point of universal acceptance—analogueous to norms recognized at the

time of our Nation's founding (such as the prohibition against piracy)—that norm may be relied on to fill the interstitial gap between controlling statute and treaty. By contrast, the majority of judges in *Al-Bihani* adopted an interpretation of CIL that appears inconsistent with plurality's holding in *Sosa*.

This inconsistent split is dangerous because it forms two conceptions of CIL that deviate toward two troubling future effects. First, narrowly construed, *Al-Bihani* indicates that CIL cannot serve as the basis for judicial remedy. Had the D.C. Circuit indicated that CIL could not be invoked by any party during litigation, this construction would have been problematic, but understandable. CIL is not incorporated into domestic U.S. law by statute or treaty; so rejecting it as a source of decision could be understood as consistent with the Supremacy Clause of Article VI of the Constitution. The *Al-Bihani* court abandoned this logic and instead suggested that CIL may be invoked to sustain government action but not invoked to challenge government action. This narrow construction lacks credibility. A growing majority in the legal world agree that CIL informs and constrains the law of war powers that Congress implicitly granted to the President.

Far more problematic is a second and much broader conception suggested by *Al-Bihani*: CIL plays no role in regulating the exercise of government power by the United States. In the context of armed hostilities, this is particularly troubling because CIL is an inherent part of the laws of war. Over the last 200 years, CIL has provided substantive guidance for the execution of national war powers. There are implicit dangers in disconnecting national security policy from compliance with established CIL norms. Indeed, this aspect of *Al-Bihani* decision departed from CIL in such an extreme manner, even the government agreed with *Al-Bihani* that CIL plays a role in this area of law.

This disconnection by the D.C. Circuit precipitates two potentially troubling outcomes. First, it may provide the Executive with the legal foundation to conclude that the President (and

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subordinate officers) need not comply with CIL constraints on the exercise of national security powers. In this era of counter-terrorism, where the government characterizes the struggle against terrorism as an armed conflict, this is potentially disastrous.

“ *Unchecked executive power is to blame for Congress’ overreaction in passing the Detainee Treatment Act of 2005 (DTA).* ”

The danger stems from military operations directed against new and constantly developing transnational terrorist threats falling outside the bulk of treaty law, which is based on law of war rules. CIL thus provides a critical source of regulation to fill the interstitial zone between traditional inter-state hostilities and hostilities against terrorist belligerents. Indeed, this was the precise interstitial gap addressed by Justice Souter in *Sosa v. Alvarez-Machain*. Five years later, *Al-Bihani* applied the same reasoning with his argument that CIL imposed an obligation on the United States to repatriate him once the hostilities in which he was captured had functionally terminated.

But when the D.C. Circuit rejected CIL as a source of constraint on the government, it silently opened a potential Pandora’s Box of resurrecting the flawed legal approach created by the Bush Administration: the approach of establishing a new legal regime of unchecked executive power. In particular, the troubling approach is that the Constitution vested the President as Commander in Chief with unconstrained authority to violate any domestic or international laws without consequence in the war on terror. Nowhere was this more readily apparent than with the interrogation of battlefield detainees.

The infamous Torture Memos provide an unsettling reminder. Through a series of memos, the President’s legal advisors justified methods of torture and coercion that were so extreme in

nature and in complete disregard for CIL, that they stretched the limits of the law. The indiscriminate repudiation of CIL norms within these memos destroyed the delicate balance that must be struck between operational innovation and legality to effectively handle unprivileged enemy belligerents. This legal framework went beyond the President’s inherent power to render judgments on conducting military operations aligned with protecting our national defense absent a congressional authorization. It stood at direct odds with the moral fabric woven throughout our Nation’s history of humane treatment and the respect for the rule of law. It also backfired against the Administration. But there is, of course, another competing paradigm here. Could this expansion of executive authority under the President’s own prerogative as Commander in Chief be justified in any way? Despite the pictures from Abu Ghraib that still haunt the American conscious, in the face of another imminent attack, fear may dictate policy and reality. This question remains unanswered for now.

A second more subtle consequence is congressional overreaction in an already hypersensitive political environment with an election on the horizon. In other words, because Congress may lack confidence in the President’s ability to adhere to established CIL principles in the execution of national security objectives, it may feel compelled to impose those constraints by enacting statutes. This may, in turn, lead to the perception that Congress is attempting to micro-manage what the President can and cannot do regarding national security.

Serious problems arise when this occurs. Congressional overreaching would invade a field historically occupied by the Executive to decide the most appropriate methods and means of achieving strategic military objectives. And when a judicial decision moves too far to one extreme and spurs such congressional reaction, it endangers the military and frustrates the constitutional framework that gives the President inherent flexibility to adapt to and handle national security and foreign affairs.

Recent history is no stranger to this situation. Unchecked executive power is to blame for Congress’ overreaction in passing the Detainee Treatment Act of 2005 (DTA). The legislation sought to correct the Bush Administration’s

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unwillingness to comply with longstanding CIL-based limitations on interrogation methods, as discussed above. As a result, the DTA effectively transformed U.S. interrogation doctrine from battle-tested interrogation methods developed by soldiers to frozen legal provisions constructed by bureaucrats in Washington. Simply put, Congress' laudable efforts to curb executive power made an even bigger mess.

The central problem with the DTA is that it eviscerated the tested doctrinal methods developed by soldiers year after year from the bottom-up under governance by the executive branch. For decades before the DTA, interrogators, guided by the Army Field Manual and the bounds of the laws of war, utilized creativity, innovation, and flexibility in handling detainees and gaining intelligence. After the DTA, the opposite occurred. Now, the military is held captive by the methods assumed effective by Congress. No longer will innovations for interrogation techniques developed from the ground-up (as consistent with existing law of war obligations) provide the seed for growing new doctrine. In sum, the DTA cemented interrogation doctrine in place from what actually works in practice to what works in Washington. Equally troubling is the structural defect in the DTA's requirement of congressional approval of changes to interrogation methods. That points to where the danger really lies. That danger is time.

Every day the United States is challenged with quickly adapting to new and constantly shifting national security threats. As the battlefield and the enemy change, so will the critical need for new and more effective interrogation methods. But this need may not be filled in a timely manner because of the DTA's requirement of congressional approval compounded by the polarization in Washington today. This places the military at a considerable disadvantage in keeping pace with the lawless enemy. In addition, the military is further disadvantaged by the detached reasoning of formulating changes to the law that are far from operational reality faced by soldiers on the front line.

Since *Al-Bihani*, this area of law has become more confusing. In the D.C. Circuit's most recent decision in this area, *Al Warafi v. Obama*, it now appears to have reversed course and suggest that the laws of war are relevant. No. 10-5170 (D.C. Cir. Feb. 22, 2011). The extent of this is

far from clear. The *Al Warafi* case involved a Guantánamo detainee captured in Afghanistan, who claimed that he served exclusively as a medic to the Taliban and thus was entitled to protections under the First Geneva Conventions. The district court disagreed. Instead, it determined that he was a Taliban member and only served as a medic when needed. Based on these findings, the district court barred the Geneva Conventions as source of rights and *Al Warafi* appealed. The D.C. Circuit agreed that *Al Warafi* was part of the Taliban but remanded the case for the district court to further determine his medic classification under the Geneva Conventions and the Army Regulation 190-8, "assuming arguendo their applicability."

This assumption is a paradox. The D.C. Circuit simply glossed over an issue that was one of the more heated exchanges the court had considered—the application CIL to the AUMF. This is notwithstanding the fact that the district judge already held that the Military Commissions Act of 2006 barred the Geneva Convention argument by specifically quoting from the *Al-Bihani* panel decision. While there are several reasons why the D.C. Circuit may have chosen to do this, the critical takeaway is that the laws of war, to some unknown extent, may be back in play.

So where does this leave us? The answer can be summed up in two words: dangerous mess. The goal line has shifted from: CIL's absolute extension via the *Al-Bihani* panel, to its dilution by the full court via its en banc denial, to its resurrection and utility in remanding a case back for more factual inquiry in *Al Warafi*. But even assuming the issue is resolved, it barely scratches the surface on delineating the boundaries and substantive components of CIL and the AUMF. Absent the Supreme Court's guidance, which is desperately needed, there remains no clear and concise understanding in this area as it relates to national security and inter-branch distribution of power. In this area of conflict regulation, with the Nation's security at risk, these critical issues must be resolved in such a way to establish guidelines that can be effectively and efficiently translated into an operational framework for those on the front lines striving to preserve our national security. ■

OCTOBER 14 BREAKFAST PROGRAM

America the Vulnerable—“The New Face of International Conflict”

On Friday, October 14, the Committee had the privilege of hosting a breakfast program featuring Joel Brenner, currently Of Counsel at Cooley LLP in Washington, DC and previously the head of U.S. counterintelligence under the Director of National Intelligence. Brenner spoke about his recently released book, *America the Vulnerable: Inside the New Threat Matrix of Digital Espionage, Crime, and Warfare*. This work is an urgent wake-up call to those responsible for protecting our country from emerging cybersecurity threats. Public officials and business actors alike “have a responsibility to read this book,” according to Vint Cerf, Chief Internet Evangelist at Google.

Thankfully for all of us, Brenner brings more to the table than just scary stories. Harvey Rishikof, Chairman of the Committee, praised Brenner for offering insights on how to “think through the problem” rather than merely identifying the threats before us. Indeed, in his conclusion, Brenner did offer a couple recommendations regarding how we can reach “low hanging fruit” in the cybersecurity realm. But, before getting to that point, he spent the bulk of the program addressing what he sees as “the nature of the problem.”

“Neither the United States government nor private industry can defend the networks on which our economy and national security depend. We don’t know how. This situation is getting worse, not better.”

Brenner’s talk began as a cautionary tale, as he read an excerpt from a chapter entitled “Dancing in the Dark.” He recounted how, in 2007, “saboteurs” who were “miles away” and whose “tools were a keyboard and a mouse” managed to take control of a generator from the Alaskan electric grid and blow it up. Fortunately, the people who ran the generator were aware that it could be made to explode and therefore isolated it physically to prevent the grid as a whole from being destroyed. But, the grid operators had not envisioned the specific way in which this generator was infiltrated. Brenner considers this episode emblematic of the situation facing our critical infrastructure as a whole. He said, ominously, “Neither the United States government nor private industry can defend the networks on which our economy and national security depend. We don’t know how. This situation is getting worse, not better.”

This inability, according to Brenner’s diagnosis, is due in part to some basic misunderstandings about cyber threats. First, many people believe that cybersecurity challenges are entirely “technological” in character, but this perception is wrong. As he puts it, the failure to implement available technology is not a technological problem; it’s a management problem. Moreover, few people have managed to understand the link between information technology and operations technology. It used to be the case that a business could protect its operations—its physical infrastructure—merely with “guns, gates, and guards.” But operations are no longer “physical” because nearly every function—production, shipping, purchasing, heating, and ventilation—is conducted through the use of information technology. Consequently, the traditional notion of a business being contained within four walls does not hold true in today’s world. Still, security measures remain slow to change.

There are four characteristics of our current system for moving and storing information, Brenner commented, that make enhancing our collective cybersecurity an even greater challenge. First of all, he says, we do not know how

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to “vet code.” In other words, we cannot effectively examine the millions of lines of programming code that form the basis of our technological systems and figure out where the potential vulnerabilities lie. He refers to this weakness as a “supply chain problem.” The next aspect of the challenge is that we don’t know with whom we are communicating on the Internet. When we submit information to someone or some institution, we are unaware of where it is going and who may ultimately have access to it. Brenner calls this the “attribution problem.” Third, he says that system boundaries have become “porous and unenforceable.” Firewalls—the tools that we use to filter out threats—don’t work; if they are not “actually irrelevant,” they are very weak, catching less than fifty percent of the malware they

military playing field, where America’s advantage has historically been great.

Brenner lastly contended that we have a fundamental misconception about the data that we produce. Attempting to apply legal controls to data, he argued, is like applying legal controls to flooding. Every day, each one of us—whether we use cell phones, credit cards, or any other technology to facilitate our transactions and interactions—is proliferating huge volumes of data about our lives. He was careful to note that this is not a criticism but rather a mere description of our condition. Like so many of us, he also chooses to use EZ Pass instead of waiting to pay cash at a toll booth. Data is an enormously powerful tool for human knowledge, and while the government’s use of it remains a legitimate political issue and must be regulated, he never-

“What has changed dramatically, however, is the potential efficiency of espionage operations due to offensive cyber operations.”

encounter. Most critically, they are perpetually a step behind the newest threats, which are built specifically to evade a firewall’s protection. Finally, there are the legal and political aspects of Internet policing, not just the technological ones. There is currently no consensus on what the right legal and political approaches should be, and who knows when one will emerge?

Brenner continued a discussion of how espionage has evolved, emphasizing the increasing importance of cyber-attacks as a tool in the spy trade. Intelligence, he said, is not new, reminding the audience that “Joshua sent spies into Canaan.” What has changed dramatically, however, is the potential efficiency of espionage operations due to offensive cyber operations. The limiting factor in previous times was how much data a spy could squeeze onto a microfilm. But, if one can now steal massive amounts of information from another government without even having to fumble with a USB drive, then spies in the traditional mold may be unnecessary for many operations. Furthermore, we have seen an explosion in the amount of resources devoted to technology by state intelligence agencies, most notably in China and Russia. These and other countries recognize that a huge investment in technology research can help level the

theless, he predicts that when we look back at our attempts to regulate research in data and its usage by others, we will be reminded of the Church’s futile efforts to contain the spread of scientific knowledge centuries ago. It is “fundamentally, technologically reactionary.”

The idea that we can put data into particular “places” and prevent it from falling into the wrong hands is fanciful. To achieve this impossible goal, we make more and more legal rules that are expensive to comply with and whose effect on privacy is minimal at best. Just think of the ever-growing end-user agreements that come with software or any communications device. It is a “charade—a legal regime that is a charade.” In short, Brenner worries that additional legal rules literally paper over the problem rather than fixing it.

Despite this skepticism, Brenner does believe that there are two pieces of low-hanging fruit that can be captured through readily achievable legal changes. The first has to do with botnets: collections of computers whose security has been breached and therefore can be controlled remotely. Infected computers or “bots” can have their passwords stolen and keystrokes logged and can be used for other malicious purposes such as identity theft. Brenner laments the fact

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that Internet service providers (ISPs) assert that they are unable to eliminate botnets because of 18 U.S.C. 2511—a federal statute governing interception and disclosure of electronic communications. Even though there is an exception for ISPs who are attempting to protect their networks as a whole, the exception does not allow an ISP to take down traffic that threatens only one person's computer. Brenner thinks this rule is wrong. "If a provider wants to protect its network, it has to clean the crud out of it," which means protecting the individual users that comprise the network. This is being done effectively in Australia, and we must learn from the Australian experience rather than sitting on our hands.

Our electrical grid is another serious problem with a relatively easy fix. Our grid, Brenner explains, is controlled by industrial systems that were meant to be isolated physically and electronically but are now being hooked up to the Internet to achieve some marginal efficiencies. "This is rash," he claims, and Stuxnet has shown us precisely why. Unless we want our electrical grid to be paralyzed or even worse by a cyber-attack, it behooves us to disconnect it from the Internet. We are mistaken to believe that the Federal Energy Regulatory Commission (FERC) can adequately protect the grid, because there is, in fact, a "cascading system of deference" to regional owners and operators built into the law, which actually amounts to a "cascading abdication of responsibility."

During the question-and-answer session, Brenner added remarks that shed additional light on the nature of the problem. Cybersecurity is a challenge, he explains, because the Internet is being employed for purposes that were never envisioned at the time of its inception. He quoted Vint Cerf, whom he rightfully called one of the Internet's inventors.

Cerf, he says, would tell you that the Internet was originally designed for a trusted group of researchers in government and universities. Remarkably, it was against the law until 1992 to use the Internet for commercial purposes. In the past decade, however, commercial use has taken off. In essence, we've taken a system that was not designed for commerce, and we have made it the backbone of commerce and numerous other important systems. For this reason, Brenner argues, cyber-offense has a basic advantage over cyber-defense. Attackers know that they can exploit vulnerabilities that exist simply due to the chaotic, decentralized development of the Internet over the past two decades.

From start to finish, Brenner's talk kept the audience fully engaged. Here's hoping that his message manages to resonate to a much wider group of listeners. ■

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The Mexican Drug War: The Case for a Non-International Armed Conflict Classification

Carina Bergal

For the past five years, the Mexican government, led by President Felipe Calderón, has been “locked in mortal combat” with several highly organized, violent drug cartels across the country. Mary Anastasia O’Grady, Mexico’s *Hopeless Drug War*, Wall St. J., Sept. 14, 2009, at A13. The number of casualties trumps that in Afghanistan; since 2006, the death toll has exceeded 30,000. In addition to the shocking mortality rate, the cartels are widely known to exercise territorial control over various parts of Mexico, even serving as gatekeepers at the US-Mexican border. The intensity of the conflict has garnered international attention, specifically in the United States, where US Department of State travel advisories warn of confrontations resembling small-unit combat. At this juncture, the Mexican government has been quite forward in its disclosure of the drug cartels’ brazen displays of sheer force and institutional control. Fears of Mexico becoming a failed state abound, as the Mexican government has deployed 45,000 soldiers and 5,000 federal police agents in an attempt to suppress the protracted violence.

The Mexican drug war is arguably considered a de facto armed conflict. Armed conflict has historically fallen into two categories: international armed conflict (“IAC”) and non-international armed conflict (“NIAC”). The inquiry into the applicability of the term “armed conflict” to NIACs has long been a complicated, if not nebulous, exercise. In fact, the International Committee of the Red Cross (“ICRC”) has even deemed the issue of applicability to be the “[A] chilles’ heel of international humanitarian law.” Toni Pfanner, *Editorial*, 91 Int’l Rev. Red Cross 5, 5 (2009). In spite of the seemingly ambiguous nature of classification, the rise in frequency of such non-international conflicts, paired with an intensified international focus on humanitarian concerns, has forced the matter into the foreground of issues facing the international legal community. The increased materialization of such conflicts mandated an almost inevitable and obligatory evaluation of NIAC classification. As a result, the evolving assessment of a broad range of international conflicts has provided a more polished and functional definition of NIAC,

despite a recent push toward the removal of the legal distinction between IAC and NIAC altogether. Specifically, the Geneva Conventions, the Additional Protocols thereto, judicial decisions, the ICRC, and the Rome Statute of the International Criminal Court (“ICC”) all provide a solid foundation from which to identify the current basic accepted tenets of NIAC.

This article will explain why the conflict in Mexico is in fact a de jure armed conflict, thus triggering the portions of international humanitarian law (“IHL”) that accompany NIAC classification. The intensity and scope of the conflict between the Mexican government and drug cartels have forced the Mexican government to respond not only with law enforcement forces, but also military forces. The nature of both the Mexican drug war and the corresponding military response transform this conflict from mere criminal activity to an armed conflict, to which the law of armed conflict should apply. Consequently, the Mexican government’s recognition of the existence of a NIAC would provide the state with greater latitude to combat the drug cartels by using a level of force that is permitted during an armed conflict. In addition, this categorization would impart a framework for the application of force by the Mexican military.

A Mounting Dilemma: The Makings of a NIAC

An examination of the events that have led up to the current volatile state in Mexico is crucial to properly categorizing the drug war. Above all, the incidents that have transpired since President Calderón’s ascension to office in 2006 provide great insight into the present state of affairs.

A Conflict Rears Its Ugly Head

The Mexican drug war has developed into a full-fledged national and international crisis. The US Department of Defense has estimated that Mexico’s deadliest drug cartels have a combined total of over 100,000 foot soldiers, which is comparable to Mexico’s army of 130,000. See Sara A. Carter, *100,000 Foot Soldiers in Cartels: Numbers Rival Mexican Army*, Wash. Times,

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Mar. 3, 2009, at A01. Drug cartels routinely buy off Mexico's government, judicial and law enforcement officials. The country cannot exclusively depend on its own institutions—the judicial system, police, prisons, and relatively reliable army—to fight the war. In fact, US military and intelligence officials, as well as Mexican citizens, think of the Mexican police forces as “quasi-criminal organizations.” Tom Bowman, *CIA and Pentagon Wonder: Could Mexico Implode?*, Nat'l Pub. Radio (Feb. 27, 2009), <http://www.npr.org/templates/story/story.php?storyId=101215537>. In spite of President Calderón's promise to restore the rule of law in Mexico, the judicial system is rife with corruption. Cartel members continually act with impunity; one study obtained by *The Wall Street Journal* estimated

“*The violence in Mexico has been noticeably sustained, with drug-related murder rates more than doubling from 2007 to 2008. The brutality has escalated to unprecedented levels, as inter-cartel violence continues to spread to previously violence-free areas.*”

that ninety-eight percent of those arrested for organized crime are set free. See David Luhnoff & Nicholas Casey, *Felipe Calderón-Interview Transcript*, Wall. St. J., (May 19, 2010), http://online.wsj.com/article/SB10001424052748703957904575252551548498376.html?mod=WSJ_topics_obama. Furthermore, the Mexican government refuses to provide figures regarding how many arrests actually result in convictions.

Cartel Dominance

The violence in Mexico has been noticeably sustained, with drug-related murder rates more than doubling from 2007 to 2008. The brutality has escalated to unprecedented levels, as inter-cartel violence continues to spread to previously violence-free areas. Even more staggering is the blatant territorial control the cartels exercise over various parts of Mexico, specifically along the US-Mexico border. These gatekeepers facilitate profitable smuggling operations estimated to bring in between US\$15 billion and US\$25 billion per year. In addition to territorial control, the DEA has specifically noted the cartels' operative structure, which is comprised of an executive council made up of visible leaders within the government and “clandestine” leaders who traffic drugs among municipalities. Additionally, a 2007 US Congressional Research Service report found the cartels to be “sophisticated, three-tiered organization[s].” Colleen W. Cook, Cong. Research Serv., RL 34215, *Mexico's Drug Cartels* 11 (2007). Lastly, the cartels' well-documented, astounding arsenal of weapons is one akin to, if not exceeding, that of the Mexican government's forces.

Current Efforts & Perspectives

In March 2007, President Calderón met with George W. Bush to launch the Mérida Initiative, a security partnership intended to assist Mexico in myriad financial and institutional areas. This partnership provides funding chiefly on the federal level, overlooking the much more needy local level. Calderón has also made many reforms in the police force, seeking to remove the pervasive corruption. In terms of the military offensive, it is currently that of brute force. Although the use of the Mexican military to battle the drug cartels has generally been well received as an appropriate strategy, considering the organized and well-armed nature of the cartels, there has been a recent outcry by human rights groups attacking its effectiveness, alleging that soldiers commit abuses while in the field. Even US Secretary of State Hillary Clinton has weighed in, stating, “This is not what the military is formed to do,” comparing the situation in Mexico to the prior drug cartel insurgency in Colombia. See Hillary Rodham Clinton, *Address before the Council on Foreign Relations: A Conversation with U.S. Secretary*

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of State Hillary Rodham Clinton (Sept. 8, 2010), <http://www.cfr.org/diplomacy/conversation-us-secretary-state-hillary-rodham-clinton/p22896>. The Mexican government categorically disagrees with Clinton, dismissing her Colombia comparison as “sloppy history.” See Ken Ellingwood, *Why Mexico is not the new Colombia when it comes to drug cartels*, L.A. Times (Sept. 25, 2010), <http://articles.latimes.com/2010/sep/25/world/la-fg-mexico-colombia-20100926>. Indeed, there are acute differences between the two countries, namely the Mexican drug cartels’ desire for money, instead of the sovereignty sought by Colombia’s rebels. As a general maxim, it is for States to appraise a situation and subsequently grant or withhold the recognition of insurgent status. See Antonio Cassese, *International Law* 67 (2001). Consequently, it can be argued that the use of the term “insurgency,” when referring to the actions of the cartels is entirely inapplicable and improper.

The Mexican Drug War Fulfills Armed Conflict Classification Requirements

The Mexican drug war conforms to the currently accepted international standards for the classification of a NIAC. From customary international to conventional law, the requisite components to trigger the law of armed conflict are evident. Clearly, the situation in Mexico can no longer be thought of as an internal disturbance, or even insurrection, merely capable of being governed by domestic law. In fact, it may be argued that the Mexican government has been acting under *opinio juris* respecting the laws of armed conflict.

Classification within the Framework of Common Article 3 of the Geneva Conventions

Consistent with the stipulations of the Geneva Conventions, the Mexican drug war qualifies as an “armed conflict not of an international character...occur[ring] in the territory of one of the High Contracting Parties.” Geneva Conventions, Art. 3 (1949). Mexico, considered a High Contracting Party through its status as a signatory to the Geneva conventions, is currently engaged in such a conflict with a nonstate actor. Therefore, under the terms of Common Article 3, the Mexican drug war should be classified as a NIAC.

Classification within the Framework of Additional Protocol II

The Mexican drug war clearly fulfills the requirements of a NIAC under the terms of Additional Protocol II, which require situations to surpass those considered “internal disturbances and tensions....and sporadic acts of violence.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609. Indeed, the violence has been intense, consistent and attributable to large, organized groups. Additional Protocol II further requires that the organized armed groups be “under responsible command, [and] exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations.” *Id.* The organization and command structure of the cartels, as well as territorial control are well-documented. Even if the Mexican government were to deny the existence of such control, it is not a requirement for NIAC classification under Common Article 3, and Additional Protocol II simply implies that as long as there is a degree of stability in the control, the requirement is fulfilled.

Classification within the Framework Created by Prosecutor v. Tadić

Under the opinion outlined in the landmark decision of *Tadić*, the Mexican drug war qualifies as a NIAC. As delineated by the ICTY, “an armed conflict exists whenever there is a resort to armed force...or protracted armed violence between governmental authorities and organized armed groups.” *Prosecutor v. Tadić*, Case No. IT-91-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (ICTY Oct. 2, 1995). In assessing the “protracted” requirement, the ICTY further explained that the violence should be measured “from the initiation to the cessation of hostilities.” *Id.* Specifically, this requirement can be measured by “the intensity of the violence and organization of the parties,” with the requisite level of intensity being reached when “the State is obligated to resort to its army as its police forces are no longer able to deal with the situation on their own.” *Id.* The Mexican military has been engaged in such protracted violence for a number of years, as the police forces are inadequate to combat such a well-armed, organized foe.

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Classification within the Framework of the Rome Statute

Consistent with the aforementioned authorities, Article 8(2)(d) and 8(2)(f) of the Rome Statute echo not only Common Article 3's requirement of a conflict being "not of an international character," but also Additional Protocol II and *Tadić's* requirements of intensity, organization and duration. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90. Thus, the conditions set forth in the Rome Statute are fulfilled by the Mexican drug war, as evidenced by the establishment of such conditions in the aforementioned sections.

Classification within the Framework of the ICRC Definition

Under the ICRC framework, the applicability of the portions of IHL that accompany NIAC becomes even more apparent. In its Opinion Paper from 2008, the ICRC offered the following definition of NIAC: "*protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach *a minimum level of intensity* and the parties involved in the conflict must show *a minimum of organisation*." ICRC, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, at 1, <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>. As applied to the current conflict, the protracted, intense violence between Mexico

and the organized drug cartels on Mexican territory clearly fulfills the ICRC's definition. This further undergirds a NIAC classification within the scope of international law.

Conclusion

The Mexican drug war displays all of the indispensable characteristics of a NIAC. The lawlessness has reached alarming heights, with police corruption and judicial failure becoming the standard. The drug cartels' infiltration of the government institutions responsible for maintaining and protecting public peace threatens Mexico's existence as a sovereign nation. Without the categorization and acknowledgment of a NIAC, the Mexican military is unable to engage in a method of warfare that will maximize its odds of disabling the drug cartels. At this point, the Mexican military must proceed with a new strategy—one that is employed during wartime.

Lastly, as a practical matter, the judgments of international courts, treaties and humanitarian efforts should not only be respected, but also practiced in a NIAC such as the Mexican drug war. This classification will also allow for the implementation of the components of IHL necessary to protect innocent civilians, bring those responsible for human rights atrocities to justice before international tribunals, and continue the practice of reinforcement of the laws of NIAC in order to further pave their way into customary international law. As such, the Mexican drug war should be classified as a NIAC. ■