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ENTRE LA GUERRA Y LA PAZ:

UN ESTUDIO SOBRE LA INSTRUMENTALIZACIÓN ESTRATÉGICA DEL DERECHO INTERNACIONAL EN LA "GUERRA CONTRA EL NARCO"

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Síntesis:

Desde los Convenios de Ginebra de 1949 se opta por criterios objetivos para definir la existencia de un conflicto armado en derecho internacional. La existencia o no-existencia de un conflicto armado (entiéndase guerra) va más allá de una discusión doctrinal, pues supone implicaciones en cuanto al uso permisible de la fuerza, el procedimiento de detenciones y las acusaciones de crímenes de guerra se refiere. Diferentes regímenes legales aplican según el país en cuestión se encuentre en un estado de guerra o, por omisión, en uno de paz . El cuerpo de leyes conocido en su conjunto como derechos humanos y el orden normativo doméstico aplican en tiempos de paz, mientras que el menos restrictivo régimen del Derecho Internacional Humanitario aplica en tiempos de guerra. Esta disyuntiva es una, literalmente, de vida o muerte.

¿Qué sucede entonces cuando un fenómeno de violencia se ubica entre las categorías de la guerra y la paz? Es decir, ¿Qué procede cuando no existe consenso acerca de los criterios objetivos – en teoría empíricamente verificables – que ofrece el derecho internacional para la clasificación de la violencia? Fenómenos de violencia posmodernos como lo son la "Guerra Contra el Terror" estadounidense y la "Guerra Contra el Narco" en México nos obligan a abordar esta pregunta con seriedad. Nathaniel Berman postula que Estados Unidos ha sido capaz de oscilar entre el Derecho Internacional Humanitario, por un lado, y los derechos humanos y el derecho penal americano, por el otro. Resulta así que Estados Unidos ha logrado *instrumentalizar estratégicamente* el derecho internacional bajo el concepto de "unlawful combatant", enfrentando a los terroristas como combatientes y procesándolos como criminales al mismo tiempo.

Partiendo del caso mexicano, argumento que fenómenos de violencia relacionados con la droga son susceptibles a dicha instrumentalización estratégica. Se sigue que, según mi hipótesis, "el narco" se ha convertido simultáneamente en enemigo a ser eliminado y en criminal a ser procesado. Para demostrar la oscilación estratégica del derecho internacional por parte del gobierno mexicano recurro al discurso publico durante el sexenio de Felipe Calderón, desentrañando de su retórica tres marcos discursivos que juntos conforman la narrativa conocida como la guerra contra el narco. Éstos son aquél de los daños colaterales, el de los enemigos públicos, y el de los héroes guiados por el Comandante en Jefe de las Fuerzas Armadas. Argumento que esta narrativa permitió enmarcar las acciones de las Fuerzas Armadas dentro de la lógica permisiva del derecho de conflicto armado, sin incurrir sin embargo en los costos que dicha clasificación legal implica. Sostengo que la administración de Calderón construyó una narrativa que le permitió explotar la incertidumbre legal que conlleva la clasificación de la violencia, así gozando de una mayor flexibilidad en el uso de la fuerza sin admitir la existencia de un conflicto armado. Por último, argumento que el Sexenio de Enrique Peña Nieto logró codificar dicha instrumentalización estratégica del derecho internacional en la controversial Ley de Seguridad Interior.

La investigación realizada presenta una serie de avances investigativos: ofrece un nuevo prisma a través del cual entender los fenómenos de violencia relacionados con la droga y el rol que cumple el derecho internacional en su regulación; esquematiza las formas en que el discurso político incide sobre las categorías en uso del derecho internacional; dilucida la relación histórica entre Estados Unidos y México en el intento por controlar el trasiego de droga; y por último, vislumbra un camino para la formulación de políticas públicas que protejan los derechos humanos de forma sistemática en países atrapados, como México, en el ocaso "entre la guerra y la paz".

Índice

Reconocimientos:

Le dirijo mi más profundo agradecimiento antes y sobretodo a mi asesor Alejandro Rodiles, quien me impulsó desde el comienzo a elevar mi razonamiento y quien me ayudó a pulir mis ideas. Le agradezco sobretodo su tiempo, confianza y motivación. Esta disertación está en gran parte inspirada en su trabajo y hubiera sido imposible sin su ayuda. Agradezco también a mi asesor de Sciences Po, David Recondo, quien me dio importantes consejos de forma y contenido.

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Chapter 1: Introduction

On January 12, 2011, during a meeting baptized as "dialogues for security", the now former Mexican President Felipe Calderón declared that he had never used the concept of "war" to classify Mexican reality under his presidency and invited all present to "revise the entirety of [his] public and private records" on the matter.[1] This was not a believable lie nor was it a wise invitation for him to extend to the academics, reporters, NGOs and businessmen that attended the meeting, for up to that date there were more than 50 registered, verifiable, and easily accessible instances in which President Calderón had referred to the violence in the country as a "war".[2] Why, then, make a statement that could so easily be falsified? Why would the President – or anyone for that matter – care for the words being used, especially so when tens of thousands had been killed due to drug-related violence? Would not the choice of words be at the most an unimportant detail in the midst of such a large-scale humanitarian catastrophe?

Words matter in everyday-life, words matter in politics, but most importantly and above all, words matter in law, where terms such as marriage, property, and armed conflict confer material and at times even life-or-death consequences. These terms help frame, categorize and regulate reality, thus also shaping and constructing it. When it comes to legal considerations, actions take on different meanings and evoke different responses depending on the words we attach to them: is he/she married? Was it murder or manslaughter? Has Mexico plunged into a Non-International Armed Conflict (NIAC) or is it simply struggling against organized crime?

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[1] Alonso Urrutia y Gustavo Castillo, *Niega jefe del Ejecutivo haber utilizado el concepto "guerra",* La Jornada (Jan. 13, 2011). ("Yo no lo he usado y sí puedo invitar a que revise todas mis expresiones públicas y privadas. Yo he usado el término de lucha contra el crimen organizado y lucha por la seguridad pública").
[2] Carlos Bravo Regidor, *Una ayudadita de memoria para Felipe Calderón*, La Razón (Jan. 28, 2011).

What is known in Mexico as "la guerra contra el narco" and around the world as the "Mexican Drug War" is a complex and constantly evolving phenomenon. An ever growing number of actors continue to surface as Drug Trafficking Organizations (DTOs) fracture over territorial, pecuniary and power disputes,[3] all the while infiltrating the government and the police force through both threats and bribes.[4] Despite their varying levels of organization and distinct features, there is a common element to the behavior of drug cartels in Mexico: their brutality. Examples of grotesque displays of violence abound since 2006,[5] when Calderón launched his "frontal combat against organized crime" and kick started military operatives in the states of Michoacán, Guerrero, Baja California, Sinaloa, Chihuahua, Durango, Nuevo León and Tamaulipas, [6] at one point deploying up to 96,000 combat troops.[7] At least 100,000 citizens have been killed since then due to drug related violence[8] and more than 115,000 have been displaced.[9]

This discouraging overview reveals why a number of legal scholars and analysts have pondered over the qualification of Mexico as a NIAC.[10] There is no running away from the

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[3] See: June S. Beittel, *Mexico's Drug Trafficking Organizations: Source and scope of the violence*, Congressional Research Services (April 15, 2013).

[4] Mary Anastasia O'Grady, *Mexico's Hopeless Drug War: Mexico's decriminalization is an admission that things aren't getting better,* The Wall Street Journal (Sept. 13, 2009). ("Government officials who couldn't be bought with silver were eliminated with lead").

[5] For a truly graphic and uninviting, yet real-as-can-be, look at the "Mexican Drug War" see: https://elblogdelnarco.com/ (The Narco Blog).

[6] Luis Astorga, *¿Qué querían que hiciera?* (Mexico City: Grijalbo, 2015):26.

[7] Peter Chalk, *Mexico's new Strategy to Combat Drug Cartels: Evaluating the National Gendarmerie,* Combating Terrorism Center at West Point (May 23, 2013).

[8] See: Kimberly Heinle, Coory Molzhan, and David A. Shirk, *Drug Violence in Mexico: Data and Analysis Through 2014,* Justice in Mexico Project (April 2015).

[9] Mica Rosenberg, *Mexico's Refugees: A hidden Cost of the Drugs War*, Reuters (Feb.17, 2011).

[10]See: Andrea Nill Sanchez, *Mexico's Drug "War": Drawing a Line Between Rhetoric and Reality*, Yale Journal of International Law vol 38 (2013); Carina Bergal, *The Mexican Drug War: The Case for a Non-International Armed conflict Classification*, Fordham International Law Journal vol. 34 (2011); Jessica Caplin, *Politics in Conflict: Why the Interests of States Inescapably Infuse International Humanitarian Law, the Case of Mexico's Drug War,* Elon Law Review vol.8 (2016)*;* Michael T. Wotherspoon, *Mexico's Drug War, International Jurisprudence, and the Role of Non-International Armed Conflict Status,* International Humanitarian Legal Studies vol. 3 (2012).

fact that Mexico is plagued by violence, but pointing to this evident truth does not suffice to resolve the question of the country's legal status. There is something awkward and unfitting in comparing Mexico's drug-related violence, motivated at its core and essence by monetary profit, to the political conflicts that have been unequivocally qualified as internal armed conflicts by international courts, including those of the former Yugoslavia, the Rwandan genocide and the Lebanese Civil War. As observed by Alejandro Rodiles, Mexico's complex reality is obscured by trying to force it into legal categories.[11]

Classifying the current state of affairs in Mexico goes beyond a mere doctrinal discussion. The answer to whether Mexico is in war or not determines whether violence in the country is regulated under International Humanitarian Law (IHL),[12] applicable exclusively in times of armed conflict,[13] or under International Human Rights Law (IHRL) and the domestic criminal system, both of which apply in times of peace.[14] This, in turn, supposes profound consequences on the use of force, prosecution and culpability for war crimes, grounds on which the parties involved may find it more convenient to locate their actions within a given legal framework over another. Although both legal regimes will be compared and contrasted further ahead, it suffices to advance that the law of armed conflict – which is another way of referring to IHL – holds a *lex specialis* relationship to IHRL[15] and establishes only minimum standards of protection during an armed conflict, generally allowing a wider range of

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[11] Alejandro Rodiles, Law and Violence in the Global South: The legal framing of Mexico's 'Narco War', Journal of Conflict & Security Law 23:1 (2018):13.

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[12] International Humanitarian Law (IHL), the Law of Armed Conflict (LOAC) and Jus In Bello will be used interchangeably.

[13] ICRC, *Violence and the Use of Force*, ICRC (2011): 26. ("The law of armed conflict is exclusively applicable in time of armed conflict, whether non-international or international").

[14] *Ibid.*

[15] Natasha Balendra, *Defining Armed Conflict,* Cardozo Law Review (2008): 2478-2479; Gary D Solis, *The law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press (2010):24. ("In the American view, in cases of overlap, LOAC, the *lex specialis* of the battlefield, trumps human rights law").

governmental action.[16] In contrast, IHRL strictly prohibits the use of lethal force unless "when strictly unavoidable in order to protect life".[17]

These differences give way to what Nathaniel Berman pegs as the *strategic instrumentalization of law*, a concept that refers to the shift or oscillation from a legal sphere to another on the basis of strategic concerns.[18] This perspective sheds light on why Felipe Calderón would deny referring to the situation in the country as a war and promises great explanatory power for understanding the deeper narrative known as the "Mexican Drug War". Also, the fact that there are tangible costs and benefits to framing violence in the country under one body of law or the other highlights the dangers of legal indeterminacy and the consequent need for academics to invite themselves into the discussion. While significant effort has been directed at arguing over appropriateness of classifying Mexico's tumult as an armed conflict or not, significantly less has been devoted to analyzing Mexico's designation under international law as the product of policy considerations. In this line, the present thesis seeks to disentangle the war narrative that has allowed the Mexican government to instrumentalize international law – be it intentionally or organically – in pursuit of political and military goals. An important methodological warning should be stipulated at this point: although borrowing Nathaniel Berman's concept of the strategic instrumentalization of law, I do not imply that the oscillation between IHL and IHRL was guided by a conscious intention to exploit international law.[19] I hypothesize that the joint application of both bodies

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[16] Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, ICRC(2001): 12 ("mitigate the human suffering caused by war").

[17] *Principles on the Use of Force and Firearms by law Enforcement Officials,* adopted on the 9th UN Congress on the Prevention of Crime and Treatment of Offenders, Havana, 27 August – 7 September 1990, UN Doc. A/CONF.144/28/Rev.1 at 112 (1990). http://www.unrol.org/files/basicp~3.pdf.

[18] Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the legal Construction of War*, Columbia Journal of Transnational Law (2004).

[19] I instead adopt Crozier's and Friedberg's notion of strategy, whereby it is something that the investigator must re-construct ex post, and which does not signify consciousness on behalf of the actors involved.[19] Agents

of law is the best available lens to comprehend the legal situation taking place in Mexico, questions of intention remaining outside the scope of analysis.

Overall, the argument goes, the existing categories of international law fail to capture the situation of permanent violence that exists in Mexico, for this reality does not adjust to the precedent of armed conflict as founded on the ICTY rulings[20] and as extracted from a strict interpretation of applicable law on the matter,[21] but does not – under any standard – constitute what is conventionally thought of as peace, either. This profit driven conflict thus floats in a space of legal indeterminacy that is politically exploited through the instrumentalization of law. In other words, while approximating *de facto* but not falling *de iure* into the category of an armed conflict, governments can find an optimum where neither IHRL nor IHL are fully respected. Any oblivion of human rights is opportunistically justified by the level of violence in the country, while any allegation of IHL violations is dismissed via the rejection of an armed conflict, as occurred with Calderón in the example above.

This dissertation purports the Mexican case as the paradigmatic example for how contemporary drug wars strain the structural categories of IHL of "war" and "no war", allowing for their manipulation. The main hypothesis to be explored throughout the text is that the legal indeterminacy attached to "Mexico's Drug War" (i.e. is it an armed conflict or not?) has been instrumentalized through the creation of a war narrative. I argue that former President Felipe Calderón's administration (2006-2012) exploited the legal grey area

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may respond strategically to external situations without being necessarily conscious of the underlying strategy. While Felipe Calderón could have consciously shifted between war and not war rhetoric, he may have very well been unaware of the international law implications under work. I do not discard this possibility: Michel Crozier and Erhard Friedberg, *Actors and Systems: The Politics of Collective Action*, The University of Chicago Press (1980).

[20] See: Sven Peterke, *Regulating "Drug Wars" and other Gray Zone Conflicts: Formal and functional approaches*, Hasow Discussion Paper 2 (2012).

[21] Mainly Common Article 3 to the Geneva Conventions, Additional Protocol II and the Rome Statute.

attached to the permanent state of violence that Mexico finds itself in, an approach continued by his successor, President Enrique Peña Nieto (2012- present), albeit in a more discreet fashion. Particular focus is placed on how Calderón weaved the notion of an armed conflict into public discourse through the creation of three interconnected frames, which together made up the "Mexican Drug War" narrative.

The aim is to study the ways in which the government was able to set up a paradigm that allowed it to benefit from IHL without being bound to the obligations that this body of law carries. This implies that there is a deeper logic to Calderón's declaration of war on the narco, one that is guided by a strategic, yet never explicit nor necessarily conscious, interpretation of international law. The underlying notion is that words matter: constructing a war metaphor through belligerent rhetoric has allowed the government to maneuver as if in an armed conflict, without the costs of being classified as such under international law. Building on this argument, the present paper will also analyze how this rhetorical scheme has negatively impacted the protection of human rights in the country, arguing that the legal classification of a NIAC would only worsen the already grim prospect of a more peaceful and secure Mexico.

In relation to the aforementioned hypothesis, the present work should help to answer the following questions:

- *What would be the military and political benefits of applying IHL to the "Mexican Drug War"?*
- *What would be the costs?*
- *How has the government framed the conflict in Mexico as a 'war'?*
- *How has this language differed, if at all, from the government's official/legal stance?*

- *Was the war narrative modified following the 2012 presidential elections?*
- *What can the Mexican "narco war" tell us about the new generation of drug-related conflicts in the global south?*
- *How do these realities challenge the structuring categories of IHL?*

In an effort to answer these questions, the dissertation will be organized as follows: the remaining sections of **chapter 1** will review the literature that discusses the "Mexican Drug War" in light of international law and present the theoretical framework to be applied throughout the work; **chapter 2** will map the strategic context under which the war narrative operates, reviewing the history of drug-trafficking in the country, underlining the divergent logics behind IHL and IHRL, and outlining the benefits and costs attached to categorizing the "Mexican Drug War" as an armed conflict; **chapter 3** will analyze the war frame employed by Calderón's government, contrast it to the vocabulary utilized in official documents, and determine whether there was continuity or rupture in Peña Nieto's administration; **chapter 4** will study the concrete implications that these strategies have had on human rights; and **chapter 5** will offer a conclusion, emphasizing how Mexico's case study can be extrapolated to other violent phenomena across the global south and offering public policy insight.

A. Literature Review

This thesis seeks to renovate a heated yet misguided debate on the role of international law in regulating violence in Mexico. Academics have promptly recognized the importance of classifying Mexico's reality under international law, situating themselves at both ends of the

war and no war spectrum, but – with the exception of few authors – ignoring what lies in the middle of these categories. Most notably, Carina Bergal, Jessica Caplin, Michael T. Wotherspoon and Craig A. Bloom argue in favor of the classification of "Mexico's Drug War" as a NIAC, while Andrea Nill-Sánchez, Alejandro Rodiles and Patrick Gallahue contend the opposite. Reviewing this legal debate accounts for a necessary but insufficient overview of the literature that paves the way to the present dissertation. A fulfilling answer to the question of "how did Mexico achieve the instrumentalization of law through a changing war narrative?" necessitates a literary backbone on the subjects of war rhetoric and war metaphors, topics for which Susan Stuart and Tawia Ansah provide valuable insight. In condominium, the works explored in this section provide the epistemological starting point for the present thesis; this is accomplished by borrowing what is useful and ignoring what is not.

1) NIAC or not? Overcoming the Tadic test

The standard legal debate on the issue of Mexico's categorization revolves around the objective criteria established by the *Tadic test*.[22] As determined by the International Criminal Court of the Former Yugoslavia (ICTY) in Dusko Tadic's judgement, the existence of a NIAC is determined by the protracted nature of armed violence, the degree of intensity of the violence, and the level of organization of the parties to the conflict, all of which are necessary in order for an armed conflict to exist.[23] These requirements carry with them a vast list of

[22] Craig A. Bloom, *Square Pegs and Round Holes: Mexico, Drugs, and International Law,* Houston Journal of International Law (2012):366. ("This groundbreaking definition has been widely used since 1995 as a test for the characterization of armed conflict in the ICTY as well as in reports of independent experts, manual son international humanitarian law, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the International Criminal Court, and the International Court of Justice").

[23] Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on

considerations, all of which allow for empirical verification. These auxiliary variables – established in the posterior ICTY trials of *Limaj*, *Milosevic* and *Haradinaj* – include but are not limited to: the number of incidents, the spread of clashes over the territory, the resulting number of deaths and injuries, the distribution of weapons, the types of weapons used, the use of armed forces, the ability of the parties to speak with one voice, to negotiate and conclude agreements, and to define a unified military strategy.[24] There is no formula for how to determine if these criteria are met or for defining how many of these variables need to be verified in order for a situation to qualify as an armed conflict, for which a strictly legal analysis leads to a binary discussion that will never achieve consensus. Under the dialectic of this debate, the same set of events can be interpreted as either achieving or not achieving the thresholds created by the *Tadic test*, allowing for legal discussion *ad infinitum*. Even if there were to be agreement over how to identify the variables, how many of them would have to be agreed upon for the criteria of violence or organization to be satisfied?

This is a trap to which Bergal, Wotherspoon, Nill Sánchez and Gallahue fall prey; notwithstanding in different ways and to different degrees. They all provide valuable insight on the intricacies of the conflict but sin of shortsightedness by trying to force a legal category over another on the basis of violence and organization as empirically verifiable criteria. In turn, Caplin (for NIAC) and Rodiles (against NIAC) incorporate politics into the equation, understanding that the legal categorization of the conflict is not fully (nor nearly) dependent on the objective criteria established by the applicable law on the matter as epitomized by the *Tadic* test. These authors go beyond the discussion over whether Mexico qualifies or not as

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Jurisdiction, ¶ 70 (Int'l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).

[24] Prosecutor v. Limaj, Case No. IT-03-66-T, Judgement, 89 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); Prosecutor v. Milosevic, Case No. IT-02-54-T Decision on the Motion for Judgement Acquittal, 28-31 (INt'l Crim. Trib. For the Former Yugoslavia June 16, 2008).

an armed conflict, instead uncovering deeper reasons for which either of these legal categories might be pushed forward or rejected. The present thesis picks up the discussion at the point where left by Caplin and Rodiles, contributing with a systematic analysis on the instrumentalization of international law through the construction of a narrative now known as the "Mexican Drug War". This is not to say, however, that other authors will not be reviewed on the merits of their contributions to the legal and normative dimensions of the debate. Overviewing their work yields a clear map of the advances made on the subject and of the epistemological gaps that have yet to be resolved:

Carina Bergal's article "The Mexican Drug War: The Case for a Non-International Armed Conflict Classification" is a solid legal defense for regulating Mexico's situation under the law of war. Bergal seeks to "establish that the conflict in Mexico is a de jure armed conflict, thus triggering the portions of IHL that accompany a NIAC classification".[25] She sets out to prove this by examining the legal standards available for classifying a NIAC, namely Common Article 3 of the Geneva Conventions, the Additional Protocols to the Conventions, the 1998 Statute of the International Criminal Court, the ICRC's Position on Armed Conflict, and of course, the ICTY ruling in *Prosecutor vs. Tadic*. She argues that the conflict at hand fulfills the main criteria of protracted armed violence, the intensity of the violence, and the organization of the parties.

The author also lists what she considers to be policy arguments for classifying the drug war as a NIAC, these being "bringing those responsible for committing unspeakable human rights atrocities to justice before international tribunals (including Mexican military), and continuing the practice of reinforcement of the laws of NIAC in order to further pave their

[25] Carina Bergal, *op. cit.,* p. 1048.

way into customary international laws".[26] To this she adds that "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".[27] In other words, she adds a normative/policy dimension to what is otherwise a purely legal analysis. Contrary to what my hypothesis purports, she sustains that granting greater latitude of action to the Mexican military will result in a victory for human rights and the rule of law in the country. This I hold to be a misdiagnosis of the disease that Mexico fights, for it supposes that the drug phenomenon is of a military, rather than of an economic, nature. What is more, I suggest that this "greater latitude of action" has already been achieved to a great extent via Calderón's reiteration of a war narrative in public discourse, without the *de iure* recognition of Mexico as a war.

In his article "Mexico's Drug War, International Jurisprudence, and the Role of Non-International Armed Conflict Status", Michael T. Wotherspoon places particular attention on the *Prosecutor v. Hardinaj et al.* case, resolved by the ICTY trial chamber. He compares the situation of the Kosovo Liberation Army (KLA) to that of Mexican DTOs and holds their resemblance to be an argument for Mexico's state of armed conflict. Indeed, he proves that both the KLA and Mexican DTOs "employed similar tactics in their armed operations",[28] notes that "Mexico's DTOs number up to 100,000 personnel" as compared to "3,000 full-time fighters and between 6,000 to 8,000 part-time fighters" by the KLA, and recognizes that "the main difference between Mexico's DTOs and the KLA are their motives behind partaking in fighting".[29] As shall be seen, I argue that this should suffice to dismiss the case

[26] *Ibid*., *op. cit.,* p. 1087.
[27] *Ibid*., p. 1042.
[28] Michael T. Wotherspoon, *op. cit.,* p. 295.
[29] *Ibid*., p. 297.

for a NIAC. Wotherspoon also makes mention of the *La Tablada* case, in which the Inter-American Commission on Human Rights (IACHR), to which Mexico is a party, declared the existence of an armed conflict after 42 Argentinian civilians attacked a military base in 1989.

In what appears to be a more casuistic approach as compared to that of Bergal, Wotherspoon demonstrates the ways that Mexican reality assimilates and in many ways exceeds conflicts previously designated as NIACs. In essence, however, this way of proceeding is not qualitatively distinct from that of Bergal. Whereas Bergal purports that Mexico fulfills the objective elements enunciated in *Prosecutor v. Tadic* and its progeny, Wotherspoon compares Mexico's case to conflicts that according to international tribunals have satisfied these same criteria, in a way suggesting: "if these cases qualify, Mexico's case does as well". It is a different way of building the same argument, perhaps strengthening it through comparison, but nonetheless following the same logic. An important distinction is that rather than forcing Mexico into the category of an armed conflict and obscuring the complexities of the country's reality, as Bergal does, Wotherspoon points out that "it would be inappropriate to apply IHL to all instances of drug-related violence".[30] He suggests that rather than inserting the whole country in a logic of war, instances of violence and individual DTOs have to be evaluated separately in order to determine their legal status.

Craig A. Bloom defies the default formula for determining the existence of a NIAC. He builds his argument in two steps, first establishing the existence of an armed conflict and then determining whether it is of an international or non-international character. Other authors do not address this distinction carefully, despite its utmost relevance. As Bloom notes, this "further classification is critical under international law", for the entire corpus of IHL applies

[30] *Ibid.,* p. 321.

to international armed conflicts but not necessarily to NIACS.[31] In step one of his two-step-analysis, Bloom refers to the "protracted nature of the conflict", the "type and variety of weapons used by cartels" and the "spread of clashes over the territory" to conclude that "the violence in Mexico rises to the level of an armed conflict within the meaning of international law".[32] In order to determine that such armed conflict is of an non-international character, the author rejects the *Tadic* framework used in step one, declaring that "the entire exercise of trying to make these factors fit a specific conflict will always be (…) a set of square pegs attempting to be inserted into round holes".[33] Instead of using the Tadic criteria as he did in step one, Bloom proposes the *Hamdan v. Rumsfeld* contradistinction paradigm, which consists in that "any armed conflict not between two or more high contracting parties, is automatically non-international".[34]

His argument thus consists in applying the *Tadic* criteria as a test to determine the existence of an armed conflict, and in applying the "contradistinction paradigm" as a separate exercise in order to conclude on the international or non-international character of the conflict. The present thesis challenges this reasoning at its first step, for determining the existence of an armed conflict on the grounds of the protracted nature of the violence, the type and diversity of weapons, and the spread of clashes is exactly what Bloom himself would call an "attempt to insert square pegs into round holes". Said in a simpler way, Bloom cautions "against the use of the *Tadic* factors in making broad factual findings",[35] but uses

[31] Craig A. Bloom, *op. cit.,* p. 371.
[32] *Ibid.,* p. 348-368.
[33] *Ibid.,* p. 377.
[34] *Ibid.,* p. 381.
[35] *Ibid.,* p. 377.

these same factors to establish the existence of an armed conflict in the first place. It is, after all, a variation of the same dichotomist debate that this thesis hopes to avoid.

Jessica Caplin agrees with Bergal, Wotherspoon and Bloom in classifying the "drug war" as a NIAC, but widens the scope of analysis beyond the strictly legal one. Although she maintains that Mexico's case satisfies the *Tadic* criteria, the heart of her article lies not in proving this – as previous works did – but rather in outlining the political considerations for both Mexico and the United Nations to avoid what is in her view the proper designation. The case for classifying Mexico as a NIAC is to Caplin no more than a premise (granted, a key premise) to the deeper political motivations that she seeks to uncover. Her defense for this assumption is not based on the careful comparison of Mexico's reality to the criteria established in the *Tadic* test, but is rather founded on the policy implications that situating the conflict under the umbrella of IHL carries. The author correctly points out that qualifying Mexico as a NIAC would make "Mexican officials (…) vulnerable to charges of war crimes" and would oblige the government to "ensure that all other parties to the conflict (…) are treated in accordance with IHL and the principle of humanity",[36] suggesting that these are both desirable outcomes. The obvious rebuttal to her normative argument is that *not* categorizing Mexico as a NIAC obliges the government to ensure that all parties to the conflict are treated in accordance to IHRL, a legal regime that offers wider protection to both civilians and those engaged in violence.[37]

As the title of her article suggests ("Politics in Conflict: Why the Interests of States Inescapably Infuse International Humanitarian Law, The Case of Mexico's Drug War"),

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[36] Jessica Caplin, *op. cit.,* p. 125.

[37] See: Oona Hataway et. Al, *Which Law Governs During Armed Conflicts? The Relationship Between International Humanitarian Law and Human Rights Law,* Yale Law School Legal Scholarship Repository (2012): 1882-1943.

Caplin considers that the law of armed conflict is being cheated by international politics, for State interests prevail over international law time and time again. It is thus, she concludes, a matter of politics inserting itself into what should in theory be a legal debate. While hard to disagree with the notion of State interests molding the legal status of the conflict, there is a deeper political layer than the one she uncovers, one where the government can strategically avoid the constraints of both IHL and IHRL at the same time. In her view, the law of armed conflict is the most apt and desirable regime to regulate "Mexico's Drug War" but is not implemented due to political and economic priorities. The present thesis differs in that (a) IHL is not the most desirable body of law for Mexico and that (b) geopolitics and policy implications undermine IHRL as much as they do IHL. Beyond these differences, Caplin views the relationship between international law and "Mexico's Drug War" with a critical lens that this thesis intends to borrow. Building on this principle, this thesis further asks: how is law instrumentalized in function of these interests? A question to which the simplified answer is: language. More specifically, I argue that Felipe Calderón was able to instrumentalize international law through the creation of a war narrative in public discourse.

Andrea Nill Sanchez rejects the notion of an armed conflict in her article titled "Mexico's Drug 'War': Drawing a Line Between Rhetoric and Reality".[38] Nill Sanchez sustains, much to my agreement, that "war rhetoric has pervaded both U.S. and Mexican political discourse […] motivating some public figures to push for transforming a metaphorical war into a literal armed conflict".[39] She outlines how government officials in both the United States and Mexico have shaped political discourse into creating a war with public backing. In doing so, however, she omits the fact that the government has achieved this without admitting to the

[38] See: Andrea Nill Sanchez, *op. cit.,* p. 467-508
[39] *Ibid*., p. 474.

legal framework of war, therefore operating under what is, in practice, a legal limbo. Her contribution is nonetheless extremely valuable, for she introduces the notion of a "rhetorical war" that has been actively constructed, claim that this thesis aims to prove and expand on. As done by the previous authors, Nill Sanchez overviews the applicable law on the matter and focuses on the *Tadic* Test, only that she concludes that the situation in Mexico does not fulfill the legal standards required, chiefly for DTOs failing to acquire the level of organization expected of an army.

Nill Sanchez arrives at a different conclusion than Bergal, Caplin and Wotherspoon on the level of organization of Mexican cartels, despite having analyzed the same set of events. This fact helps illustrate why the present thesis is not interested in debating over the empirical verification of the indicia established by the *Tadic* test and its progeny, for they are too vague and lead to a binary discussion without allowing for a synthesis. In studying the consequences of framing the drug war under IHL, Nill Sanchez warns that this body of law "allows for a proportionality test that may lead to the loss of many Mexican civilian lives" and alerts of the dangerous implications it would carry in terms of detention and prosecution.[40] While proponents of designating Mexico as a NIAC see practical benefits in applying the law of armed conflict, I agree with Nill Sanchez in that doing so would prolong the conflict, intensify the suffering of Mexican citizens, unduly restrict civil liberties, and further increase the death toll.

At last, Alejandro Rodiles distances himself from the strictly legal approach of reviewing the *Tadic* Test and other legal instruments in light of events in Mexico. In his article titled "Law and Violence in the Global South: The Legal Framing of Mexico's Narco Related

[40] Andrea Nill Sanchez, *op. cit.,* p. 493.

Violence", Rodiles acknowledges that the qualification of the situation as an armed conflict is "legally contested […]",[41] suggesting that there is no real point in perpetuating the debate on ambiguous and vague criteria. In his view, the very structuring categories of IHL peril as conflicts in the global south linger between war and peace. He opens the debate of Mexico's qualification as a NIAC to the much wider question of whether this category is able to capture the nature of postmodern conflicts.

In Rodiles' view, trying to mold the conflict in Mexico into the category of a NIAC has contributed to construct the country's violent reality, both through policy and perception. Most importantly, Rodiles notices that the complexity of profit-driven conflict allows for the strategic instrumentalization of law, making him the first author to apply Berman's theory to Mexico's situation. As observed by Rodiles, the war metaphor justifies the government's recourse to exceptional measures and contributes to erase the limits between the law of war and the law of peace. The present dissertation adopts this view and seeks to develop it through a detailed mapping of the Mexican discourse from 2006 to the present, evaluating its role in the strategic instrumentalization international law. The objective is to obtain a deeper understanding of how international law has been instrumentalized by the government, both through formal and informal declarations. Doing so necessitates a core literary background on the relationship between language and war.

2) Language and war

As pointed out earlier, Nill Sánchez and Rodiles note the governmental construction of a war narrative. They observe the potentially self-fulfilling character of the vocabulary employed

[41] Alejandro Rodiles, *op. cit*., p. 2.

by the government, cautioning the transformation of a metaphorical war into a literal one. Nill Sanchez rightly observes that "acceptance of the war metaphor (…) clears the way for political action",[42] while Rodiles reveals that "narcos became the enemies to be defeated rather than the criminal offenders to be prosecuted".[43] These authors infer the power of language in "Mexico's Drug War", but – likely due to the scope of their papers – do not analyze the impact of war rhetoric systematically.[44] In contrast, Susan Stuart and Tawia Ansah have delivered systematic and comprehensive studies on war rhetoric, focusing on America's abstract "wars" on drugs and terror, respectively. These papers provide the blueprints for a holistic study on the relationship between language and war in "Mexico's Drug War":

Susan Stuart's "War as a Metaphor and the Rule of Law in Crisis: The Lessons We Should Have Learned from the War on Drugs" outlines how all three branches of government in the United States created and reproduced war-like rhetoric to the point of turning teenage students into public enemies.[45] Stuart re-constructs the "War on Drugs" along forty years of American history, reviewing how conservative Presidents Nixon, Ford, Reagan and H.W Bush employed militarized rhetoric, "implicitly fram[ing] the War as a struggle between good and evil for the soul of a nation".[46] Although Stuart clearly alludes to an American readership when titling the article "(…)Lessons *We* Should Have Learned(…)", the ears of any Mexican reader should ring to the list of impressive, almost ludicrous, parallels between

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[42] Andrea Nill Sanchez, *op. cit.,* p. 475.
[43] Alejandro Rodiles, *op. cit.,* p. 7.
[44] It must be noted that Nill Sanchez's article was published on the first year of Peña Nieto's presidential term.
[45] Susan Stuart, *War as a metaphor and the rule of law in crisis: The lessons we should have learned from the war on drugs,* South Illinois University Law Journal (2011): 4. ["(…) teenagers got caught in the crossfire. They were the natural enemy in this War because it demanded complete obeisance to authority and subjugation to forces of unreasonable fear"].
[46] *Ibid.,* p. 5.

the American "War on Drugs" and "Mexico's Drug War". Referring to the United States, Stuart argues that "at some point (…) we have crossed the line from the marketing use of the metaphorical militarization to actual militarization",[47] that "we have found it too easy to use militarized rhetoric without examining its consequences"[48] and that "today's militaristic rhetoric is increasingly identifying fellow citizens as enemies in a literal war".[49] Any of these statements could be perfectly attributed to Mexican reality and are all lessons that Mexican policymakers should keep close in mind. Similarly, statements by Nixon, Ford, Reagan or H.W Bush could have easily come out of Calderón's mouth. Stuart further demonstrates how "all branches of government sold the emotional message by incessant repetition". She analyzes the hysterical war rhetoric employed in Supreme Court rulings in order to justify arbitrary limitations to student civil rights[50] and the mandates enacted by congress forcing schools to become drug free.[51] Mexicans have many lessons to learn from America's "War on Drugs" and Stuart's text is an ideal starting point to do so. In saying so, however, I do not imply that militarization in the United States is comparable to that undergone in Mexico. Such is not the case.

Tawia Ansah's text ("War: Rhetoric and Norm Creation in Response to Terror") also exposes appalling similarities between America's complex "War on Terror" and "Mexico's Drug War".[52] The author focuses on the immediate response by the United States government to the 9/11 attacks in an effort to understand "how the language of war shapes and creates

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[47] *Ibid.,* p. 3.
[48] *Ibid.*
[49] *Ibid.*
[50] See: Safford Unified School District # v. Redding; Morse v. Frederick
[51] Drug Free Schools and Communities Act of 1986; Anti-Drug Abuse Act of 1986; Anti Drug Abuse Act of 1988; Drug-Free Schools and Communities Act of 1989; No Child Left Behind Act of 2002º
[52] See: Tawia Baidoe Ansah, *War: Rhetoric and norm-creation in response to terror,* Virginia Journal of International Law (2003): 797- 851.

the international legal norms governing the use of force", ultimately demonstrating that "the lexicon of war is predictive of the norms" subsequently created.[53] This predictive power is achieved by pairing schools of rhetoric to theories of war.[54] By deciphering the language utilized by government officials he determines a corresponding vision on war, which in turn allows for a prediction on the legal justifications that will follow. In America's case, the discourse of a "War on Terror" falls under the category of demonstrative speech, which "appeals primarily to emotions (pathos) at the expense of legal and rational/political speech (logos and ethos)".[55] This category of speech reflects an eschatological view of war, whereby the "War on Terror" is "a war against civilization" that will decide the fate of American values around the world.[56] Ansah's swift way of linking language to war and war to language provides an interesting and fitting structure for the study of war rhetoric in "Mexico's Drug War", or for the study of war rhetoric in any conflict for that matter.

A. Theoretical Framework

The theoretical underpinnings of my hypothesis can be broadly captured in two words: strategy and rhetoric. There is, of course, a vast array of concepts and theories surrounding these topics, from which a selection has to be made. I present an interdisciplinary analytical

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[53] *Ibid.,* p. 807.
[54] Ansah pairs different rhetorical styles to a particular theory or understanding of war. He borrows Aristotle's classification of rhetoric, dividing the discipline into (1) political/deliberative speech; (2) forensic/legal speech, and (3) epideictic/demonstrative or ceremonial speech. These types of rhetoric are paired with a theory of war, from which he discerns three: (1) a political war (Clausewitz) where costs and gains are estimated; (2) an eschatological war, meaning a war for the fate of a civilization, and (3) a cataclysmic war, which refers literally to a war for the survival of the human race. In Ansah's view, "how we talk about war reflects how we conceive war to be. Do we think in eschatological terms of a final war? Is our culture steeped in the discourse of war as a rational and inevitable extension of our political system and, therefore, rational policy? Is war, when it comes, an anomalous and catastrophic event?". *Ibid.*, p. 814.
[55] *Ibid.,* p. 852.
[56] *Ibid.,* p. 817.

framework that draws from concepts on strategic instrumentalization, framing, and the strategic-relational approach. These uncover a clearer vision of what I consider to be the hidden interplay between Mexican political reality and international law. The goal in this section is to introduce the theories that structure and give coherence to the arguments presented in the coming chapters.

1) Strategic Instrumentalization

Central to advancing the arguments presented in this dissertation are Nathaniel Berman's developments on the strategic instrumentalization of law. Berman posits that "law's role in relation to war is primarily not one of opposition but of construction",[57] meaning that rather than containing violence, the legal category of armed conflict channels it into certain spheres of human action and excludes it from others. This occurs because belligerents in (international) armed conflicts are granted what Berman calls "combatant privilege", which protects them from prosecution for engaging in violence as long as their actions comply with the laws of war. This privilege, Berman argues, is a "central feature of the ever-renewed process of legally constructing war as an arena of permissible violence".[58]

He further proves that the legal category of war has been historically contested, first being defined in formal terms, then factual, and finally functional ones.[59] The strategic instrumentalization of law is one step ahead of radical functionalism as put forward by McDougal and Feliciano.[60] Under strategic instrumentalization, actors "have not sought to

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[57] Nathaniel Berman, *op. cit.,* p. 1
[58] *Ibid.,* p. 12.
[59] *Ibid.,* p. 15-23.
[60] See: Myres S. McDougal and Florentino P. Feliciano, *Law and Minimum World Public Order,* Yale University Press (1961); *Ibid.,* p. 36 ("This radical functionalism is but one short step from the strategic instrumentalization I argue is characteristic of many conflicts").

conflate the distinction between war and not-war", as occurs in functionalism, but rather have achieved "to deploy the two (…) practices for strategic effects".[61] Therein lies the concept's relevance for understanding "Mexico's Drug War" and its status under international law. It refers not merely to the strategic choice between the two available legal categories, but to a strategic oscillation between them.[62] These shifts, he accurately notes, have been "deliberately used to achieve strategic effects on the battlefield or in the realm of public opinion".[63] I am ultimately trying to prove that the strategic instrumentalization of law can be observed in Mexico's so-called war.

I argue that strategic instrumentalization is a key concept for understanding how Mexico has been able to act as if in a war while shielding itself from the legal, political and economic costs of being classified as such under the law. What is more, proving the applicability of this concept to Mexico's case would logically allow for its extension to other drug-related, profit-driven conflicts in the global south. Finally, the strategic instrumentalization paradigm automatically distinguishes this thesis from texts centered on the debate over the objective criteria (*Tadic* test) reviewed in the previous section, for such discussions are guided by a factualist interpretation of international law. A question necessarily follows: if the strategic instrumentalization is the theory to be proven or the hypothesis to be examined, if you will, what are the means through which this can be achieved? What mechanism could have the Mexican government deployed to achieve the instrumentalization of law? The body of texts on framing and the strategic-relational approach provide the theoretical grounds for answering these questions.

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[61] *Ibid.*
[62] *Ibid.* ["This kind of deliberately deployed oscillation between the two polar rubrics poses a challenge different in kind (...)].
[63] *Ibid.,* p. 7.

2) Framing

Another way of saying that the Mexican government has been able to convince its citizens of being in a war without locating itself under the *jus in bello* regime would be to say that it has been able to *frame* the conflict in its own terms. Framing is a concept that, although born in the field of cognitive science,[64] has been widely applied in sociology,[65] economics,[66] social movements research[67] and political communication,[68] among other disciplines.[69] As Baldwin Van Gorp puts it, framing is "gradually becoming a *passe-partout*".[70]

Gamson and Modigliani provide a broad yet illustrative definition: a frame is a "central organizing idea or story line that provides meaning to an unfolding strip of events, a weaving connection among them".[71] More concretely, "the frame suggests what the controversy is about", it defines "the essence of the issue".[72] Similarly, Robert Entman writes that "to frame is to select some aspects of a perceived reality and make them more salient (…)".[73] Referring

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[64]See: Frederic Bartlett, *Remembering: A study in experimental and social psychology,* Cambridge University Press (1932).
[65] See: Erving Goffman, *Frame Analysis: An essay on the organization of Experience,* Northeastern University Press (1974).
[66] See: Daniel Kahneman and Amos Tversky, *Prospect Theory: An analysis of decision under risk,* Econometrica (1979): 263-291.
[67] See: David A. Snow and Robert Benford, *Ideology, frame resonance, and participant mobilization,* International Social Movement Research (1988): 197-217.
[68] See: Todd Gitlin, *The world is watching: Mass media in the making and unmaking of the new left,* University of California Press (1980).
[69] For anthropology see: Gregory Bateson, *Steps to an ecology of mind* (New York: Ballantine Books, 1955); for policy research see: Donald Schon and Martin Rein, *Frame Reflection: Towards the resolution of intractable policy controversies* (New York: Basic Books, 1994).
[70] Baldwin Van Gorp, *The constructionist approach to framing: Bringing culture back in,* Journal of Communication (2006):60.
[71] William A. Gamson and Andre Modigliani, *Media discourse and public opinion on nuclear power: A constructionist approach,* The University of Chicago Press (1989):3.
[72] Claes H. De Vreese and Sophie Leeher, *Framing theory*, The International Encyclopedia of Political Communication (2016): 1-10.
[73] Robert Entman, *Framing: Toward clarification of a fractured paradigm,* Journal of Communication, (1993):52.

more directly to a political context, Gitlin suggests that frames are "persistent patterns of cognition, interpretation, and presentation, of selection emphasis and exclusion by which symbol-handlers routinely organize discourse".[74] By joining these definitions, frames allow us to conceive Mexican politicians and military officials as more than mere public functionaries; they become *symbol-holders* and *frame-builders*.

This does not mean, however, that any given agent has been able to unilaterally set his or her own frame, whatever this may be. Sniderman and Theriault point out that "framing studies (…) have [usually] neglected the fact that frames are contestable".[75] Most studies have "restricted attention to situations in which citizens are artificially sequestered, restricted to hearing only one way of thinking about a political issue".[76] But understanding frame-setting as a straight-forward, unilateral exercise would not appropriately reflect the way in which different agents in Mexico, including media outlets, have portrayed drug-related violence in the country. There have been at least two competing frames: the "drug war" frame and the "organized crime" one. As will be shown in sections 3.1 ("The War Metaphor") and 3.2 ("Official Discourse"), however, it is not completely accurate to talk about *competing* frames, for the government has strategically oscillated between them. In this particular case, combining frame theory and Berman's strategic instrumentalization theory provides a more reliable depiction of reality.

Frames are also well complemented by Pierre Bourdieu's structuralist heuristic device of *fields*. Without going too much into detail, fields are abstract spaces of social action in which

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[74] Todd Gitlin, *op. cit.* p. 7.
[75] Paul Sniderman and Sean M. Theriault, *The structure of political argument and the logic of issue framing,* in Studies of Public Opinion, edited by Sniderman and Saris (Princeton, NJ: Princeton University Press, 2004).
[76] Dennis Chong and James N. Druckman, *A theory of framing and opinion formation in competitive elite environments,* Journal of Communication (2007): 100.

agents compete for the possession of symbolic capital; be it of physical, economic, cultural or social nature. Each field is structured by a set of mutually-determined relations between agents and their roles in the production, distribution and consumption of symbolic capital. In Bourdieu's own words, "visible beings, whether individuals or groups, exist and subsist in and through difference; that is, they occupy relative positions in a space of relations (…)".[77] Fields are hence a "structure of differentiated positions, defined in each case by the place they [agents] occupy in the distribution of a particular kind of capital".[78] The differentiation amongst agents in the field leads to competition, which in turn produces symbolic power and more importantly, symbolic violence, over which the government has the legitimate monopoly.[79] Frame-setting, just like the race for capital in the Bourdieusian sense, is inserted in a logic of competition guided by mutually-determined social relations. In this line, Pan and Kosicky note that "resources are not distributed equally", for which "actors strategically cultivate their resources and translate them into *framing power*".[80] The frame-setting competition can be therefore understood as occurring within what Bourdieu would call a *linguistic field*.

Equally relevant for the purpose of this thesis are Bourdieu's reflections on the economics of linguistic exchanges.[81]As occurs in other fields, the value of discourse in the field of language is inseparable from the entirety of the social structure, which is present in every

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[77] Pierre Bourdieu, *Practical Reason: On the theory of action* (Stanford: Stanford University Press, 1998):31.
[78] *Ibid.,* p. 15.
[79] *Ibid.,* p. 40. ["(…) using a variation around Max Weber's famous formula, that the state is an X (to be determined) which successfully claims the monopoly of the legitimate use of physical and *symbolic* violence over a definite territory and over the totality of the corresponding population"].
[80] Zhongang Pan and Gerald M. Kosicky, *Framing as a strategic action in publication deliberation.* In Framing Public Life, edited by S. D. Reese, O. H. Gandy, Jr., & A. E. Grant (New Jersey: Routledge, 2001): 35-66.
[81] Pierre Bourdieu, *C'est Que Veut Dire Parler: L'économie des échanges linguistiques* (Paris: Fayard, 1982).

interaction.[82] The authority and legitimacy of the individual pronouncing the words is central to establishing the value of the discursive capital. In fact, "the market is not favorable to the emissaries of linguistic capital, however great the capital, if the recipients do not recognize the legitimacy of the discourse".[83] This becomes gravely relevant in relation to the Mexican context, where the main emissary of the war discourse is the President himself; enrobed in as much authority and legitimacy as anybody could. Tying this back to the concept of framing, Bourdieu's reflections on the value of linguistic capital highlight the superior capacity of government authorities to frame drug-related violence in their own terms.

Therefore, framing is posited as the mechanism through which the government has been able to shape Mexico's violent reality, assimilating it to a war and likening it to IHL. Chapter 3 will uncover the fabrication of three main frames (casualties, enemies, and heroes) that together make up the deeper narrative known as the "Mexican Drug War". In turn, Bourdieu's sociological contributions help to highlight the frame-setting power available to the government.

3) Strategic- Relational Approach:

All social research relating to strategy necessarily assumes – be it tacitly or explicitly – a view on the ontological interplay between structure and agency. In claiming the existence of a strategy in Mexico's framing of a "Drug War", for example, I unavoidably presuppose that certain agents (individual and/or collective) make decisions under a structure that both

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[82] *Ibid.,* p. 50. ["Il s'agit d'un véritable rapport de force que le seul point de vue linguistique ne suffit à appréhender, car les acteurs traduisent dans leur échange toute la structure sociale dans lequel il a lieu et dans laquelle ils sont insérés"].

[83] *Ibid.,* p. 54. ["(…) le marché n'est favorable aux détenteurs du capital linguistique le plus grand que si les destinataires de leur production reconnaissent leur légitimité"].

enables and constraints their actions in the pursuit of an objective(s). As has been warned, however, this does not mean that the agents involved are entirely aware of the variables shaping their decisions or of their ultimate consequences. It is highly likely, for example, that Calderón shifted between war and no war rhetoric with goals in mind other than the instrumentalization of IHL and IHRL (such as public opinion support and exceptional presidential powers), the instrumentalization of law being an unforeseen consequence. In any case, the agency-structure dichotomy has been the source of an endless philosophical debate whose extension escapes the scope of the present thesis, but in relation to which it is necessary to take a stance in order to lay bare all theoretical assumptions made throughout the text. The *strategic-relational approach* (SRA) provides us with a nuanced understanding of strategy, which is restrained by context and the ways in which it pre-defines preferences and decisions. In this way, this framework allows us to overcome the "inadmissible dichotomy between (absolute) external constraint and (unconditional) free-willed action".[84]

In my view, the SRA as developed by Bob Jessop[85] and subsequently by Colin Hay yields the best framework for studying strategic decision making in the Mexican context; not to say in any political context for fear of navigating unknown waters. SRA is but one of the various theories that has attempted to transcend the dualism of structure and agency. Most notably, I select this paradigm over Anthony Giddens' structuration approach,[86] Roy Bhaskar's transformational model of social action[87] and Margaret Archer's morphogenetic theory.[88] Rather than conducting analysis in terms of structure and agency, SRA "develops

[84] Bob Jessop, *Critical Realism and the Strategic Relational Approach*, New Formations: A Journal of Culture, Theory and Politics (2006): 49
[85] See: Bob Jessop, *State Power: A strategic relational approach* (Cambridge: Polity Press, 2007).
[86] See: Anthony Giddens, *The Constitution of Society: Outline of the theory of structuration* (Cambridge: Polity, 1984).
[87] Roy Bhaskar, *The Possibility of Naturalism* (Hempstead: Harvester Whatsheaf, 1989).
[88] Margaret Archer, *Realist Social theory* (Cambridge: Cambridge University Press, 1995).

more realistic concepts in which both structure and agency are present",[89] these being mainly the concepts of *strategy* and *strategic context*.

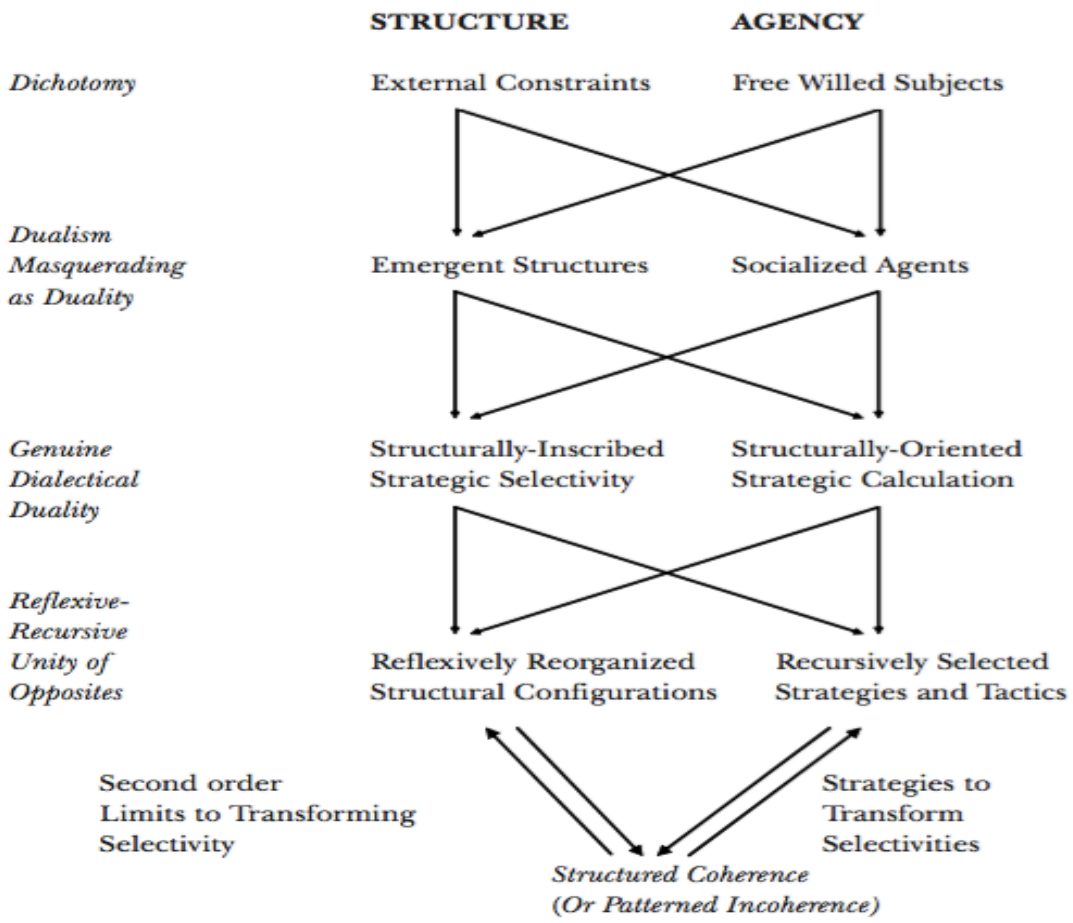
Under this approach, *strategy* is is defined as the "conduct oriented towards the context in which it takes place", while the *strategic context* is simply the "consideration of the extent to which the context shapes the courses of action available to the actor".[90] The present dissertation summarizes the strategic context available to Calderón by the time of his swearing-in as president in two sections: Mexico's history of drug-trafficking and the legal indeterminacy surrounding phenomena of drug related violence. Moreover, the *strategic selectivity of the context* refers to the "idea that the context or environment in which political behavior takes place favors certain strategies over others as means to realize a given set of intentions or preferences".[91] Strategic selectivity hence underscores the "tendency for specific structures and structural configurations to selectively reinforce specific forms of action, tactics, or strategies and to discourage others".[92] This concept is presented as a cost-benefit analysis of applying IHL and IHRL separately to the Mexican case. In this way the historical and legal structures available to Presidents Calderón and Peña Nieto favored the joint application of *jus in bello* and human rights law as the most favorable courses of action. This dialectic may be more clearly appreciated in **figure 1** below,[93] where SRA as put forward by Jessop and Hay "makes its appearance in *row three*", labeled the 'genuine dialectical duality'. Taken all together, the concepts of strategic context, strategic selectivity

[89] Colin Hay, *Class Notes: Advanced Political Analysis*, Sciences Po (Fall semester 2016).
[90] Colin Hay, *op. cit.*
[91] Colin Hay, *op. cit.*
[92] Bob Jessop, *Critical Realism…op cit.,* 49
[93] Bob Jessop, *Ibid.,* p. 50

of the context, and structurally-oriented strategic calculation will be critical throughout the study of Mexico's strategic instrumentalization of international law.

In the form of a summary, Berman's strategic instrumentalization of law is the hypothesis to be proven, framing is the means through which it is said to be achieved, and the SRA framework is the roadmap through which to better understand the particularities of the Mexican case in its dialectic between agency and structure.

Figure 1: A Strategic-Relational Approach to Structure and Agency



Chapter 2: To be or not to be…a NIAC? Mapping the Strategic Context

Before delving into Mexico's strategy itself we must expose the *strategic context* to which the country is subject. This way of proceeding corresponds to SRA as presented in the previous section. We also delve into the possibilities available under this context and their implications in terms of costs and benefits, translated in Jessop's terms into the *strategic selectivity of the context*. In laying out the strategic terrain, this chapter focuses not on *how* international law has been instrumentalized, but instead on *why* this has occurred. In other words, we review the strategic context and its strategic selectivity in order to understand why the instrumentalization of law is both possible and desirable to the government in the first place.

I organize the mapping of the strategic context in the following way: **section A** will provide a brief but sound review on the history behind the so-called "Mexican Drug War"; **section B** will expand on what is meant by Mexico's 'legal grey area', arguing that the IHL's legal indeterminacy regarding the question of categorization is what makes the strategic instrumentalization of international law *possible*; and **section C** will compare the two legal regimes available and outline the costs and benefits associated with being classified as a NIAC, uncovering the reasons for which the instrumentalization of international law would be *desirable* to the Mexican government.

A. Historical background: Contextualizing the "Mexican Drug War"

Today's confusing playing field in the fight against DTOs becomes clearer when traced back to its origins. Doing so reveals, among other things, the vast power that Mexican cartels have garnered over time and the government's inability to confront them under the prohibitionist paradigm.

Any account of drug trafficking must begin with prohibition, for without the history of narcotics would be no different to that of most other markets. The characteristics that are so distinctive of Mexican DTOs today would most certainly differ had legislation surrounding drug production and consumption been more permissive throughout the 1900s, a period that the Mexican sociologist Luis Astorga labels as "the century of drugs".[94] Our overview thus begins in the early 20th century, at a time when the prohibitionist paradigm began to gain ground in the United States and Mexico. As will become evident, the history of drug-related violence in these two countries is tightly interlinked, mostly due to American pressure over Mexican drug policy.

The first attempt to regulate narcotics dates back to 1914, when the United States Congress approved the first *quasi*-prohibitionist law on marihuana and opioids.[95] Mexico followed with only a brief delay, introducing regulation on marihuana cultivation in 1920 and enacting the prohibition of both marihuana and opium poppy in 1926.[96] The disparity in

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[94] See: Luis Astorga, *El Siglo de las Drogas: Del Porfiriato al Nuevo Milenio* (Mexico City: Plaza y Janés 2005).
[95] Ioan Grillo, *El Narco: Inside Mexico's Criminal Insurgence* (New York: Bloomsbury Press, 2011): 52.
[96] Mónica Serrano, *México: narcotráfico y gobernabilidad*, Revista pensamiento Iberoamericano n.1 (Sept. 2007). President Plutarco Elías Calles decreed ilegal the production and import of drugs and regulated their medical use. His sucesor, Pascual Ortíz Rubio, would later modify the Penal Federal Code in order to criminalize the possession, sale, and consumption of narcotics.

legislation between Mexico and the United States during the period from 1914 to 1926 gave the incipient drug merchants an advantageous start. They were able to legally produce marihuana and opium in Mexico and export them to the United States, where prices had rocketed due to prohibition.[97] Guillermo Valdés Castellanos, the former Director of Mexico's Center of National Research and Security (CISEN),[98] pinpoints this time-period as the beginning of modern drug-trafficking in the country.[99]

Astorga documents the proliferation of opium throughout the country following its prohibition in 1926. Its consumption mainly soared in the regions of Sinaloa, Sonora, Baja California, Chihuahua, Tamaulipas, and Mexico City,[100] but remained far from creating large-scale criminal enterprises alike the ones we encounter today. In fact, the Chinese community in Mexico (and particularly in Sinaloa) was able to satisfy local and American demand for opium all by itself.[101] The dominance of Chinese immigrants in opium trade was such that its use became popularly referred to as the "Chinese vice", leading to the violent expropriation of their businesses in the 1930s.[102, 103] The market for marihuana swelled during those years, a fact evidenced by government reports that detail the confiscation of cannabis

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[97] Guillermo Valdés Castellanos, Historia del Narcotráfico en México: Apuntes para entender el crimen organizado y la violencia, (Mexico City: Aguilar, 2013): 35.
[98] Centro de Investigación y Seguridad Nacional (CISEN).
[99] Guillermo Valdés Castellanos, *op. cit.,* p. 35. ["(…) iniciándose de esa manera el gran negocio del narcotráfico"].
[100] Luis Astorga, *El Siglo…op. cit.,* p. 23-40.
[101] Guillermo Valdés Castellanos, *op. cit.* p. 39 ["(…) la cantidad de opio que se tenía que producir para satisfacer esa demanda local, sumada la de Estados Unidos, podía ser satisfecha por la comunidad china"].
[102] Ioan Grillo, *op. cit.,* p. 58-60.
[103] This anti-Chinese prejudice has not been completely eradicated in Mexico. In 2008, President Calderón commented, quite unnecessarily, that "only with the money seized from a citizen with Chinese origins (…) we are building 310 clinics in the country, for the treatment and prevention of drug addictions amongst the young". See: Presidencia de la República, *Sé que México enfrenta un gran problema de seguridad. Éste es un cancer que se ha venido incubando durante años y al que no se le dio la debida atención, pero es un cancer que vamos a erradicar* (Aug. 25, 2008). http://calderon.presidencia.gob.mx/2008/08/se-que-mexico-enfrenta-un-gran-problema-de-seguridad-este-es-un-cancer-que-se-ha-venido-incubando-durante-anos-y-al-que-no-se-le-dio-la-debida-atencion-pero-es-un-cancer-que-vamos-a-erradicar-presiden/

crops in 18 out of 32 states of the Mexican Republic.[104] Although drug-traffickers of the time were mostly organized in small family and community networks, they already presented many of the elements that are commonplace in contemporary drug cartels. Valdés Castellanos sustains that the DNA of organized crime in Mexico was forged from 1926 to 1940: Drug distributers were already closely related to local governments, violent clashes were abundant, the rule of law in post-revolutionary Mexico was weak to say the least, and there existed a clear asymmetry in the relations between Mexico and the United States.[105] These are all elements that continue to define the so-called "Mexican Drug War" today.

In 1940, President Lázaro Cárdenas (1934-1940) made an early attempt to modify the futile prohibitionist framework of the previous decade in an episode that became known as the 'Mexican alternative'. He passed a new Federal Regulation on Drug Addiction ('Reglamento Federal de Toxicomanía'), which treated drug addicts as diseased rather than as delinquents.[106] Cárdenas tried to "define the problem of drugs as a public health issue", urging the State to control the market for narcotics.[107] This short-lived law is worth citing for its progressive spirit:

> "Considering (…)
>
> That the persecution of the addicts that is done according to the regulation of 1931 is contrary to the concept of justice of which the addict is currently being

[104] Luis Astorga, *El Siglo…* op. cit., p. 36.
[105] Guillermo Valdés Castellanos, *op. cit.,* p. 84.
[106] Mariana Flores Guevara, *La Alternativa Mexicana al Marco Internacional de Prohibición de Drogas durante el Cardenismo* (doctoral dissertation, submitted at El Colegio de México, Mexico City, 2013).
[107] Froylan Enciso, *Los fracasos del chantaje: régimen de prohibición de drogas y narcotráfico*, in Los grandes problemas de México compiled by Arturo Alvarado and Mónica Serrano (Mexico City: El Colegio de México, 2010): 70. ["Este periodo en México se puede delinear desde el triunfo del carrancismo hasta el fracaso de los intentos de Lázaro Cárdenas por definir el problema de las drogas como un asunto de salud pública y de necesidad de que el Estado controlara el mercado de narcóticos.

deprived, for the addict must be conceived as diseased who must be tended to and cured, not as a true delinquent who must suffer punishment;

(…)

That the only result obtained from the application of the referred regulation of 1931 has been the increase in price of drugs, under those circumstances yielding great benefits to the traffickers".[108]

The 'Reglamento Federal de Toxicomanías' was promptly reversed in what could easily be described as the bluntest example of American pressure over Mexican Drug policy. The law was "well received by public opinion (…)" in Mexico but the "United States government considered it dangerous".[109] Aware that World War II had significantly compromised the flow of pharmaceutic products from Germany, the Franklin D. Roosevelt administration "(…) suspended the export of medical drugs to Mexico", leaving Mexican pharmacies and hospitals in dire shortage of medicines. It was not until the 1940 Regulation on Drug Addiction was repealed a few months later that the United States restarted its pharmaceutic supply to its southern neighbor.[110] Froylan Enciso highlights this episode as a cultural point of inflection in the country. He suggests that it was during these years that "the voices that tried to propel this topic as a matter of public health (…) lost force against the impossibility of implementing laws contrary to American prohibition".[111] These voices have yet to regain their long lost strength.

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[108] Diario Oficial de la Federación, Reglamento Federal de Toxicomanías, (February 17, 1940).
[109] Froylan Enciso, *op. cit.,* p. 72
[110] *Ibid.*
[111] *Ibid.,* p. 73. ("Las voces que trataban de impulsar el tema como asunto de salud pública y fortalecimiento institucional del Estado perdieron fuerza ante la imposibilidad de instrumentar políticas diferentes al prohibicionismo estadounidense").

Organized crime committed to drug trafficking grew spectacularly during the period from 1940 to the early years of the 1980s. The flow of opium to the United States by air reached such levels that in 1953 the government ordered "the suspension of commercial flights in the air space of Sinaloa, Sonora, Chihuahua and Durango".[112] Sources of the time reveal that opium trade passed from the hands of Chinese family networks to those of private criminal enterprises, most of which were heavily backed by government officials in northern states of the country.[113] An important development was the strengthening and increased centralization of the Mexican State with the consolidation of the hegemonic political party (PNR-PRM-PRI).[114] Starting in the 1940s, PRI would establish the conditions of a 'pax mafiosa', whereby "traffickers were simultaneously contained, extorted, controlled, combatted, and when necessary, protected by the political and security apparatus of the State (…)".[115] The all-encompassing control exerted by the party allowed it to configure a pact with powerful networks of criminals: they would be allowed to carry on with their business as long as complying with the conditions set by the government, including the occasional confiscation of drug shipments – mostly for the purpose of preserving the façade created to appease the United States. Under these conditions, blossoming criminal organizations were ready to scale-up in the decades to come.

The sixties brought about vertiginous change to the Mexican drug industry with the boom of marihuana consumption in the United States. Social and political revolt gave

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[112] Luis Astorga, *El Siglo… op. cit.,* p. 9.
[113] Guillermo Valdés Castellanos, *op. cit.,* p. 98
[114] Founded in 1929 as the Partido Nacional Revolucionario (PNR), then rebranded as the Partido de la Revolución Mexican (PRM) in 1938, and finally renamed the Partido Revolucionario Institucional (PRI).
[115] Luis Astorga, *¿Qué Querían Que Hiciera?...o*p. cit., p. 20 ("Los traficantes fueron simultáneamente contenidos, extorsionados, controlados, combatidos, en caso necesario, y protegidos por el aparato político y de seguridad del Estado, y a la vez marginados por el poder político").

way to a rebellious culture of drug consumption, perceived by Mexican producers as an unparalleled business opportunity. The number of American Citizens to try marihuana for the first time went up from 68,000 in 1962 to 2,906,000 in 1970.[116] Valdés Castellanos estimates that by 1979 Mexico was exporting 2,750 tons of marihuana to the United States, meaning that thousands of rural families had started to grow cannabis instead of other less profitable crops.[117] It is during these years that the complex drug world became reduced to the names of some few 'capos' who took over local networks and created transnational illegal empires.

The Sinaloa organization quickly became the most powerful and famous cartel, not to mention the most violent one.[118] A report published in 1976 by newspaper Excelsior assured that criminals in Sinaloa carried the most modern weapons[119] and that "for two years straight there has not been a day in which the local press does not document one or two people gunned down by machine guns or high-power weapons".[120] This period of rising violence in the region coincided with Nixon's recently declared 'War on Drugs' in the United States; a dramatic combination. Together, these two developments led to the first militarized operation carried out by the Mexican government, nicknamed 'Operation Condor'.

This military plan marks the "beginning of the formal participation of Mexican armed forces in drug trafficking operations".[121] The operation consisted in the deployment of

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[116] SAMHSA Office of Applied Studies, *National Survey on Drug Use and Health* (2002).
[117] Guillermo Valdés Castellanos, *op. cit.*
[118] Diego Enrique Osorno. El Cartel de Sinaloa: Una historia del uso político del narco (Mexico City: Grijalbo, 2009):123.
[119] Guillermo Valdés Castellanos, *op. cit.,* p. 118
[120] Luis Astorga, *El Siglo…op. cit.,* p. 114 ("Desde hace dos años no hay día en que la prensa no dé cuenta de uno o dos tiroteados con ametralladora o armas de alto poder").
[121] Martha Alicia Tudón Maldonado, *Reforma del Sector Militar en México*, La Gaceta de Ciencia Política N.I (2017): 61.

10,000 soldiers with the purpose of destroying illegal drug plantations in the States of Sinaloa, Chihuahua and Durango, a region known as the 'Golden Triangle'. The overall result was that the Mexican drug industry "fell under the control of less organizations, but with greater resources, [becoming] more dangerous to society and the State".[122] What is more, the operation did not go by without human rights violations. Already in 1979, Robert B. Craig documents "the abuse of fundamental rights during arrest, detention and imprisonment for narcotics violations",[123] as well as "the disregard of *campesinos* rights during drug-related maneuvers in the countryside".[124] It would be unfair, however, to deny the partial success of the operation, as the destruction of marihuana and opium plantations forced the Sinaloa Organization to move down to the state of Jalisco.[125] The short-tem fall in marihuana revenue would be soon after overcompensated by their entrance to the cocaine market.[126]

The 1980s were a decisive decade in the configuration of organized crime in Mexico. Demand for cocaine in the United States rose throughout the 1970s, reaching its initiation peak (highest number of people to try it for the first time) in 1980.[127] Colombian drug lords became the chief cocaine traders by mid 1970s, establishing Miami as the white powder capital of the world and forcing the American government to take drastic measures.[128] On June 24, 1982, President Reagan signed into action Executive Order

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[122] *Ibid*.
[123] Richard B. Craig, *Human Rights and Mexico's Antidrug Campaign,* Social Science Quarterly vol. 60 N.4 (1980): 695-696
[124] *Ibid*, p. 696-700
[125] From this moment on, up to the early 1990s, the Sinaloa Organization would become known as the Guadalajara Cartel, for most of the Sinaloa drug lords moved to Guadalajara, capital city of Jalisco.
[126] Guillermo Valdés Castellanos, *op. cit.,* p. 217.
[127] Guillermo Valdés Castellanos, *op. cit.,* p. 183.
[128] *Ibid.*

12368, giving the White House wider control over anti-drug efforts.[129] Reagan made it his goal to close the drug route that Colombian cartels had secured through the Caribbean and into southern Florida.[130] The result was that Colombians were forced to "move their products through Mexico and into Texas and Southern California".[131] Mexican Drug cartels, with their vast experience in transporting marihuana and opium, served the Colombian cartels as the perfect intermediaries.[132] Their induction to the profitable cocaine trade would lead to the growth and posterior fragmentation of the Mexican narco. Cocaine quickly became their main source of both revenue and dispute.

This decade would also mark the beginning of the 'kingpin strategy'. The United States went on a frantic manhunt seeking revenge for the brutal assassination of DEA agent Enrique Camarena in 1985. The aftermath would include the capture of the three most important drug lords of the time: Rafael Caro Quintero, Ernesto Fonseca Carrillo, and Miguel Ángel Félix Gallardo.[133] Camarena's death was the tipping point; the United States would no longer tolerate Mexico's double attitude towards the narco. Facing heavy pressure, Mexican President Miguel de la Madrid (1982-1988) would for the first time declare drug trafficking a 'national security problem',[134] igniting a more frontal approach by the federal government but without substantially modifying local alliances.[135]

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[129] Lotte Berendje Rozemarijn, *Ronald Reagan's War on Drugs: A policy of failure but a political success* (master thesis submitted to Universiteit Leiden; 2013). On file with author.
[130] He also ordered the creation of the South Florida Task Force, directed by Vice President George Bush.
[131] William Dean, *Current Situation in Mexico,* in The War on Mexican Cartels: Options for U.S and Mexican Policy-Makers by the Harvard University Institute of Politics (Sept. 2012).
[132] Guillermo Valdés Castellanos, *op. cit.,* p. 194. As Valdés Castellanos puts it, they became the "Federal Express or DHL of Colombian Cartels (…)".
[133] Will Grant, *Mexico Drugs: How one DEA killing began a brutal war*, BBC News (Feb. 7, 2012).
[134] Andrea Nill Sanchez, *op. cit.,* p. 470.
[135] Miguel de la Madrid purged the corrupt Dirección Federal de Seguridad (DFS) and created the Dirección General de Investigación y Seguridad Nacional.

The Sinaloa Organization's (Guadalajara Cartel) began to fragment by the early 1990s, giving way to the Sinaloa, Juárez and Tijuana Cartels.[136] New players such as the Garcia Ábrego in Tamaulipas, the Amezcua in Colima and the Valencia in Michoacán took up the opportunity and made themselves of the amphetamine business. In short, Mexico "passed from the [relatively contained] Sinaloa monopoly to an open competition [scheme], and, inevitably, to a war of all-against-all to get a piece of the cake".[137] This would radically change the way in which the government related to DTOs, as their tacit – and somewhat schizophrenic – partnership would become more confusing and difficult to preserve.

An additional element contributing to the 'perfect storm' of the 1990s was the successful implementation of "Plan Colombia", a joint strategy by the United States and Colombia directed at crushing Colombian cartels. The collapse of Colombian cartels left a vacuum that Mexican organizations were more than eager to fill. In fact, the United States Bi-National Criminal Proceeds Study estimates that the proportion of cocaine that passed through Mexico before getting to the United States increased from 40% to more than 90% in the years spanning from 1991 to 2004.[138]

The last variable in the historical formula that Felipe Calderón would inherit in 2006 is democratization. PRI started to lose power over local governments starting in 1989, a process that would culminate in the presidential elections of the year 2000 – the 'democratic transition' achieved by Vicente Fox's victory. Tim Padgett sullenly notes that "when Calderón's National Action Party [PAN] toppled the PRI in 2000, the cartels

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[136] Animal Político, *Narcodata: Los cárteles se fortalecen con brazos armados que arrinconan a la ciudadanía*, (Oct. 2015). http://narcodata.animalpolitico.com/brazos-armados/
[137] Guillermo Valdés Castellanos, *op. cit.,* p. 219.
[138] Homeland Security, *United States of America – Mexico Bi-National Criminal Proceeds Study* (2015).

splintered and embarked on an orgy of violence that spawned soulless killing machines".[139] Taken off guard, President Fox launched 'Operativo México Seguro' in 2005, installing Mexican militia in the States of Baja California, Sinaloa and Tamaulipas, and dismissing 700 police agents from their functions.[140] By the time Fox left office there were armed forces stationed in the states of Baja California, Sinaloa, Tamaulipas, Michoacán and Guerrero.[141] Just like in 1979, military intervention would not go without accusations of human rights violations.[142] Calderón would take Fox's confrontation with the 'narcos' to the next level, leading to a sharp increase in drug-related deaths[143] and forced displacements.[144]

The review hereby provided should underscore the fact that the so-called 'war' did not appear from thin air. Calderón inherited a process that began in the early 20th century, one characterized by a massive and constant demand for drugs, the political accommodation of drug trade facilitated by alarming levels of corruption, the sudden entrance of Mexican organizations to the cocaine and amphetamine markets, and the fragmentation of DTOs across the country. Having these elements in mind should shed light on why the war narrative employed by Calderón was a possible and to an extent desirable policy strategy at the time of his swearing in as President. Indeed, more fatalist accounts have gone as far as to say that Calderón's 'war' was an inevitable product of

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[139] Tim Padgett, *Day of the Dead*, Time Magazine (June 30, 2011).
[140] Martha Alicia Tudón Maldonado, *op. cit*., p. 63.
[141] *Ibid.*
[142] Press release, Centro de Derechos Humanos Fr. Francisco de Vitoria O.P.A.C. (2005).
[143] See: Laura Atuesta, Oscar S. Siordia, Alejandro Madrazo Lajous, '*Guerra Contra las Drogas en México: registros (oficiales) de eventos durante el periodo de diciembre de 2006 a noviembre de 2011,* Cuadernos de Trabajo del Monitor del Programa de Política de Drogas (2016); See Kimberly Heinle, Cory Molzahn, and David A. Shirk, *op. cit.*
[144] Laura Atuesta, Oscar S. Siordia, Alejandro Madrazo Lajous, *ibid.*

history.[145] Although essential to understand the policy and legal decisions of his administration, this historical baggage does not compose the entirety of the *strategic context* to which Calderón was exposed at the time of taking office on December 1, 2006. There is a missing side to the equation, that of international law and the ways in which it enables and constrains military action.

B. Legal Indeterminacy Explained

Vital to this dissertation is the premise that Mexico's state of affairs lies in a legal grey area. This legal ambiguity is what enables the instrumentalization of law as developed by Berman in the first place, which is to say that the reason that makes Mexico's reality politically exploitable under international law is precisely the fact that there is no clear, not-subject-to-debate answer to the question of what body of law applies to drug-related violence in the country. Simply put, the strategic oscillation between IHL and IHRL would be impossible if Mexico's case were to be a text-book example of either 'war' or 'not-war'. Drawing on the analogy evoked by Mexican security analyst Alejandro Hope, "this is not Switzerland and this is not Syria".[146] If Mexico were anything like either of these countries, the present debate would not have a *raison d'être*, for there would be no space for discussion over what body of law is best suited to contain the violence.

Establishing ambiguity is thus the necessary starting point for any discussion revolving around the strategic instrumentalization of law in Mexico. The question to ask is why is Mexican narco-violence so difficult to classify under international law in the first place? Why

[145] Jorge Chabat, *Combatting Drugs in Mexico under Calderón: The Inevitable War*, CIDE (2010).
[146] Alejandro Hope, *Esto no es Suiza y esto no es Siria,* El Universal (May 15, 2017).

does the legal corpus fail to provide a clear-cut answer as it does for other cases, such as the ones of, say, Switzerland and Syria? Only having answered these questions may we move to analyzing the war narrative and its role in framing violence to convenience.

The legal uncertainty that accompanies the permanent state of violence in the country must be therefore treated as a premise, or a pre-requisite if you will, in order for the government to achieve the strategic shift between the IHRL and the law of armed conflict. This is admittedly a rather strong claim to treat as a premise, for acknowledging the greyness of drug-related violence amounts to directly challenging the very structuring categories of IHL. History shows, however, that the definition of war has always been contested. The legal construction of war has been modified throughout time in order to adjust to the ever changing nature of conflict and to the interests of big players in the world arena, as occurred following World War II and during the anti-colonialist struggles of the 1970s.[147] I hold that along with terrorism, the new generation of drug-related conflicts potentially represent the next critical juncture in the law of armed conflict, and "Mexico's Drug War" is potentially the case-study *par excellence* amongst them.

The 'War on Terror' has been widely studied for the ways in which concepts such as that of "unlawful combatant" exploit the shortcomings of IHL's current paradigm. The unclear status surrounding violence between the United States and Al Qaeda has allowed the American government to manipulate the categories of 'war' and 'not-war' to convenience, adopting the legal concepts that further their policies and rejecting those that obstruct them.[148] In this way, the 'unlawful combatant' fabrication has allowed the government to sustain that

[147] Nathaniel Berman, *op. cit.,* p. 15-23.
[148] This is well exemplified by John Bellinger's lecture at the London School of Economics: John B. Bellinger, Legal Issues in the War on Terrorism, London School of Economics (Oct. 31, 2006)

"some detainees [do] not merit the protections of criminal law because of their *combatant* activities, and that they [do] not merit the protections of *jus in bello* due to the *unlawful* nature of their combat".[149]

This creative legal resource, made possible by IHL's incapacity to regulate contemporary conflicts, allows the American government to treat Al Qaeda fighters as both criminals and combatants at the same time. The "Mexican Drug War" floats in a space of legal indeterminacy that leads to similar results to those of the 'War on Terror": narcos are both criminals to be prosecuted and combatants to be fought; Mexico is both in war and not in war.

I argue that drug related violence, alike terrorism, calls for the re-evaluation of IHL's taxonomy and more specifically for a critical review of the criteria through which violence is classified. However radical this claim may appear to be, I am certainly not the first (nor will be the last) person to suggest that drug-related conflicts call for a renewed interpretation of IHL.[150] In my view, this argument is best presented by first exposing the contingency to which the definition of war/armed conflict has historically been subject to.

1) The historical contingence of 'war'

As Berman notes, the "legal construction of war [is] highly contingent, both in the sense of having varied historically and in the sense of having been contested within each period".[151]

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[149] Nathaniel Berman, *op. cit.,* p. 13.
[150] See: Sven Peterke, *op. cit.;* Pierre Hauck and Sven Peterke, *Organized crime and gang violence in national and international* law, International Review of the Red Cross Vol. 92 N.878 (2010); Michael Hoffman, *Emerging combatants, war crimes and the future of international humanitarian* law, Crime Law and Social Change (2000): 99-110; Alejandro Rodiles, *op. cit.*; Jan Angstrom, *Towards a Typology of Internal Armed Conflict: Synthesising a Decade of Conceptual Turmoil,* Civil Wars Vol.4 N.3 (2001): 99-116.
[151] Nathaniel Berman, *op. cit.,* p. 6

Up until World War I, the existence or non-existence of war was determined through a *formalist* approach, whereby a 'declaration of war'[152] served as a "bright-line criterion".[153] While devoid of ambiguity, the formalist paradigm deposited all authority on the subjective will of sovereigns, where a declaration of war amounted *ipso facto* to the existence of one. This meant that high intensity conflicts could be discarded as wars for lack of sovereign recognition, or that, conversely, low intensity ones could qualify as wars simply because a given authority declared it to be so.[154]

World War II exposed the limits to the subjective criteria propounded by the formalist doctrine. Particularly alarming was the realization that the Third Reich circumvented IHL "through the creation of puppet governments who terminated hostilities with Germany – placing the actions of those who continued to fight under the rubric of non-war violence, punishable by normal criminal law".[155] Addressing the issue of resistance to occupation, Common Article 2 to the Geneva Conventions established that "(…) the Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party (…)".[156] However subtle, this phrasing amounted to a paradigm shift from a formalist to a factualist classification of war under international law. The Geneva Conventions of 1949 thus sought to preclude manipulations of this sort from arising in the future by establishing

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[152] Hague Convention (III) Relative to the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, T.S. No. 538:
Article 1. The Contracting Powers recognized that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war, or of an ultimatum with conditional declaration of war

[153] Nathaniel Berman, *op. cit.,* p. 16

[154] *Ibid.* ["This bright-line criterion (…) proved to be strikingly under –and over- inclusive. On the one hand, it often flew in the face of reality by failing to include many high-intensity conflicts for want of sovereign acknowledgement. On the other hand, it could similarly deny reality by continuing the legal existence of wars after the end of violence"].

[155] *Ibid.,* p. 18

[156] ICRC, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949.

factual standards for the applicability of *jus in bello*.[157] No longer would it suffice for sovereigns to determine whether two countries were in war or not; the observance of military occupation would be paramount to war regardless of recognition by the parties. Parallel to this doctrinal change was the move away from the term 'war' and its substitution for that of an 'armed conflict'. The latter is supposed to be more descriptive of an observable reality, carrying with it an objective connotation. Since that moment, "the test for the existence of an armed conflict for the purpose of *jus in bello* is supposed to be based on a factual evaluation of the conflict and remain indifferent to the merits of the parties' claims".[158]

The next stage of contestation came in the 1970s as a response to the wave of anti-colonialist efforts across Africa and the Middle East, culminating with the adoption of Protocols I and II additional to the Geneva conventions, in June 8, 1977.[159] According to the ICRC, these protocols "were adopted by States to make international humanitarian law more complete and more universal, and to adapt it better to modern conflicts".[160] Indeed, Protocol II magnifies the applicability of *jus in bello* to a whole new range of conflicts by expanding on the definition provided by Common Article 3, which rendered the concept of NIACs too ambiguous and which did not include "any mechanism for the monitoring and enforcement of its application".[161] However transcendental this protocol was, it conserved the factualist

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[157] In contrast to the Geneva Conventions, The Hague Convention of 1907 provided that "hostilities (…) must not commence without previous and explicit warning, in the form either of a declaration of war giving the reasons on which it is based or of an ultimatum with conditional declaration of war". Third Convention of The Hague of 1907, Article 1.

[158] Nathaniel Berman, *op. cit.,* p. 19.

[159] See: Ian Brownlie, *International Law and the Use of Force By States,* (Gloucestershire: Clarendon Press, 1963).

[160] ICRC, *Protocol Additional 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.

[161] Gary D. Solis, *op. cit.,* p. 159.

paradigm created in 1949, something that becomes patent in Article I, where armed conflicts of a non-international character are defined in terms of objective criteria:

> "This Protocol, which develops and supplements Article 3 common to the Geneva Conventions (…), shall apply to all armed conflicts which (…) take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".[162]

Two main criteria can be identified: firstly, the conflict must occur within the territory of a signatory State against a dissident counterpart. Secondly, the dissident party must have a certain level of organization, identified through the existence of a responsible command and the exercise of control over part of the territory of the High Contracting Party. As seen above (section I.1.i), these criteria have evolved into those of the intensity of the violence and level of organization, as developed in detail by the ICTY rulings on *Prosecutor v. Tadic*, *Haradinaj and Limaj*. The very same criteria are found in Article 8 (2) (f) of the Rome Statute, which defines NIACs as conflicts "that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups *or between* such groups".[163]

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[162] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention))…op. cit.*
[163] UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998.

The point here is not to review the entirety of the legal dispositions that regulate armed conflicts, but to expose the paradigms to which they have been subject over time and to uncover the one to which it is presently subject. Doing so reveals the contingent character of 'war' or 'armed conflict' as a legal category, and exposes it as the product of negotiation and re-negotiation by global powers at the moment of each critical juncture, rather than as immutable categories. Today's dominant interpretation of IHL remains a factualist, otherwise called objective one, and has been essentially unchallenged since 1949. The ICRC's commentary of 2016 on Common Article 3 renders this crystal clear by stating that the existence of an armed conflict not of an international character is "a determination made *based on the facts"*.[164]

Modern conflicts force us into asking ourselves whether factualist aspirations in defining the applicability of *jus in bello* have run into a roadblock, just like the formalist ones did following World War II. This is precisely what violence in Mexico should lead us to question. Do violence and organization still suffice as the sole determinants of an armed conflict? We shall see some of the ways in which these variables fail to capture Mexico's complexity.

2) How to measure 'violence' and 'organization'?

The legal debate over the objective criteria developed in the Tadic test and its progeny yields no clear answer to the classification of Mexico's permanent state of violence. Scholars and jurists discuss *ad* infinitum on the basis of vague criteria for which there is no measurable

[164] ICRC, Commentary of 2016 Article 3: Conflicts of not an international character, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=59F6CDFA490736C1C1257F7D004BA0EC#index_Toc465169864. ("A situation of violence that crosses the threshold of an 'armed conflict of not of an international character' is a situation in which organized Parties confront one another with violence of a certain degree of intensity. It is a determination based on the facts").

threshold, always attempting to "fit square pegs into round holes".[165] This is to say that Mexico's classification is unavoidably contestable in terms of *lex lata*,[166] which in turn suggests that we may once again find ourselves at a critical juncture in international law; one to which there is no way out other than re-evaluating the nature of contemporary conflicts and their correspondence to the current legal categories.

Drug-related violence in Mexico begs the question of whether the empirically verifiable criteria of violence and organization suffice to locate complex realities under the appropriate legal regime. In cases of legal indeterminacy like this one, the strategic instrumentalization of law becomes more descriptive than the *Tadic test* in painting a picture of how IHL is applied, for the logic to which Mexico's classification ultimately responds is that of a strategic shift between legal bodies, regardless of the observable, objective reality. Black letter law therefore leaves many questions unanswered regarding how 'protracted violence' and the 'level of organization' are measured in a context as chaotic as the Mexican one. One of such questions is that of "whether and when it is possible to aggregate violence by various armed groups such that collectively the intensity threshold for NIAC is crossed".[167]

The United States Congressional Research Service identifies *at least* nine major DTOs in Mexico.[168] The original drafters of Common Article 3 and of Protocol II did not envisage situations in which a High Contracting Party confronts a multiplicity of non-state armed groups (NSAGs) within its own territory at the same time,[169] as occurs in contemporary drug-related conflicts and – some would argue – in the fight against terrorism. But, writing in 1949

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[165] Craig A. Bloom, *op. cit.*
[166] Alejandro Rodiles, *op. cit.*
[167] Annyssa Bellal, *ICRC Commentary of Common Article 3: Some questions relating to organized armed groups and the applicability of IHL*, Ejil:Talk! (October 5, 2017).
[168] June S. Beittel, *op. cit.*
[169] According to Hoffman, traditional non-international armed conflicts are "those in which the state's armed forces engage an insurgent force". Michael Hoffman, *op. cit.,* p. 100.

and 1977 respectively, how could they have forecasted the appearance of such all-against-all internal brawls? Proponents of classifying Mexico as a NIAC take advantage of this (quite comprehensible) shortsightedness by aggregating indicia of violence across cartels, as if they all participated jointly in a single conflict called the "Mexican Drug War". There is no legal basis, however, for summing up the deaths resulting from clashes against 'La Familia Michoacana', 'los Zetas', the 'Knights Templar' and the 'Cartel Jalisco – Nueva Generación' in a single procedure.

If anything, we would have to consider the existence of an armed conflict between the Mexican government and each individual DTO separately, as well as the possibility of *inter-cartel armed conflicts* occurring within Mexican territory.[170] Under the current paradigm, the criteria of violence and organization would have to be tested for each of these potential conflicts and for each of the armed groups involved, something that would lead to a significantly more complex reality for international law to regulate. Assuming for simplicity's sake that there are nine major DTOs and that each one of them may enter an armed conflict with *either* the State or with *only* one of the other cartels, there would then be 45 possible combinations of armed conflicts in Mexico.

Recognizing the multiplicity of actors involved and assessing the existence of a NIAC(s) in the country accordingly, contributes to further blur the fine line between 'war' and 'not-war'. Is the "Mexican Drug War" then one between the State and 'Los Zetas'? Or between the 'Gulf Cartel' and the 'Sinaloa Cartel'? Or between the State and both the 'Gulf Cartel and the Sinaloa Cartel'? By treating DTOs separately, it may occur that a particular organization achieves the threshold of violence but is not sufficiently organized, or vice

[170] As we know, the Rome Statute Art. 8 (2)(f) allows for armed conflicts to exist between NSAGs.

versa. Gallahue follows this logic and concludes that "the violence perpetrated by *individual groups* is too sporadic and too dispersed to reach the threshold of intensity".[171] It must be said, however, that even if a specific group, say Los Zetas, were to satisfy the thresholds of both violence and organization, then the Mexican armed forces would be left with a situation in which they would have to uphold IHL when engaging this group yet act in accordance to the more restrictive IHRL when engaging all other DTOs. The impracticality of such situation renders the point moot. Until there is no clear, quasi-consensual way to proceed in the measurement of violence and organization, the debate over Mexico's classification or over that of similar conflicts will remain boxed into a corner.

3) Political motivations, a renewed interpretation

The limits to the *Tadic test* and, as a consequence of the factualist paradigm, are otherwise exposed by accentuating Mexico's contested classification. Interestingly, this is not only achieved by reviewing the divergence in the literature that discusses the country's legal status, but also by witnessing the face-to-face debates that jurists have engaged in on the matter. At such an occasion organized jointly by the University of Essex and the Columbia Law School in 2013, Marco Sassoli and Noam Lubell debate over the legal classification of drug-related violence around the globe, both taking the "Mexican Drug War" as the prime case-study to be addressed.[172] Important arguments can be drawn from this encounter even though the debate seems to have been staged and is likely not to accurately reflect the participants' views. It is nonetheless telling that they chose Mexico's case as the point of

[171] Patrick Gallahue, *Mexico's 'War on Drugs' – Real or Rhetorical Armed Conflict?,* Journal of International Law of Peace and Armed Conflict Vol.24 (2011): 45.
[172] Marco Sassoli and Noam Lubell, *Do the Laws of Armed Conflict Apply to Drug-Related Violence (Debate),* International Centre on Human Rights and Drug Policy (2013) http://www.hr-dp.org/contents/206

departure for inquiring over the applicability of *jus in bello* to drug-related violence. The most important point of disagreement between them is the role that political motives play in classifying armed conflicts. This is a point that is worth elaborating on, both because it highlights a shortcoming of the *Tadic* criteria in light of drug-related violence and because of its particular relevance to the "Mexican Drug War".

Jurisprudence suggests that motivation is inconsequential to the determination of a NIAC. Trial Chamber II in *Prosecutor v. Limaj* specifically declared that "the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and the organization of the parties (…)". In turn, "(…)the *purpose* of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, *irrelevant*".[173] These statements fall clearly in line with the currently reigning factualist paradigm. Driving the point home, the chamber restates that "the motives for the accused's participation in the attack are irrelevant (…)".[174] Here, I believe, lies an important gap in the current legal paradigm inasmuch determining the existence of an armed conflict is concerned.

The indiscriminate extrapolation of the *Lima*j principle to all *potential* NIACS has led to a grave conceptual obscurity to which "Mexico's Drug War" and other drug-related conflicts fall victims. Excluding political motives from the 'NIAC formula' serves only to murk complex realities, leading many to conflate conflicts that are as strikingly contrasting to one another as are the ones in Syria and in Mexico. As Rodiles argues, the Limaj "dictum cannot be taken as if produced in a vacuum".[175] This dictum calls for several remarks, all of which limit its scope.

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[173] *The Prosecutor v. Limaj, Judgment*, No. IT-03-66-T (30 November 2005) paras 170ff [emphasis added].
[174] *Ibid.,* paras 190ff
[175] Alejandro Rodiles, *op. cit.*

The ruling by Trial Chamber II corresponds to the specific conjuncture of the Kosovo War, a conflict fought between the Kosovo Liberation Army (KLA) – seeking independence, and the forces of the Federal Republic of Yugoslavia – containing it. More specifically, Fatmir Limaj, Haradin Bala and Isak Musliu, all members of the KLA, were indicted with the crimes of abducting at least thirty-five civilians, detaining them "in a prison camp (…) for prolonged periods of time under inhumane conditions and routinely subject[ing] [them] to assault, beatings and torture". [176] At least fourteen detainees were murdered and "another ten were allegedly executed in the nearby Berishe/Berise Mountains (…)".[177] Fatmir Limaj was accused under Article 7(1) of the ICTY Statute for "allegedly committing, planning, instigating, ordering, or otherwise aiding and abetting the aforementioned crimes, including through his participation in a joint criminal enterprise".[178]

The Defense had clear incentives to deny the existence of an armed conflict, hoping to negate the tribunal's jurisdiction over the case:

> "in order for the Tribunal to have jurisdiction over crimes punishable under Article 3 of the Statute, two preliminary requirements must be satisfied. There must be an armed conflict, whether international or internal (…), and, the acts of the accused must be closely related to this armed conflict".[179]

In this line, the Defense argued for the non-existence of an armed conflict by ascertaining that "the strength of the Serbian forces does not indicate that their purpose was to defeat the

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[176] *The Prosecutor v. Limaj, Judgment*, *op. cit.* paras 1ff
[177] *Ibid.*
[178] *Ibid.,* paras 2ff
[179] *Ibid.,* paras 83ff

KLA, but to *ethnically cleanse* Kosovo".[180] It is only in response to this reasoning that the Chamber concludes that "the purpose of the armed forces to engage in acts of violence or also achieve some further objective is (…) *irrelevant*".[181] An important conclusion may be drawn from reviewing the context guiding this ruling: the exclusion of ulterior motives should not be treated as a maxim to be transposed by analogy to any other potential armed conflict, as has been commonly done.[182] Firstly, the ruling corresponds to the 'ethnic cleansing' argument, and should not be irresponsibly applied to all cases in which ulterior motives of different natures play a role. Secondly, case law is not strictly binding in international law, something that those pushing for the classification of Mexico as a NIAC seem to conveniently ignore when authoritatively referencing the *Prosecutor v. Limaj* case.

On the firs point, we should highlight that the Chamber's ruling does not explicitly refer to the rejection of *political* motives, but instead declares the exclusion *in abstracto* of "the motives for the accused's participation in the attack (…)", whatever these may be.[183] At first glance, the Limaj dictum appears to be an unforgiving rejection of any further purpose beyond the violent actions themselves, including any political one. But the ruling deserves a second reading in light of the politically charged milieu in which the actions of the accused take place. In contrast to "Mexico's Drug War", the fight between the KLA and Serbian forces has its origin in political disagreement.[184] For starters, the ICTY's jurisdiction is limited to the "serious violations of international humanitarian law committed in the territory

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[180] *Ibid.,* paras 170ff
[181] *Ibid.,* paras 170ff
[182] Carina Bergal, *op. cit.,* p. 1042 ("While considering the additional condition of political objectives during the *Prosecutor v. Limaj* case, which dealt with the fighting between the Serbian forces and the Kosovo Liberation Army, the ICTY rejected its relevance").
[183] *The Prosecutor v. Limaj, Judgment, op. cit.,* paras 190ff
[184] See: Henry H. Perrit, *The road to independence for Kosovo: a chronicle of the Ahtisaari plan* (New York: Cambridge University Press, 2010).

of the former Yugoslavia since 1991 (…)",[185] for which its work revolves around an inextricably political conflict. Similarly, the Chamber's sentence in question refers only to actions that took place during the struggle for Kosovar independence (1998-1999), a politically charged conflict at heart.

Another viable interpretation thus arises, one whereby the Chamber takes the political motives for granted, given of course, that *none* of the indictments brought forward to the ICTY were ever *apolitical*. How could they be, if the tribunal's jurisdiction is defined both territorially and temporally by the disintegration of Yugoslavia? As a consequence, all trials by the ICTY must be unavoidably political to their core. The reading that surfaces is that in excluding the "motives for the accused's participation in the attack (…)", the chamber does not necessarily exclude political ones, but rather overlooks them for being a seemingly necessary component of any indictment brought forward to the ICTY.

This is admittedly a controversial reading, one that some may find unconvincing or inconclusive. It is nonetheless complemented by the unbinding character of jurisprudence in international law. Article 38 of the Statute of the International Court of Justice (ICJ) qualifies "(…) *judicial decisions* and the teachings of the most highly publicists of the various nations, as *subsidiary means* for the determination of rules law".[186] Even if if the *Limaj* ruling were to unambiguously declare the irrelevance of political motivations, such decision should not suffice in itself to discard purpose as a relevant consideration. *The Limaj v. Prosecutor* case is informative, of course, but should, according to the article above cited, be a subsidiary and not definitive justification for excluding political motivations as relevant criteria.

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[185] United Nations Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)*, 25 May 1993. Art. 1

[186] United Nations, *Statute of the International Court of Justice,* 18 April 1946.

In his mock debate with Marco Sassoli, Noam Lubell proposes a simple yet promising formula to incorporate political purpose as an additional variable to establishing the existence of an armed conflict. In his own words, it is "not that we should have a pure political motif in order to have an armed conflict, but rather, that if we have a pure *criminal motif*, it is excluded [from being an armed conflict]".[187] This means that no group should be expected to be completely politicized in order to be considered a party to an armed conflict, but groups that are *solely* pursuing criminal objectives should be denied combatant status. I find this suggestion powerfully convincing, regardless of whether its original emissary truly stands by it or not. A group should be discarded as a party to the conflict if it follows no political objective as its mandate. Following this logic, a party to a conflict with both political and criminal aims – i.e. the Fuerzas Armadas Revolucionarias de Colombia (FARC) – should still be evaluated on the merits of its organization and of the intensity of the violence to which it contributes. In contrast to the FARC, which defines itself as a "revolutionary movement of a political and military character"[188] and which is today evolving into a full-fledged political party, Mexican cartels do not display clear political ambitions nor do they propound ideological convictions.

DTOs have infiltrated the State at local and federal levels,[189] but have done this merely as means to an end; the end, of course, being revenue. Even though it is difficult to ascertain the degree to which drug cartels have colluded with government officials across the country

[187] Marco Sassoli and Noam Lubell, *op. cit.*
[188] FARC, *Quiénes somos y por qué luchamos*, https://www.farc-ep.co/nosotros.html. ("Las Fuerzas Armadas Revolucionarias de Colombia- Ejército del Pueblo FARC-EP somos un movimiento revolucionario de carácter político militar nacido en el año de 1964 en las montañas del sur del departamento del Tolima").
[189] For a vast review on the links between the government and DTOs see: Ricardo Ravelo, *En Manos del Narco: El Nuevo rostro del crimen organizado y su relación con el poder* (Mexico City: Ediciones B México, 2016).

only on the basis of disconnected examples,[190] these are enough to confirm the allegiance between powerful drug lords and public servants at different levels of government. As attested by the historical review provided above, drug trafficking in Mexico has been enabled by political corruption since its inception. This does not necessarily mean that politicians are always to blame: 75 mayors and former mayors were murdered in the country between 2006 and 2014.[191] The message is clear, local politicians have to cooperate or suffer the consequences, many times placing themselves and their families in grave danger. The fact that cartel's tentacles reach deep into the government apparatus does not mean that they have political objectives. As Rodiles argues, criminal organizations of all sorts work within the State and are all but interested in its collapse. He argues that studies on the organization of the Sicilian mafia in Italy[192] and of favela gangs in Rio de Janeiro[193] prove that these groups thrive precisely because they work with and through the State, not against it.

Cartels do not seek to compete against the government or to establish a parallel one. They rather attempt to coerce the existing authority for the purpose of their ulterior, pecuniary objectives. What DTOs want the most, as the very term 'Drug Trafficking Organization' suggests, is to secure their drug trafficking routes. Unfortunately, these criminal organizations are willing to do anything to safeguard their lavishly lucrative activities, including meddling with local and federal governments. This does not make them any less criminals; it only makes them successful ones. The International Law Association (ILA) addressed this issue in its Final Report on the Meaning of Armed Conflict in International

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[190] The case of Mayor Luis Abarca and his link to 'Guerreros Unidos' is the most salient example. There are also investigations currently underway against the former governor of Coahuila, Humberto Moreira.
[191] Kimberly Heinle, Cory Molzahn, and David A. Shirk, *op. cit.*
[192] See R Catanzaro, 'La struttura Organizzativa della criminalità mafiosa in Sicilia' in T Bandini *et al* (eds), *La Criminalità Organizzata: Moderne Tecnologie di Ricerca e Nuove Ipotesi Esplicative* (Giuffrè1993):147.
[193] See: E Desmond Arias, 'The Dynamics of Criminal Governance: Networks and Social Order in Rio de Janeiro' (2006) 38 J. Lat. Am. Stud. 293, 301.

Law, where it declares that "if the criminal gangs decided to challenge civil authorities for the right to govern, as opposed to fighting to prevent the break-up of their criminal activities, Mexico could become the scene of a non-international armed conflict".[194]

Much more could be said on this subject, but doing so would distance us from the discussion on political motivations as a legal criterion in the determination of a NIAC. In my view, rejecting the claim to combatant status of any violent armed group with *purely criminal motifs* does a lot to establish clearer categories in international law and to paint a more reliable picture of contemporary conflicts. In the context of modern drug-related violence, this approach suggests that some phenomena must be dealt with as organized crime on the basis of the groups' motivations and regardless of the observance of objective criteria such as violence and organization.

More importantly, treating DTOs as criminal organizations rather than as belligerents may prove a more efficient strategy for defeating them while protecting Human Rights.[195] Rather than discussing over the application of IHL, Mexico should comply with the United Nations Convention on Transnational Organized Crime (hereafter Palermo Convention) and the United Nations Convention against Corruption (UNC), a subject treated in length by the scholar and analyst Edgardo Buscaglia.[196] What must be said at this point is that dispersing the fog that obtuse legal categories carry with them is the necessary step to take before making better policy decisions. This is to say that, beyond the legal arguments provide above,

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[194] International Law Association, *Final Report on the Meaning of Armed Conflict in International Law* (2010): 28.

[195]Edgardo Buscaglia, México Pierde la Guerra, Esquire México (Mar. 10, 2015), 96.
The United Nations Convention Against Transnational Organized Crime (UNTOC), also known as the Palermo Convention, outlines the practices that have led to the success in the fight against organized crime in the United States, France, Italy, and even Colombia.[195]

[196] See: Edgardo Buscaglia, Vacíos de Poder en México : Cómo combatir la delincuencia organizada (Mexico City: Penguin Random House, (2013).

there exist normative reasons for re-interpreting the *ex ante* rejection of political motivations as a relevant criterion in IHL.

Taken altogether, the historical contingency of war, the question of how to measure violence and organization, and the controversy over purpose locate Mexico in a 'legal grey area', sentencing debate over its classification to a nebulous dimension with no clear way of reaching an answer. The controversies over aggregate violence and political motivation blatantly expose the ways in which IHL fails to provide an uncontested classification for Mexico's drug related violence, as it would for a political conflict like the one in Syria or for a country in a state of unchallenged peace like Switzerland. There may, of course, be other elements that contribute to further obfuscating a clear-cut classification for Mexico's violence, but the ones presented in this section I consider to be the most salient.

Under these considerations, the factualist paradigm guiding the law of armed conflict reaches its clear limits. It is exceeded by the increasingly complex and apolitical situations of permanent violence in the global south, particularly that of Mexico. On the other hand, the resultant legal indeterminacy is an indispensable element in Mexico's *strategic context*. The uncertainty that follows from IHL's outdated categories allows for the instrumentalization of international law, which is in turn made desirable by the costs and benefits that different strategies imply. Applying the SRA framework concept of the *strategic selectivity of the context,* we shall move on in chapter 3 to determine the strategy that this particular context of legal uncertainty favors.

C. IHL, IHRL, or Both?

The last component for the strategic layout to be complete is a cost-benefit analysis. Having established the legal indeterminacy to which Mexico and other States engulfed by drug-related violence are subject to, we recognize that the governments involved in these *undefined states of violence* have wider maneuverability over their actions pertaining to the use of force. The inconclusiveness of international law on the question of categorization allows for its strategic instrumentalization, guided by the costs and benefits that each legal regime implies.

There must be clear benefits to the war narrative in order for Calderón's administration to have repeatedly used the term 'war', but there must also be clear costs in order for the same administration to avoid the term in official documents and to reject accusations of an armed conflict. There is surely a coherence to the apparently schizophrenic use of martial language by the government, but uncovering the logic behind Mexico's selective use of language requires a previous analysis of the legal implications that being or not being classified as a NIAC carry, which in turn necessitates a sketch of the legal regimes that apply in times of peace and in times of war, as well as their relation to each other.

1) IHL, IHRL, and how they relate to each other in NIACs

As should be clear by now, IHL is the branch of international law designed specifically to regulate actions that take place during armed conflicts. Also known as the law of armed conflict or *jus in bello*, IHL is meant to protect persons not directly participating in hostilities as well as to delineate the means and methods through which those engaged in combat may inflict harm to each other. Most precepts of the law of armed conflict can be found in the

Geneva conventions, the Additional Protocols to the conventions, and the Hague Conventions of 1899 and 1907.[197] These documents are complemented by customary international law, making States bound to most of the obligations established by IHL even if such countries have not ratified the corresponding treaties. A study carried out by the ICRC concluded that 161 of the rules governing the conduct of military operations in an armed conflict are customary,[198] and that of those rules, "a large number (…) are applicable in both international and non international armed conflict".[199] Customary law consequently contributes to homologate NIACs to international armed conflicts, mainly by establishing that many of the standards of protection omitted by Common Article 3 of the Geneva Conventions are nevertheless applicable in armed conflicts of a non-international character.[200]

Three main principles may be discerned from the body of codified and customary rules that together make up IHL. These are the principles of necessity, proportionality and distinction. The principle of necessity indicates that violence should be restricted "to the amount necessary to achieve the aim of the conflict";[201] the principle of proportionality establishes that the collateral damage of any operation should be proportional to the military

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[197] ICRC, *Violence and the Use of Force* (July 2011): 10. ["Several other treaties complement these provisions, such as The Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, the Convention on Certain Conventional Weapons of 1980, the 1997 Convention on the Prohibition of Anti-Personnel Mines and on their Destruction, the Rome Statute of the International Criminal Court of 1998 and the 2005 Protocol III additional to the Geneva Conventions (…)].

[198] ICRC, *Customary International Humanitarian Law*, edited by Jean-Marie Henckaerts and Louise Doswald Beck (2005).

[199] ICRC, *Violence and the Use of Force* (July 2011): 13.

[200] Attacks on civilian objects are a clear example of this homologation through customary law. Customary law transposes the prohibition of attacks on civilian objects to NIACs even though it is not expressly interdicted in treaty law.

[201] Marco Sassoli, Antoine A. Bouvier and Anne Quintin, *How does Law Protect in War: Cases Documents and teaching Materials on Contemporary Practice in International Humanitarian Law*, ICRC Outline of International Humanitarian Law Vol.1:1 (2011).

benefits that such operation supposes;[202] and lastly, the principle of distinction underscores the basic need to distinguish between civilians and combatants.[203] The underlying assumption behind these principles is that "the parties to an armed conflict have rational aims and that those aims as such do not contradict IHL".[204]

In turn, IHRL – also referred throughout as human rights law[205] – consists of a "set of principles and rules on the basis of which individuals or groups can expect certain standards of protection, conduct or benefits from the authorities, simply because they are human beings".[206] Human rights law is codified in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and regional treaties such as the American and European Conventions on Human Rights. Unlike the law of armed conflict, which grants protections depending on the combatant or non-combatant status of each individual, IHRL protects all human beings regardless of their participation, or lack thereof, in hostilities. Another way of making this distinction would be to say that "(…) whereas the provisions of [I]HRL focus predominantly on the rights of the individual, IHL balances the rights of the individual with the imperatives of military necessity".[207] In this sense, humanitarian law is less humanitarian than human rights law. This does not mean that the two legal regimes are in necessary contradiction to each other. The relation between IHL and IHRL is most elegantly explained by Natasha Balendra:

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[202] The ICRC determines that proportionality in attack is a customary rule. It states that "launching an attack which may be expect to cause incidental loss of civilian life, civilian objects, or a combination thereof, which would be excessive in relation to the advantage anticipated, is prohibited". Jean-Marie Henckaerts and Louise Doswald- Beck, *Customary International Humanitarian Law Volume 1: Rules*, ICRC (2005).
[203] Marco Sassoli, Antoine A. Bouvier and Anne Quintin, *op. cit.,* p. 2
[204] *Ibid.*
[205] Other authors abbreviate IHRL as HRL.
[206] ICRC, *Violence and the Use of Force…op. cit*., p. 11.
[207] Natasha Balendra, *op. cit.* p. 2482

> "The consensus among many international tribunals and international organizations appears to be that both [I]HRL and IHL are directly applicable in armed conflict but when the two sets of law conflict, IHL takes priority as the more specialized law or the lex specialis".[208]

As Gallahue puts it, "it is a firmly agreed upon principle that human rights law does not cease once armed conflict commences".[209]A choice between the two legal regimes should *only* exist when "two norms are applicable to the same case and the outcome differs depending on which norm is applied".[210,211] In such cases, the *lex specialis* principle upholds *jus in bello* as prevalent over IHRL on the grounds of its specificity (i.e. IHL is specifically designed to regulate armed conflicts). The most relevant aspects where both bodies of law lead to divergent outcomes, triggering the *lex specialis* reasoning, are on the cases relating to the use of force, prosecution for war crimes, and detention. The disparities between both bodies of law on these subjects are either beneficial or costly depending on the eyes of the beholder.

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[208] Natasha Balendra, *op. cit.,* p. 2482
[209] Patrick Gallahue, *op. cit.*
[210] Natasha Balendra, *op. cit*.
[211] This is the prevailing interpretation out of the three possible theoretical approaches. The other approaches are the displacement model, whereby "during an armed conflict, humanitarian law displaces human rights law" with nor further discussion, and the complementarity model, whereby "when there is an armed conflict (…) human rights law and humanitarian law are applied and interpreted harmoniously". The approach hereby adopted is the conflict resolution model, whereby "when an armed conflict is present, the decision maker must evaluate the relationship between human rights law and humanitarian law. If they are, in fact, complementary, then both are applied". Oona Hathaway, Rebrecca Crootof, Philip Levitz, Haley Nix and William Perdue, *op. cit.*

2) War, what is it good for? Benefits of being classified as a NIAC

Edwin Starr's famous 1970 song affirms that war is good for 'absolutely nothing'.[212] This may be true for common civilians, who ultimately pay the price in blood and suffering for the violence that surrounds them, but it is not always the case from the perspective of all the parties involved. Armed conflict has been a usual method for obtaining resources, legitimacy, and power throughout history. We should stress that in Mexico's case, costs and benefits are to be considered as such from the government's perspective and through nobody else's. It is, after all, public officials that have oscillated between the 'war' and 'no war' language, as a consequence exploiting the benefits attached to IHL while avoiding its costs. The single most important benefit to be derived from a war narrative relates to the use of force, subject on which the norms of IHL and IHRL lead to radically different outcomes, triggering the application of IHL on the grounds of *lex specialis*.

Article 3 of the Universal Declaration of Human Rights proclaims that "everyone has the right to life, liberty, and security of person",[213] with exceptions to this maxim working under strict conditions. The United Nations Code of Conduct for Law Enforcement Officials (CCLEO) states that "law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty".[214] Similarly, the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (hereafter BPUFF) allows for the use of force only as a means of last resource, dictating that government authorities "may use force and firearms only if other means remain ineffective (…)". It further mandates law enforcement officials to "ensure that assistance and medical

[212] Recall the lyrics: "War, HUH! what is it good for? Absolutely nothing!".
[213] United Nations General Assembly, *Universal Declaration of Human Rights,* 10 December 1948.
[214] United Nations General Assembly, *Code of Conduct for Law Enforcement* Officials, 17 December 1979.

aid are rendered to any injured or affected persons at the earliest possible moment",[215] something that would be unthinkable to ask of a soldier fighting an enemy. Article 9 of BPUFF sums up the limitations imposed on the use of force under the human rights framework:

> "Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, *intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life*".[216]

Moreover, in the event that the lethal use of firearms is indeed "unavoidable in order to protect life", law enforcement officials "shall identify themselves (…) and give clear warning of their intent to use firearms, with sufficient time for the warning to be observed".[217] Although violated around the world on a variable basis, the IHRL framework on the use of force sets reasonable standards to which to hold governments accountable during law enforcement operations.

The same protections do not hold in times of armed conflict, where parties to the conflict

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[215] Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 7 September 1990.
[216] *Ibid.*
[217] *Ibid.*

may inflict lethal damage to each other as long as safeguarding the aforementioned principles of necessity, proportionality and distinction. This is true for both international and non-international armed conflicts. Referring to NIACs, Common Article 3 only protects "persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*".[218] Similarly, article 13 of Protocol II affords protection to civilians "(…) against the dangers arising from military operations (…) *unless* and for such time as they take a direct part in hostilities".[219] The ICRC commentary on Protocol II adds that "[those] belonging to armed forces or armed groups may be attacked at any time".[220] The quandary lies in determining the point at which a civilian begins or ceases to directly participate in hostilities and in identifying who belongs to an armed group and who does not – something that becomes increasingly complicated as these groups become more informal. Under the IHL framework, the State may openly engage in combat and use deadly force against 'civilians' who take direct part in hostilities, even if lethal force is not 'absolutely necessary' as IHRL would dictate.

As noted by Nill Sánchez, "the main difference between the use of force in armed conflict under IHL and the use of force in law enforcement operations governed by international human rights law is the principles guiding it".[221] Imagine, for example, that government forces kill four civilians during an operation. If this occurred during peacetime, law enforcement officials would have clearly violated human rights law and would – under normal circumstances – be liable to legal prosecution. If these were soldiers engaging in a military

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[218] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War* (Third Geneva Convention), 12 August 1949.
[219] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II)…*op. cit.*
[220] *Ibid*.
[221] Andrea Nill Sanchez, *op. cit.,* p. 492.

operative against an enemy, on the other hand, there is a possibility for the civilian deaths to be justified as collateral damage.[222] During an armed conflict, the deaths of these civilians could have been *necessary* to achieve the military objective, and their deaths could be argued to be *proportional* to the military objectives that the operation supposed.[223] Guided by these principles, the actions of the soldiers and the consequent deaths of civilians may be legally justified.

It becomes clear that human rights law is significantly more restrictive than the law of armed conflict on the use of force. The restrictions imposed by human rights law are unrealistic on the battlefield, for soldiers taking part in an armed conflict cannot be expected to give clear warning of their intent to use firearms, to ensure immediate medical assistance to injured enemies, or to withhold attacks on clearly identified combatants unless when engaged by them first. These are restrictions that any government carrying out law enforcement operations – such as the Mexican government claims to be doing – is obliged to uphold.

Evidence shows, however, that the use of force by Mexican security forces is dictated by the logic and principles of *jus in bello*. Information drawn from the Secretary of Defense (SEDENA) and the Secretary of Marine (SEMAR) suggests that the deaths of cartel members resulting from armed confrontations with Mexican security forces are treated as combatant deaths rather than as civilian casualties. Most revealing in this regard is the lethality rate, understood as the ratio of civilian deaths per every civilian injured (civilian dead/civilian

[222] By civilians in this context (NIAC) is meant all those that do not participate in the hostilities or belong to an armed group.

[223] *Ibid.,* p. 493. (The law of armed conflict "allows for a proportionality test that may lead to the loss of many [more] Mexican civilian lives").

injured). In law enforcement operations, one should not expect the number of civilian casualties to be much larger than that of civilians injured. Indeed, it is uncommon for violence governed by human rights law to yield a lethality rate far superior to 1.[224]

The Mexican army averaged a 7.9 lethality rate from 2007 to 2014, registering a constant increase from 2007 (1.6) to 2012 (14.7).[225] The federal police, for example, averaged 4.8 civilians dead per every civilian injured between the years of 2007 and 2014.[226] This indicator rose to 20.2 in 2013 alone, surpassing the army's lethality rate for the same year.[227] To put things in perspective, the Vietnam War registered four wounded people per every dead (a 0.25 lethality rate) during the period from 1964 to 1973, the Israeli-Lebanese conflict registered 4.5 injured per every dead (a 0.22 lethality rate) in 1982, and the Yugoslav wars recorded 5.2 wounded per every dead (a 0.19 lethality rate) from 1991 to 1992.[228] A more ominous picture emerges when reviewing the dead to wounded ratio by federal entity in Mexico, where the states of Guerrero and Coahuila registered 26.3 and 22.5 lethality rates from January 2013 to April 2014, respectively.[229] These figures are unthinkable under a law enforcement paradigm and should elicit serious investigations on the arbitrary deprivation of civilian lives. Instead, because these confrontations are said to have occurred under the context of a 'war', the justice system has "not investigat[ed] the vast majority of cases in which security forces utilize force with lethal results, for which their excessive violence remains unpunished".[230]

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[224] Carlos Silva Forné, Catalina Pérez Correa, Rodrigo Gutiérrez Rivas, *Índice de letalidad 2008-2014: menos enfrentamientos, misma letalidad, más opacidad,* Perfiles Latinoamericanos (2014): 343 ("Se esperaría que en enfrentamientos entre civiles y cuerpos de seguridad, la cantidad de muertos no sobrepasara por mucho al de heridos y por tanto que el valor del índice no fuera muy superior a uno").
[225] *Ibid.*
[226] *Ibid.*
[227] *Ibid*., p. 344.
[228] Robin M. Coupland and David R. Meddings, *Mortality associated with use of weapons in armed conflicts, wartime atrocities, and civilian mass shootings: literature review,* BMJ Vol. 319 (Aug. 14, 1999).
[229]Carlos Silva Forné, Catalina Pérez Correa, Rodrigo Gutiérrez Rivas, *op. cit.,* p. 346.
[230] *Ibid.,* p. 334. ("Un sistema de justicia que no investiga la enorme mayoría de los casos en los que las fuerzas de seguridad utilizaxn la fuerza con resultados letales, por lo que el uso excesivo queda impune)".

The lethality rate alone suggests that Mexican security forces have successfully applied a *jus in bello* interpretation of the use of force, transforming what would in peacetime be considered prosecutable extrajudicial killings into wartime enemy casualties. These deaths would have otherwise prompted serious investigations, but have instead been – for the most part – overlooked.[231] Said differently, soldiers, marines, and federal police officers have enjoyed the combatant's privilege of legal immunity from arbitrary killing while claiming to realize law enforcement and security tasks. In this regard, it is affordable to conclude that Mexican security forces have located themselves, quite advantageously, under the IHL logic.

There is additional advantage to be obtained from IHL's unclear regulation on detention during NIACs. Articles 4 and 5 of Protocol II Additional to the Geneva Conventions "prescribes how persons deprived of their liberty for reasons related to the armed conflict must be treated (…) but it does not clarify for which reasons and by which procedures a person may be interned".[232] This procedural silence leaves two possibilities during an armed conflict of a non-international character: either human rights are enforced, or the proceedings applicable in *international* armed conflicts are applied by analogy to NIACs.[233] The legal figure of *arraigo* has brought Mexico closer to the latter option.

Elevated to a Constitutional rank on December 10, 2007, the figure of *arraigo* allows for citizens suspected of participating in organized crime to be detained for up to 80 days with

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[231] Human Rights Watch, *Mexico's Disappeared: The Enduring Cost of a Crisis Ignored* (2013): 111-117.
[232] Marco Sassoli and Laura M. Olson, *The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts,* International Review of the Red Cross Vol. 90 N. 871 (Sept. 2008): 618.
[233] *Ibid.*

insufficient evidence[234] and without a trial.[235] As the Mexican Commission for the Defense and Promotion of Human Rights (CMDPDH) points out, this figure is "used to deprive a person from liberty in order to obtain information that could be later used at the trial stage, information that is often obtained during torture".[236] This sort of pre-charge arrest is akin to IHL's traditional answer to internment in international armed conflicts. By violating the principles of legality and the presumption of innocence enshrined in human rights law, the figure of *arraigo* assimilates organized crime members to prisoners of war (POWs) in international armed conflicts.[237] This situation is worryingly reminiscent of the category of 'unlawful combatants' fabricated by the United States, for "the Mexican State has set up a regime of exception where the application of a pre-conviction punishment reduces the juridical guarantees and places people in a legal limbo where they are neither accused nor under trial".[238] DTO members may be arbitrarily killed and detained, but they do not hold the combatant privilege of doing the same to their adversaries. At last, and contrary to Edwin Starr's popular adage, Mexican security forces have indeed extracted benefit from 'war'; or at least from the "Mexican Drug War" narrative.

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[234] Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, *Arraigo made in Mexico: A violation to Human Rights, Report before the Committee Against Torture*, on the occasion of the review of the 5th and 6th Periodic Reports of Mexico (Oct. 2012): 6. ["(…) simply pointing someone of belonging to organized crime, often through protected witnesses or victims of torture, is enough so that authorities may order an *arraigo*"].
[235] *Ibid.,* p. 5
[236] *Ibid.,* p. 3.
[237] Juan E. Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Human Rights Council (Dec. 29, 2014): 51. ("The government reported that of 534 persons placed in pre-charge detention in 2013, 432 were charged").
[238] Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, *op. cit.,* p. 5

3) Costs of being classified as a NIAC

Up until this point, we are hard-pressed to believe that identifying the situation in Mexico as a NIAC is advantageous for the Mexican government due to IHL's flexibility on the use of force and detention, as was adduced by Bergal. It should become clear by the end of this section, however, that acknowledging a state of armed conflict also carries heavy costs and is therefore avoided when possible. This becomes particularly true for the case of armed conflicts of a non-international character, for they challenge the State's sovereignty in a way that most international armed conflicts do not. The costs for classifying Mexico as a NIAC may be roughly broken down into two main rubrics: legitimacy and prosecution for war crimes. We borrow from Jessica Caplin's insight on the subject, keeping in mind that, unlike the present dissertation, she assumes that the Mexican case satisfies the *Tadic* criteria and holds the NIAC classification to be a desirable outcome.[239]

An important cost attached to acknowledging the existence of an armed conflict within a State's territory is that doing so confers non-state actors a *de facto* degree of legitimacy. This is strictly linked to a key notion in IHL known as the principle of 'equality of belligerents', whereby all parties to the conflict must be treated equally under the law.[240] This principle is crucial to maintaining the doctrinal division between *jus ad bello* and *jus in bellum* but presents a predicament when it comes to NIACs. Should not binding non-state actors to the same provisions as those to which State forces are bound make them equals under the law? Common Article 3 drafters anticipated this complication and devised a crafty solution: all

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[239] To her eye there is no indeterminacy; Mexico's situation warrants the application of IHL and anything other than the recognition of NIAC amounts to undermining international law in the name of politics. See section 1.1 (literature review) for further reflections on Caplin's paper.

[240] See: Jonathan Somer, *Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict*, International Review of the Red Cross Vol. 89 N. 867 (Sept. 2007).

"parties to the conflict should (…) endeavor to bring into force (…) all or part of the other provisions of the present convention", *but* "the application of the preceding provisions shall not affect the legal status of the parties to the conflict".[241] Non-state armed groups are thus obliged to follow IHL provisions without their compliance amounting to modifying their legal status.

Understood in a wider sense, however, legitimacy goes beyond the parties' legal status and involves an element of social perception.[242] In Bloom's words, "deeming the struggle to be an armed conflict can be *perceived* as giving legitimacy to the combatants and their goals".[243] Recognizing the existence of a NIAC involves a shift in how society perceives the parties involved, something that is profoundly costly in politics, a milieu in which perception matters the most. As Caplin puts it, acknowledging an armed conflict implies that "outside observers may begin to view the cartels as more than simply profit-seeking criminal elements".[244] Others have expressed the same concern regarding terrorism: writing in the aftermath of the September 11 attacks, Hendrick Herzberg opined that using the term 'war' "ascribes the perpetrators a dignity they do not merit, a status they cannot claim, and a strength they do not possess".[245] Similarly, Michael Howard wrote that "to declare war on terrorists (…) is at once to accord terrorists a status and dignity that they seek and that they do not deserve. It confers them a kind of legitimacy".[246]

Recognition of an armed conflict also tells us something about the government's *de facto*

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[241] International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)…op. cit.*
[242] See: Tom R. Tyler, *Psychological Perspectives on Legitimacy and Legitimation*, Annual Review of Psychology Vol.57 (2006): 375-400; See: Dawn Steinhoff, *Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups*, Texas International Law Journal Vol. 45 (2010).
[243] Craig A. Bloom, *op. cit.,* p. 382. Bergal, Ansah, and Caplin share this opinion.
[244] Jessica Caplin, *op. cit.,* p. 146.
[245] Hendrick Hertzberg, *Tuesday, and After*, The New Yorker (Sept. 24, 2001).
[246] Michael Howard, *What's in a Name? How to fight terrorism,* Foreign Affairs (Jan. – Feb. 2002):8.

authority and capacities. According to Protocol II, a NIAC designation implies that the violence exceeds "situations of internal disturbances and tensions, (…) riots, isolated and sporadic acts of violence and other acts of a similar nature".[247] Admitting that the state of affairs has exceeded these situations is paramount to acknowledging that the State was unable of containing these developments at their early stages, inescapably acknowledging an affront to its sovereignty and reflecting a degree of government incompetence in its failure to guarantee peace within its territory. This, in turn, supposes potential declines in tourism and foreign direct investment.[248]

A second, more tangible, cost to designating the metaphoric "Mexican Drug War" as an armed conflict is the possibility of prosecuting Mexican officials for war crimes, including Presidents Calderón and Peña Nieto. If qualified as a NIAC, both Mexican officials and non-state actors would be susceptible to prosecution under the provisions laid out in Common Article 3,[249] Additional Protocol II,[250] the Rome Statute, and customary international law. The list of crimes for which Mexican officials and cartel bosses could be tried includes but is *not limited to*: wilful killing, torture or inhuman treatment, wilfully causing great suffering, outrages upon personal dignity, declaring that no quarter will be given, enforced disappearances, rape, and mutilation. Significantly larger is the list of well-documented instances in which government authorities have incurred in these crimes.[251] This will be

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[247] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Art. 1, 8 June 1977.
[248] Jessica Caplin, *op. cit.,* p. 147; Elaine Glusac, *After New Travel Warning, Questions About Safety In Mexico,* The New York Times (Sept.29, 2017).
[249] Common Article 3 clearly states that (…) each Party to the conflict shall be bound to apply, as a minimum, the following provisions".
[250] Although not a signatory to Additional Protocol II, Mexico is bound to its provisions for their rank as customary law.
[251] See: Human Rights Watch, *Neither Rights Nor Security: Killings, Torture, and Disappearances in Mexico's "War on Drugs"* (2011); See: International Crisis Group*, Peña Nieto's Challenge: Criminal Cartels and Rule*

treated in more detail in chapter 4.

As a State-Party to the Rome Statute, Mexican officials could be tried by the International Criminal Court (ICC) for any of the war crimes listed above. Granted, they could also be prosecuted for crimes against humanity *without* the need for an armed conflict to exist. But unlike war crimes, crimes against humanity require that the conduct be committed "as part of a widespread and systematic attack (…)", therefore imposing a qualitatively higher threshold of culpability that is, of course, harder to prove.[252] A group of Mexican lawyers and activists took it upon themselves to accuse President Calderón of war crimes and crimes against humanity before the ICC in November 2011.[253,254] The Chief Prosecutor at the time, Luis Moreno Ocampo, dismissed the case by stating that "we don't judge political decisions or political responsibilities".[255] Although counterfactual, it seems reasonable to assume that official recognition of an armed conflict would pressure the ICC into revising the evidence relating to war crimes in Mexico, making it more difficult to shrug off accusations as mere political decisions. It also seems reasonable to assume that, regardless of their low likelihood to be prosecuted, Mexican officials should shield themselves from individual responsibility for war crimes by avoiding classification as an armed conflict.[256] As noted by Caplin, Mexico would certainly be unwilling to subject itself to international criminal law if it could avoid

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of Law in Mexico, Latin America Report N.48 (19 March 2013); See: Kimberly Heinle, Cory Molzahn, and David A. Shirk, *op. cit*.; See: Amnesty International, *Mexico 2016/2017* (2017).

[252] United Nations General Assembly, *Rome Statute of the International Criminal Court*, Art. 7, 17 July 1998.

[253] Sara Webb and Manuel Rueda, *Mexican groups asks ICC to probe president, officials*, Reuters (Nov. 25, 2011).

[254]Accused alongside the President were Guillermo Galván, Secretary of National Defense, Genaro García Luna, Minister of Public Security, Francisco Saynéz Mendez, Secretary of Marine, and Joaquín "El Chapo" Guzmán.

[255] Associated Press, *ICC Won't Take Up Case of Mexico's Drug War*, Latin American Herald Tribune (March 26, 2018).

[256] Article 77 of the Rome Statute states that "punishment can be either imprisonment for a specified number of years, which may not exceed a maximum of 30 years" or, "a term of life imprisonment when justified by the extreme gravity of the crime".

doing so simply by avoiding an acknowledgement of the violence as a NIAC".[257]

Wrapping up, this chapter provided a mapping of the strategic context in three steps: we revised the historical background leading up to Calderón's decision to militarize the country, exposed the current paradigm of international law and its indeterminacy regarding drug-related violence, and outlined the benefits and costs associated to being classified as a NIAC. The end goal was to lay out the *strategic context*, or the "(...) extent to which the context shapes the courses available to the actor".[258] Succinctly put, history attests to the 'perfect storm' inherited by Calderón, the legal indeterminacy exposes the wide maneuverability that allows for international law to be instrumentalized, and the cost-benefit outline demonstrates the ways in which Mexican authorities can profit from the strategic oscillation between the law of armed conflict and human rights law. Said differently, the historical review and the cost-benefit analysis should highlight the *desirability* of shifting between the two available legal regimes, while the indeterminacy of international law should underscore the *possibility* of this strategic oscillation, meaning that Berman's strategic instrumentalization would be impossible if Mexico were a clear cut case of either 'war' (as is the case in Syria) or 'no war' (Switzerland).

These considerations should together uncover the *strategic selectivity of the* context, meaning that they should collectively yield a context that favors certain strategies over others by selectively reinforcing specific forms of action. According to the hypothesis hereby purported, the context favors a strategy whereby both IHL and IHRL are applied to convenience. In what is a constant interplay between structure and agency under the SRA framework, next chapter is devoted to analyzing the government's concrete course of action

[257] Jessica Caplin, *op. cit.,* p. 146.
[258] Colin Hay, *op. cit.*

by uncovering the ‘war narrative’ constructed through public discourse. Applying framing as a guiding theoretical tool, chapter 3 argues for the power of language as a means to achieving the strategic instrumentalization of law.

Chapter 3: The Mexican Optimum – Oscillating between 'war' and 'no war'

Whereas last chapter analyzed the preconditions for the strategic instrumentalization of international law – as in *why* is it possible and desirable for international law to be instrumentalized? –, this chapter will untangle the concrete strategy carried out for this purpose. The goal is to understand *how* – through what means – was the strategic instrumentalization of law achieved. As advanced from the start, the hypothesis to be confirmed is that language is the main driver behind the strategic instrumentalization of international law. To be more precise, the selective use of bellicose language in public discourse located Mexico's reality within a war narrative – allowing the government to extract the previously outlined benefits on the use of force and detention – while, at the same time, the rejection of an armed conflict allowed it to avoid the costs associated to IHL's application; thus achieving the strategic oscillation between 'war' and 'no war'. This chapter should tie together theories on language (framing and Bourdieu's *fields*) with Berman's theory of the strategic instrumentalization of international law. I should underline that the aim is to analyze the "Mexican Drug War" at a discursive level rather than to scrutinize it from a public policy perspective.

Section A will revise Felipe Calderón's public discourse in an attempt to prove the fabrication of a war narrative through the employment of three interconnected frames; **Section B** will analyze the language employed in official documents in order to study the degree to which it is consistent with public discourse; and **Section C** will determine whether there has been continuity or rupture in Enrique Peña Nieto's presidency, focusing on the hotly

debated Internal Security Law ("Ley de Seguridad Interior") passed by congress on December 2017.[259]

A. Deconstructing the War Narrative: President Calderón's Public Discourse (2006-2012)

The first step will be to deconstruct the 'war narrative' by reviewing the selective use of language in Felipe Calderón's public discourse and uncovering the *frames* guiding it. This section places great importance on language associated with 'war', proposing that martially stirring vocabulary has amounted to a conceptual confusion that is legally favorable to the Mexican government.

The notion of framing is key to capturing the relevance of word choice relative to a given set of phenomena, for it underlines the role of words in shaping interpretation. Recalling Gitlin, framing is a process "of selection emphasis and exclusion", utilized by "symbol-handlers" to shape perceived reality.[260] Taking a war-related example, Lakoff explains how the Bush administration shifted from a 'self-defense narrative' ("Saddam was threatening the United States with weapons of mass destruction") to a 'rescue narrative', whereby the United States became the hero "bringing democracy to the people of Iraq and freeing them from torture (…)".[261, 262] In the wider context of the 'War on Terror', "*crime* changed to *war*, with

[259] Ley de Seguridad Interior, *Diario Oficial de la Federación* (Dec. 21, 2017).
[260] Todd Gitlin, *op. cit.,* p. 7.
[261] George Lakoff, *The Political Mind: A Cognitive Scientist's Guide to Your Brain and its Politics* (New York: Penguin Group, 2008): 37-38.
[262] It could be argued that this "rescue narrative" attempted to frame not only Iraqis, but the whole world, as the victims to be rescued. In George W. Bush's words, "There's is no doubt in my mind that Saddam Hussein was a threat to the world peace. And there's no doubt in my mind that the United States did the right thing in removing him from power".

casualties, *enemies*, *military action*, *war powers*, and so on".[263] I argue that Felipe Calderón achieved to frame drug-related violence in Mexico in similar terms. Such narrative can be understood as a 'semantic field', wherein actors implicated were assigned the 'semantic roles' of combatants, enemies, heroes and casualties.[264]

I propose the existence of three main frames that together make up the "deep narrative" known as the "Mexican Drug War": [265] (1) The spike in civilian lives lost since 2007 is framed as *collateral damage*;[266] (2) drug traffickers and drug dealers are framed as national *enemies* aiming to corrupt the Mexican youth; and (3) Calderón's role as *Commander in Chief* is reinforced while the Mexican armed forces are framed as public *heroes* in a war for the nation's survival. These frames shall be exposed through a selection of public statements made by President Calderón during his time in office, the vast majority taken from the government's database.[267] Bourdieu's reflections on the economics of linguistic exchanges remind us that 'linguistic capital' depends in part on the emissary's legitimacy, highlighting Calderón's enhanced frame-setting power.[268]

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[263] George Lakoff, *Don't Think of an Elephant! Know Your Values and Frame the Debate* (Vermont: Chelsea Green Publishing Company, 2004).
[264] George Lakoff, *The Political Mind…op. cit.,* p. 37-38.
[265] George Lakoff explains that a process known as "neural binding" allows "simple narratives to be combined into larger more complex ones". Lakoff uses a visual example: "When you see a blue square, it appears as a single object. Yet the color and shape are registered in different parts of the brain. Neural binding allows us to bring together neural activation in different parts of the brain to form single integrated wholes". In the same vein, neural binding allows us to bring together concepts such as collateral damage, enemies and heroes into a single, integrated, and more complex narrative. See: George Lakoff, *The Political Mind: A Cognitive Scientist's Guide to Your Brain and its Politics* (New York: Penguin Group, 2008).
[266] "Indeed, during the four-year rise in violence from 2007 to 2011, the number of murders increased from 8,867 to 27,199. No other country in the Western Hemisphere saw such a large increase either in the homicide rate or in the absolute number of homicides over the last two decades" in Kimberly Heinle, Cory Molzahn, and David A. Shirk, *op. cit.,* p. 4.
[267] Presidencia de la República, database available at : http://calderon.presidencia.gob.mx/prensa/discursos/ . All emphases on quotes in speeches by Felipe Calderón are added by me for the purposes of this dissertation.
[268] Pierre Bourdieu, *C'est Que Veut Dire Parler… op. cit.,* p. 54. ["(…) le marché n'est favorable aux détenteurs du capital linguistique le plus grand que si les destinataires de leur production reconnaissent leur légitimité"].

The construction of these frames is facilitated by the incessant repetition of the term 'war', employed by Calderón 62 times from December 2006 to November 2010, with more than two years remaining of his administration.[269] Related terms such as 'combat' (*combate*), battle (*batalla)* and fight/struggle (*lucha*) are also studied but only through a general understanding of the context guiding their use, for they are only relevant when utilized with martial, that is, bellicose, purposes. According to Miguel David Norzagaray's work, the term 'combat' was used in drug-related contexts in 161 occasions in Calderón's first four years of presidency,[270] as compared to 80 instances in Salinas' entire administration, 53 in Zedillo's, and 93 in Fox's. Similarly, the term 'battle' is employed 226 times by Calderón, as compared to 20 by Presidents Salinas, 27 by Zedillo, and 48 by Fox.[271] Lastly, Calderón used the term 'fight' 341 times in a drug-related context during his first four years as President, as compared to 85 times by Salinas, 77 by Zedillo and 129 by Fox in their entire terms.[272] Repetition is not all there is to framing, yet it is an important element in the process of reinforcing selected narratives over others. Lakoff argues that "if we hear the same language over and over again, we will think more and more in terms of the frames and metaphors activated by that language".[273] Calderón's disproportionate reiteration of these terms, as compared to previous presidents, is a relevant indicator of the value assigned to martial rhetoric during his administration.

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[269] In turn, as Miguel David Norzagaray Shows, previous presidents Zedillo and Calderón used the term 6 and 8 times, respectively: Miguel David Norzagaray López, *El Narcotráfico en México desde el discurso oficial: Un análisis de los sexenios comprendidos en el periodo 1988 – 2009*, Facultad Latinoamericana de Ciencias Sociales Sede Académica México (Nov. 2010): 224

[270] Norzagaray published his work in November 2010, with roughly two years remaining in Calderón's administration. Mexican presidents have six year terms with no reelection. All of the facts cited from his work, which is, I must say, the most complete and systematic review of discourse relating to *narcotráfico* in Mexico, should take into account the fact that his data misses the last third of Calderón's administration.

[271] Miguel David Norzagaray López, *op. cit.,* p. 225

[272] *Ibid.*

[273] George Lakoff, *The Political Mind…op. cit.,* p. 15.

The systematic use of this language is not inconsequential, it is testament to how war became the State's *ratio essendi*, becoming the ultimate justification for many of its unprecedented decisions and, it must be said, atrocious results.[274] From a legal perspective, however, these conceptual frames do not amount to placing Mexico under the Law of Armed Conflict, as would have been the case under the subjective paradigm predating the 1949 Geneva Conventions. Instead, these frames are analyzed as means used to approximate the country to a *de facto* state of war without *de iure* falling into the category of an armed conflict. Language is thus purported as the main tool for exploiting the legal indeterminacy to which Mexico's state of violence is subject.

1) Framing civilian deaths as 'collateral damage'

On his first day in office, President Calderón addressed the Mexican people from the stage of the National Auditorium, where he "order[ed] the ministries of the Marine and of Defense to double their efforts to guarantee national security *over any other interest*".[275] The President issued an ominous warning: "I know that reestablishing peace will not be nor easy nor quick", he said. "It will take time, cost a lot of money, and even, unfortunately, *human lives*".[276] This

[274] Calderón deployed 6,000 soldiers to Michoacán on December 3, 2006. There were 45,000 soldiers deployed to fight DTOs by the end of 2007 and 96,000 soldiers in 2011, at the height of the conflict. Approximately 16,000 marines joined the effort. The results were more deaths than ever, both of civilians and government agents. By the end of Calderón's presidential term, more than 2,800 police officers had been killed, along with more than 350 soldiers and marines. His offensive forced cartels to "arm themselves on the same scale as the army", leading to the immediate escalation of violence, much to the civilian population's disregard. For a review on Calderón's security legacy see: International Crisis Group, *Peña Nieto's Challenge: Criminal Cartels and Rule of Law in Mexico*, Latin America Report N. 48 (March 19, 2013). For complete critiques on Calderón's challenge to DTOs see: Rubén Aguilar and Jorge Castañeda, *El Narco: La guerra fallida* (Mexico City: Punto de Lectura, 2010) and Rubén Aguilar and Jorge Castañeda, *Los Saldos del Narco: El Fracaso de Una Guerra* (Mexico City: Punto de Lectura, 2012).

[275] Presidencia de la República, *Palabras al Pueblo de México desde el Auditorio Nacional*, (Dec. 1, 2006). http://calderon.presidencia.gob.mx/2006/12/palabras-al-pueblo-de-mexico-desde-el-auditorio-nacional/

[276] *Ibid.*

would nevertheless be a necessary cost to pay in order to "end the impunity surrounding the delinquents that threaten our lives and our families".[277] As if reassuring the population, the President added that he "would be at the frontline of this battle, a battle that we *have* to wield (…)".[278] The overarching message can be coherently construed by adding up these statements in a single proposition: *because national security is the State's utmost priority, the government will wage a necessary battle that will unfortunately cost time, money, and human lives.* This speech would be an unfortunate yet accurate prognosis. Civilian lives would from the outset be framed as a necessary cost, an unavoidable sacrifice for the nation's greater good.

This formula became an early constant in Calderón's public discourse. The President visited the state of Michoacán soon after announcing the launch of the Michoacán 'Joint Operation' (*Operación Conjunta Michoacán*),[279] where he highlighted his admonition upon addressing the newly deployed forces: "I reiterate" he said, "that this is no easy nor quick task; that it will take a long time, implicate enormous resources of the Mexican people, including the unfortunate loss of human lives".[280] The following month the President attended the VI National Convention of the American Chamber Mexico, where he again adverted that the nation faced a battle that would "cost many resources (…) and, of course (…) many human lives. But this is a battle, my friends, that *we have to wage*; it is our duty

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[277] *Ibid.*
[278] *Ibid.*
[279] Presidencia de la República, *Anuncio Sobre la Operación Conjunta Michoacán,* (Dec. 11, 2006). http://calderon.presidencia.gob.mx/2006/12/anuncio-sobre-la-operacion-conjunta-michoacan/
[280] Presidencia de la República, *El Presidente de México, Lic. Felipe Calderón, Durante la Visita y Saludo a las Fuerzas Federales en el Estado de Michoacán*, (Jan. 3, 2007). http://calderon.presidencia.gob.mx/2007/01/el-presidente-de-mexico-lic-felipe-calderon-durante-la-visita-y-saludo-a-las-fuerzas-federales-en-el-estado-de-michoacan/#b5

to the Mexicans of the future".[281] Nine days later, at a meeting with the Canadian Chamber of Commerce, President Calderón frequented the same recipe, adding that "(…) we are waging a battle without quarter".[282, 283] Then again, on March 15, 2007, on the report on his first one-hundred days in office, President Calderón cautioned that "it is not realistic to expect immediate results, for which we are prepared for a long battle that will demand many resources, and unfortunately, also human lives".[284]

Soon thereafter Calderón incorporated the term 'war' to this discursive formula. On the day following his one-hundred-day report, while touring the state of Baja California, the President said the following: "I have not doubted for a second in using all of the State's force (…)" he declared, "we are fighting to win this *war* on crime".[285] On a later meeting focused on his National Security Strategy, President Calderón went on a 'war' spree during which he used the term five times in a ten-minute-span,[286] without missing the opportunity to remind

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[281] Presidencia de la República, *El Presidente Calderón en el Desayuno con Motivo de la VI Convención Nacional de la Cámara Nacional Americana de Comercio*, (Feb. 27, 2007). http://calderon.presidencia.gob.mx/2007/02/el-presidente-calderon-en-el-desayuno-con-motivo-de-la-vi-convencion-nacional-de-la-camara-nacional-americana-de-comercio/

[282] Presidencia de la República, *El Presidente Calderón en la Comida con Motivo del Evento Annual de Canchman Day 2007, en el Marco del 25 Aniversario del Establecimiento de la Cámara de Canadá en México*, (March 8, 2007). http://calderon.presidencia.gob.mx/2007/03/el-presidente-calderon-en-la-comida-con-motivo-del-evento-anual-de-cancham-day-2007-en-el-marco-del-25%c2%ba-aniversario-del-establecimiento-de-la-camara-de-comercio-de-canada-en-mexico/

[283] As a side note, we should be reminded that "declaring that no quarter will be given" constitutes a war crime under international law.

[284] Presidencia de la República, *El Presidente Calderón en la Presentación del Balance de Inicio de Gobierno*, (March 15, 2007). http://calderon.presidencia.gob.mx/2007/03/el-presidente-calderon-en-la-presentacion-del-balance-de-inicio-de-gobierno/

[285] Presidencia de la República, *El Presidente Calderón en el Evento Acciones Sociales en Baja California*, (March 16, 2007). http://calderon.presidencia.gob.mx/2007/03/el-presidente-calderon-en-el-evento-acciones-sociales-en-baja-california/

[286] "It is because of this that since the first days of my government we began a frontal *war* against delinquency and organized crime, a *war* that follows an integral and long-term strategy (…). We know that it will be a long term *war*, that it will not be nor easy nor fast, that it will take time, economic resources, human lives, but it is a *war* that we are going to win with the backing of society". Presidencia de la República, *El Presidente Calderón en el Evento "Limpiemos México" Estrategia Nacional de Seguridad. Programa en Zona de Recuperación*, (July 2, 2007). http://calderon.presidencia.gob.mx/2007/07/el-presidente-calderon-en-el-evento-limpiemos-mexico-estrategia-nacional-de-seguridad-programa-en-zona-de-recuperacion/

the population that "it will be a long-term *war* (…) that will take time, economic resources, [and] human lives".[287]

These warnings worked in his favor as the situation worsened. Looking back at his first three years in office, Calderón recalled that "when we began this *war* (…) *we knew* that it would take time, money and that it would also cost human lives".[288] In 2010 he reminisced on his first day in office: "I said it since my first day, that this was a long-term battle. I said at the National Auditorium that it would cost (…) human lives, as it unfortunately has (…)".[289]

The constant reference to civilian deaths as necessary – yet abstract – 'costs' served as a rhetoric tool to normalize the exceptional level of violence in the country at the time. The President's intent to justify the sharp rise in drug related deaths became evident when addressing a forum organized by The Economist magazine, where he stressed that his government's efforts would take time, resources and lives, "*as any war of this dimension does*".[290] This is a clear example of an attempt to justify civilian deaths by insinuating that *all wars* cost lives, in doing so implying that Mexico's victims are the normal price to pay for a "war of this dimension". He recycled this reasoning on December 20, 2007 by underlining that "when we started this frontal *war* against delinquency I noted that (…) it

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[287] *Ibid.*

[288] Presidencia de la República, *El Presidente Calderón en la Sesión Almuerzo Individual Titulada "Riders on the Storm": Mexico Overcoming the Crisis,* (Jan. 29, 2009). http://calderon.presidencia.gob.mx/2009/01/el-presidente-calderon-en-la-sesion-almuerzo-individual-titulada-riders-on-the-storm-mexico-overcoming-the-crisis/

[289] Presidencia de la República*, Cuarta Intervención del Presidente Calderón en el Diálogo por la Seguridad. Hacia una Política de Estado,* (Aug. 3, 2010). http://calderon.presidencia.gob.mx/2010/08/cuarta-intervencion-del-presidente-calderon-en-el-dialogo-por-la-seguridad-hacia-una-politica-de-estado/

[290] Presidencia de la República*, El Presidente Calderón en la Comida con Motivo del Foro El Economista,* (Aug. 3, 2010). http://calderon.presidencia.gob.mx/2007/04/el-presidente-calderon-en-la-comida-con-motivo-del-foro-el-economista/ (" He dicho y reitero, es un problema tan arraigado en nuestro país y tiene tan hondas raíces que requiere tiempo, tomará mucho tiempo, tomará recursos económicos, importantes recursos económicos, lo que toma una guerra de esta dimensión, costará (…) por desgracia vidas humanas").

would cost time, economic resources, and even human lives. We know this because *that is how wars are*, precisely".[291] The same occurred on June 4, 2008, when he called it "naïve to assume that these problems will be resolved in the short-run". It is an effort "that will imply many costs, *as occurs in any other war* (…)", he said.[292] Beyond being a comfortable excuse to the spike in homicides since his swearing in as President,[293] these statements reveal an explicit affinity or kinship to IHL; a closer one, at least, to what is to be expected in times of peace. Whether done wittingly or not, public discourse unveils a pattern whereby the administration's actions are framed under a logic closer to IHL than to IHRL.

Although never using the terms 'casualty' or 'collateral damage', Calderón's treatment of civilian deaths throughout his public discourse is strikingly similar to the principles of proportionality and necessity applicable in times of war, while remains bizarrely distant to the "right to life (…) and security of person" enshrined in the Universal Declaration of Human Rights.[294] As we know, armed conflicts allow limitations to these rights on the basis of proportionality, necessity and distinction, whereas IHRL categorically rejects the use of lethal force "unless when strictly unavoidable to protect life".[295] The 'cost formula' – pronounced *ad nauseam* with few variants and directed at a wide range of audiences – is constantly alluding to civilian deaths as *necessary* sacrifices and positing them, along with time and economic resources, as the *proportional* price to pay in "any war of this dimension".

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[291] Presidencia de la República, *El Presidente Calderón en el Desayuno con Motivo de Fin de Año en Convivencia del Mando Supremo con Personal Naval,* (Dec. 20, 2007). http://calderon.presidencia.gob.mx/2007/12/el-presidente-calderon-en-el-desayuno-con-motivo-de-fin-de-ano-en-convivencia-del-mando-supremo-con-personal-naval/

[292] Presidencia de la República, *El Presidente Calderón en la Mesa de Negocios con el Gobierno de México,* (June 4, 2008). http://calderon.presidencia.gob.mx/2008/06/el-presidente-calderon-en-la-mesa-de-negocios-con-el-gobierno-de-mexico/ [emphasis added].

[293] "(…) from 2007 to 2011, Mexico's rate climbed sharply, increasing threefold from roughly 8.1 to 23.5 homicides per 100,000 [citizens]" in Kimberly Heinle, Cory Molzahn, and David A. Shirk, *op. cit.,* p 3.

[294] UN General Assembly, *Universal Declaration of Human Rights,* 10 December 1948.

[295] *Principles on the Use of Force and Firearms by law Enforcement Officials… op. cit.*

Although mentions of this formula are too many (and too similar in content) for all of them to be hereby cited,[296] a general overview reveals the pattern followed by President Calderón. It is no coincidence that victims were "routinely labeled by security forces as [either] criminals or as 'collateral damage' of shootouts between security forces and armed persons".[297] In a clear example of this, the Secretary of National Defense during Calderón's administration declared that "despite the death of civilians – kids, young students and adults – in encounters between the Armed Forces and organized crime, the strategy will hold. These are *collateral damages* and they are regrettable".[298] This language contributed to framing deaths as necessary and proportionally calculated war casualties rather than as human rights violations and served to justify the use of force to a degree that would be inadmissible in law enforcement operations. That is, in times of peace.

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[296] For other examples in which President Calderón reiterates this cost formula see also: Presidente de la República, *El Presidente Clderón en la Clausura del Foro Internacional Sobre Políticas Públicas para el Desarrollo de México*, (Feb. 8, 2007). http://calderon.presidencia.gob.mx/2007/02/el-presidente-calderon-en-la-clausura-del-foro-internacional-sobre-politicas-publicas-para-el-desarrollo-de-mexico/ ; Presidencia de la República, Sesión Pleanaria: *"Conversación con el Lic. Felipe Calderón Hinojosa, Presidente de México"*, (Jan. 26, 2007). http://calderon.presidencia.gob.mx/2007/01/sesion-plenaria-conversacion-con-el-lic-felipe-calderon-hinojosa-presidente-de-mexico/ ; Presidencia de la República, *El Presidnte Calderón en la Comida con Miembros de la Comunidad Judía en México*, (Oct. 12, 2007). http://calderon.presidencia.gob.mx/2007/10/el-presidente-calderon-en-la-comida-con-miembros-de-la-comunidad-judia-en-mexico/ ; Presidencia de la República, *Sé que México enfrenta ...op. cit.* http://calderon.presidencia.gob.mx/2008/08/se-que-mexico-enfrenta-un-gran-problema-de-seguridad-este-es-un-cancer-que-se-ha-venido-incubando-durante-anos-y-al-que-no-se-le-dio-la-debida-atencion-pero-es-un-cancer-que-vamos-a-erradicar-presiden/ ; Presidencia de la República, *El Presidente Calderón en la Presentación del Programa Nacional Contra las Adicciones*, (April 17, 2007). http://calderon.presidencia.gob.mx/2007/04/el-presidente-calderon-en-la-presentacion-del-programa-nacional-contra-las-adicciones/ ; Presidencia de la República, *Mensaje del Presidente Calderón con Motivo del Primer Informe de Gobierno*, (Sep. 2, 2007). http://calderon.presidencia.gob.mx/2007/09/mensaje-a-la-nacion-del-presidente-de-los-estados-unidos-mexicanos-con-motivo-de-su-primer-informe-de-gobierno/

[297] See Human Rights Watch, *op. cit.,* p. 169.

[298] Associated Press, *Muertes de civiles en el combate al crimen, "daños colaterales": Galván*, La Jornada (April 13, 2010).

2) Framing criminals as public 'enemies'

The second frame found throughout Calderón's discourse is that of a public enemy threatening to topple the State and its institutions, all the while corrupting the Mexican youth by turning the country into a drug consuming nation. The vocabulary employed for this purpose includes the words 'threat', 'poisoning', 'enslavement', and of course, 'enemy'. As recorded by Norzagaray, Calderón refers to an enemy in 117 occasions, with yet two years remaining of his administration, whereas Presidents Salinas, Zedillo, and Fox used the term nine, two, and eight times in their entire terms, respectively.[299] Calderón defines this enemy in a dangerously vague fashion, for to him "whoever seeds anguish, violence and death amongst Mexicans, is the enemy".[300]

The parallels with the American "War on Drugs" are daunting. Upon analyzing public discourse in the United States, Susan Stuart noted that "militaristic rhetoric [was] increasingly identifying citizens as enemies in a literal war".[301] In the same vein, this section argues that in Mexico "narcos became the enemies to be defeated rather than the criminal offenders to be prosecuted", as Rodiles phrased it.[302] Most important is the claim that Calderón's rhetoric had tangible consequences, reflected in the country's lethality rate – which far exceeds that expected of a country carrying out law enforcement operations, as well as in the quasi-POW figure of *arraigo* and in the use of torture by police agents and armed forces.

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[299] Miguel David Norzagaray López, *op. cit.,* p. 222
[300] Presidencia de la República, *Palabras del Presidente Calderón Durante el Desayuno Conmemorativo al Día de la Fuerza Aérea Mexicana*, (Feb. 10, 2007). http://calderon.presidencia.gob.mx/2007/02/palabras-del-presidente-calderon-durante-el-desayuno-conmemorativo-al-dia-de-la-fuerza-aerea-mexicana/
[301] Susan Stuart, *War op. cit.,* p. 6.
[302] Alejandro Rodiles, *op. cit.*

The enemy fabricated by President Calderón is repeatedly said to pose a direct threat to the State's institutions and survival. He talks of "an unprecedented *enemy*, [of] criminals that defy the Mexican State and its institutions, that besiege society, poison our youth, that threaten our nation".[303] It is because of this threat that "we have procured a battle without quarter against an *enemy* (…) that pretends to impose its interests and fulfill its ambitions via intimidation and violence".[304] On his first-year-report Calderón stressed that "drug-trafficking and organized crime constitute the main threat to peace and security". [305] The government confronts these phenomena, he said, so that they do not "take over what is ours (…) we fight so that our families, our children, women, and in general all Mexicans are able to walk the streets, roads, towns and cities without fear".[306] These enemies, he said, "seek to bend the authorities, to terrify the population and to subdue it".[307] As a consequence, "all Mexicans of our generation have the duty to declare war on the enemies of Mexico".[308]

Following the same storyline, drug-traffickers became villains fighting to actively destroy the country's future. Calderón many times reminded the population that "the goal of delinquency, lets not forget, was and will be to sequester Mexico's future".[309] He adverted that "we will utilize all the State's force to respond to those that defy authority and our society, to respond to those who challenge our institutions and *place the future of the country*

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[303] Presidencia de la República, *El Presidente Calderón en el Desayuno con Motivo del Día del Ejército Mexicano*, (Feb. 19, 2009). http://calderon.presidencia.gob.mx/2009/02/el-presidente-calderon-en-el-desayuno-con-motivo-del-dia-del-ejercito-mexicano/

[304] *Ibid.*

[305] Presidencia de la República, *Mensaje del Presidente Calderón con Motivo del Primer Informe de Gobierno…op. cit.*

[306] *Ibid.*

[307] *Ibid.*

[308] Presidencia de la República, *El Presidente Calderón en la Ceremonia de Clausura y Apertura de Cursos del Sistema Eduativo Militar*, (Sep. 12, 2008). http://calderon.presidencia.gob.mx/2008/09/el-presidente-calderon-en-la-ceremonia-de-clausura-y-apertura-de-cursos-del-sistema-educativo-militar/

[309] Presidencia de la República, *Mensaje del Presidente Calderón con Motivo del Primer Informe de Gobierno…op. cit.*

in danger".[310] This is "an *enemy* that kills, kidnaps and extorts innocent people; that blackmails honest men and women and that (…) stagnates the *future* of many people".[311] The Federal Government would therefore "affront with valor and determination those who threaten our homeland and *endanger its future*". [312] Under these circumstances, security became something to be recovered from the enemy that had deprived us from it: "we will recover security in Guerrero, Michoacán, Baja California (…) and in every region in the country that is threatened by organized crime. That is the *enemy*".

Calderón was particularly emphatic when commemorating the "Battle of Puebla" in 2007, speech in which he used the term 'enemy' on sixteen occasions. Calderón spoke of organized crime as the "new *enemy* of the nation (…)",[313] drawing an analogy between modern-day delinquents and the French invaders of 1862. It is "(…) an enemy that threatens the peace and security of our families, of our development and our future",[314] he said, and insisted that "this *enemy* pretends to impose its interests and ambitions before the highest Mexican values, they want to immobilize our society through intimidation and violence, they want to seem, also [as the French], invincible".[315] A similar analogy was utilized in the commemoration of the defense of the Port of Veracruz from the U.S invasion of 1914, event during which Calderón declared that "today, almost a century after the deed of Veracruz,

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[310] Presidencia de la República, *Palabras del Presidente Calderón Durante el Desayuno Conmemorativo al Día de la Fuerza Aérea Mexicana*, (Feb. 10, 2007). http://calderon.presidencia.gob.mx/2007/02/palabras-del-presidente-calderon-durante-el-desayuno-conmemorativo-al-dia-de-la-fuerza-aerea-mexicana/

[311] Presidencia de la República, *Mensaje a la Nación del Presidente Calderón en Materia de Seguridad en el Marco de su tercer Informe de Gobierno*, (Aug. 29, 2009). http://calderon.presidencia.gob.mx/2009/08/mensaje-a-la-nacion-del-presidente-calderon-en-materia-de-seguridad-en-el-marco-de-su-tercer-informe-de-gobierno/

[312] Presidencia de la República, *Palabras del Presidente Calderón Durante el Desayuno Conmemorativo al Día de la Fuerza Aérea Mexicana…op. cit.*

[313] Presidencia de la República, *El Presidente Calderón en la Ceremonia Conmemorativa al CXLV Aniversario de la Batalla del 5 de Mayo de* 1862, (May 5, 2007). http://calderon.presidencia.gob.mx/2007/05/el-presidente-calderon-en-la-ceremonia-conmemorativa-al-cxlv-aniversario-de-la-batalla-del-5-de-mayo-de-1862/

[314] *Ibid.*

[315] *Ibid.*

Mexico faces different enemies (…) that alter the lifestyle of the families and communities of Mexico".[316]

The 'public enemy' frame was also constructed via the portrayal of DTOs as entities attempting to *poison* and *enslave* the Mexican youth through drug addiction. Calderón employed highly moralist language through which he created and fed the unfounded fear of increased drug consumption by the nation's youngsters. He framed his administration's war as the ultimate effort to salvage the "bodies and souls of our kids" from drug addiction and violence.[317] According to President Calderón, DTOs made a "deliberate effort to provoke addiction in our kids and youngsters with the objective of creating in them dependency and, with it, amplify a safe and profitable domestic market".[318] Their end-goal, he said, is "to generate genuine serfdom, genuine *slavery* [to drugs]".[319] The purpose behind this rhetoric was to unite all voices against a common enemy. The executive achieved it by tapping into the most profound preoccupation of most adult citizens: their children. "Either we rescue Mexico (…)", he said, "(…) or we cancel the future of prosperity that the sons [and

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[316] Presidencia de la República, *El Presidente Calderón en la Ceremonia Conmemorativa del XCV Aniversario de la Defensa del Puerto de Veracruz y Jura de Bandera de los Cadetes del Primer Año de la Heroica Escuela Naval Militar*, (April 21, 2009). http://calderon.presidencia.gob.mx/2009/04/el-presidente-calderon-en-la-ceremonia-conmemorativa-del-xcv-aniversario-de-la-defensa-del-puerto-de-veracruz-y-jura-de-bandera-de-los-cadetes-del-primer-ano-de-la-heroica-escuela-naval-militar/

[317] Presidencia de la República, *Palabras del Presidente Calderón Durante el Desayuno al Día de la Fuerza Aérea Mexicana…op. cit.*

[318] Presidencia de la República, *Palabras del Presidente Felipe Calderón durante la Inauguración de la XXXI Reunión Ordinaria de la Conferencia Nacional de Gobernadores*, (Feb. 16, 2007). http://calderon.presidencia.gob.mx/2007/02/palabras-del-presidente-felipe-calderon-durante-la-inauguracion-de-la-xxxi-reunion-ordinaria-de-la-conferencia-nacional-de-gobernadores/

[319] Presidencia de la República, *El Presidente Calderón en el Rescate de Espacios Públicos, Rehabilitación del Parque 5 de Abril*, (Oct. 2, 2007). http://calderon.presidencia.gob.mx/2007/10/el-presidente-calderon-en-el-rescate-de-espacios-publicos-rehabilitacion-del-parque-5-de-abril/

daughters] of all Mexicans deserve".[320] As anticipated by Stuart, the government "(…)explicitly framed the war to play on people's fears".[321]

Calderón laid bear this pathos-driven strategy from the early days of his presidency. On March 7, 2007 he declared "the reason behind this battle [to be] clear, we're not going to leave the course of our lives and our country, and much less will we yield control to those that pretend to *poison the bodies and souls of our kids*".[322] In what is a clear example of militaristic rhetoric, the President affirmed that the government "will not give truce nor quarter to the *enemy of Mexico*, to those that poison our kids and young ones".[323] The "soul and body" of the Mexican youth thus became the uncontested *casus belli* : "we will fight delinquency with everything we've got" said the President in his first-year-report, "because what is at stake is the future of the kids and youngsters of Mexico; because we have to face those that poison the body and soul of our lads (…)".[324] Nine day later he affirmed that "we're fighting to win this war (…) because this is about rescuing our kids and young ones from the claws of drug addiction".[325] He used a similar vocabulary during President George W. Bush's visit on negotiations for the Merida initiative, where he held that Mexico has shown its "(…) firm compromise in the battle against those that want to poison the body and soul of our

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[320] Presidencia de la República, *Palabras del Presidente Calderón Durante el Desayuno Conmemorativo al Día de la Fuerza Aérea Mexicana…op. cit.*
[321] Susan Stuart, *op. cit.,* p. 5.
[322] Presidencia de la República, *El Presidente Calderón en el Anuncio de la Estrategia Integral para la Prevención del Delito y Combate a la Delincuencia* (March 7, 2007).
[323] *Ibid.*
[324] Presidencia de la República, *Mensaje del Presidente Calderón con Motivo del Primer Informe de Gobierno…op. cit.*
[325] Presidencia de la República, *El Presidente Calderón en el Evento Acciones Sociales en Baja California…op. cit.*

youngsters".[326] Later that year he empathetically declared to "know of the anguish of mothers that notice, often too late, that their kids have fallen prey to the claws of drugs".[327]

The President persisted in framing his "war" as an effort to rescue young generations from drug addiction despite the lack of evidence pointing towards a significant rise in consumption among Mexicans. The President emphasized that "drugs sicken and enslave those that consume them (…)",[328] but what is worse, they "(…) weaken the will and destroy people, families, communities and countries".[329] Calderón also affirmed that what DTOs look for is to turn our Mexico, not only into a country of transit for drugs to the United States, but into a destination, a point of sale and consumption (…)".[330] It is because of this that organized crime "takes pains to give out, even gift, drugs to our children and adolescents outside of schools".[331] This discourse remained unmodified throughout his administration. On his sixth and last annual report, Calderón assured that "our country stopped being one of mere transit of drugs, to become, unfortunately, a consumer country".[332]

However effective this fear-based rhetoric may have been in amassing public support, Rubén Aguilar and Jorge Castañeda demonstrate that the much repeated idea of drugs reaching the Mexican youth is grossly inaccurate. Approximately 465,000 people were addicted to drugs in Mexico in 2008 according to the National Survey on Addictions,

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[326] Presidencia de la República, *El Presidente Calderón en la Recepción del Presidente de los Estados Unidos de América, George W. Bush,* (March 13, 2007). http://calderon.presidencia.gob.mx/2007/03/el-presidente-calderon-en-la-recepcion-al-presidente-de-los-estados-unidos-de-america-george-w-bush/

[327] Presidencia de la República, *El President Calderón en el Evento "Limpiemos México" Estrategia Nacional de Seguridad…op. cit.*

[328] Presidencia de la República, *El Presidente Calderón en la Presentación del Programa Nacional Contra las Adicciones…op. cit.* http://calderon.presidencia.gob.mx/2007/04/el-presidente-calderon-en-la-presentacion-del-programa-nacional-contra-las-adicciones/

[329] *Ibid.*

[330] *Ibid.*

[331] *Ibid.*

[332] Presidencia de la República, *El Presidente Calderón Durante su Mensaje con Motivo del Sexto Informe de Gobierno*, (Sep. 3, 2012). http://calderon.presidencia.gob.mx/2012/09/el-presidente-calderon-durante-su-mensaje-con-motivo-del-sexto-informe-de-gobierno/

amounting only to 0.4% of the country's population, in contrast to the "more than half a million, probably one million addicts to illegal drugs" that Calderón claimed there was in the country at the time.[333] In fact, Mexico has a lower incidence and prevalence of drug consumption than most countries in the American continent and significantly lower ones compared to the world average,[334] evidencing the fiction behind the narrative of saving kids from the "claws" of drugs and of preventing the country from becoming a drug-consuming destination. In this line, Aguilar and Castañeda also show that the prices of drugs in the biggest-consuming cities of Mexico (Tijuana, Ciudad Juárez, Mexico City, Monterrey, etc.) are significantly low relative to those in most American cities, making the Mexican market comparatively unattractive as a "selling spot" or "destination". A simple comparison helps to put things in perspective: while one kilogram of pure cocaine costs around 12,500 dollars in Mexico City, it can cost up to 97,000 dollars in New York or Seattle.[335]

President Calderón did not pay attention to these figures and instead opted for a deliberate conflation of consumer and producer countries, turning them all into one of the same. In his second-year-report he boasted of a "record confiscation of cocaine in a single operative, which would amount to 470 million doses, more than *four doses per every Mexican*".[336] He did the same in Davos, Switzerland, where he stated, apparently proud, that "what we have confiscated in these three years would be sufficient to provide *20 doses to each Mexican or*

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[333] Presidencia de la República, *El Presidente Calderón en la Presentación del Programa Nacional Contra las Adicciones…op. cit.*

[334] Rubén Aguilar and Jorge Castañeda, *El Narco: La Guerra Fallida…op. cit.* p.19- 20. ["En Estados Unidos, por ejemplo, la cifra correspondiente alcanza tres por ciento de una población seis veces mayor que la de México; en Alemania llega a 2.1 por ciento, y 1.8 por ciento en Holanda. (…) La Organización Mundial de la Salud (OMS) calculó en 7.8 por ciento el índice mundial de incidencia, superior al de México con 5.5 por ciento, y muy inferior al de Estados Unidos con 42 por ciento (11 de cada 17 estadounidenses dice haber consumido drogas alguna vez en su vida). (…)

[335] Rubén Aguilar and Jorge Castañeda, *El Narco: La Guerra Fallida…op. cit.*

[336] Presidencia de la República, *Mensajes de Presidente Felipe Calderón Hinojosa en Torno al Segundo Informe de Gobierno*, (Aug. 30, 2008).

66 doses to every young Mexican between 15 and 30 years of age".[337] Again on April 21, 2009, the President stated that "the army has ensured more than 30 tons of cocaine and eradicated almost 1,500 plantations of marihuana, which equals *300 million doses that will not poison our young ones*".[338] And the same on September 2, 2010, on the occasion of his four-year-report, where the President assured that "the total of marihuana, cocaine and heroine seized *is equal to giving 1,500 doses to every young Mexican* between the ages 15 and 30".[339] What seems to be guiding this confusion is an attempt to establish a direct link between the government's actions against DTOs and the protection of children from drug addictions. Calderón sought to convince the citizens that "(…) most of the Federal Government's effort in its fight against drug-trafficking is directed to rescuing kids and youngsters from the claws of addiction", [340] although no evidence suggested a relationship between the confiscation of drugs and reduced consumption in the country.

The sophism underlying these statements should become evident in light of the consumption figures presented above. It is deceitful to speak of these government seizures as having saved the Mexican youth from consuming such doses, when all data suggests that the vast majority of these substances would have made their way across the northern border to a more profitable market. Such a discursive alchemy is nonetheless useful in framing drug-traffickers as the most pressing danger to Mexico's young ones and in justifying the government's actions as successful and warranted ones.

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[337] Presidencia de la República, *El Presidente Calderón en la Sesión Almuerzo Individual Titulada "Riders on the Storm" …op. cit.*

[338] Presidencia de la República, *El Presidente Calderón en la Ceremonia Conmemorativa del XCV Aniversario de la Defensa del Puerto de Veracruz…* op. cit.

[339]Presidencia de la República, *Mensaje del Presidente Calderón con Motivo del Cuarto Informe de Gobierno*, (Sep. 2, 2010) http://calderon.presidencia.gob.mx/2010/09/el-presidente-calderon-en-su-mensaje-con-motivo-del-iv-informe-de-gobierno/

[340]Presidencia de la República, *El Presidente Calderón en la Presentación del Programa Nacional Contra las Adicciones…op. cit.*

By reconstructing Calderón's discourse we discover the existence of an ever-present enemy. This frame gained inertia by systematically portraying narcos as a force that – borrowing from Calderón's dictionary – poisons and enslaves the boys and girls of Mexico, intends to take over the State, and seeks to ultimately destroy the nation's future. Unlike criminals, enemies are combatants meant to be eliminated, for which the relevance of this frame escapes the symbolic realm and carries practical consequences. Such logic reinforces the "use of all of the State's force" and the "battle without quarter" to which President Calderón alluded in multiple occasions, and justifies (although not completely explains) the sharp increase in the ratio of civilian deaths per every civilian injured in clashes with the police and armed forces (1.6 in 2007 to 14.7 in 2012).[341] Calderón's "war against an abstraction [drugs] found an enemy (…) and fundamentally changed the rule of law to make engaging the enemy much easier".[342] A link may also be drawn between the portrayal of cartel members as enemies in a struggle for the nation's future and their treatment under the legal figure of *arraigo*, which as discussed earlier assimilates that of a POW status more closely than that of a criminal.

All in all, this section has set out to prove the existence of a frame that assigned organized criminals the 'semantic role' of enemies within the 'semantic field' known as the "Mexican Drug War". The next section will focus on the President's own semantic role as Commander in Chief and on the role of the armed forces as the nation's heroes.

[341] Carlos Silva Forné, Catalina Pérez Correa, Rodrigo Gutiérrez Rivas, *op. cit.,* p. 343
[342] Susan Stuart, *op. cit.,* p. 6.

3) Framing the President as the Commander in Chief and the Armed Forces as heroes

The last frame that makes up the deep narrative known as the "Mexican Drug War" relates to the President's role as Commander in Chief and to the exaltation of the armed forces as heroes in a war for the nation's survival. An important caveat should be made explicit from the outset: in arguing that soldiers and marines were framed as *heroes* I do not, in any way, intend to undermine the valor of those that have placed their lives in danger, guided by the will to build a better country and acting in accordance to the law. I do not, in other words, suggest that any of these men and women have not acted heroically while carrying out their duty, as I am sure many of them have. What this section underlines is the systematicity with which President Calderón addressed the armed forces as combatants defending the nation against an enemy, rather than as auxiliary forces pursuing criminals in law enforcement operations. In this sense, this frame is inextricably intertwined to the discursive construction of an enemy, for both semantic roles depend on each other for their effectiveness in the wider narrative. If organized criminals are the enemies, whoever confronts them is the hero. In order for there to be an "us vs. them" narrative, there needs to be an "us" and there needs to be a "them". It is important for both sides to be clearly demarcated; it is important for "the good" and "the bad" to be well defined: "let no one get this wrong, let no one confuse sides (…)", said the President in 2009 as complaints against the Armed Forces surfaced, "(…) the enemies of the country, the enemies of all Mexicans, (…) the enemies of all that aspire to keep living honestly and in an environment of certainty and security, the enemies are those

that challenge our institutions, [those] that threaten society (…)".[343] In other words, the enemies are *them* and not *us*. At the forefront of this fight "between good and evil (…)" would be the Commander in Chief.

On January 3, 2007, only "34 days after taking office, [Calderón] held the fifth meeting with elements of the armed forces",[344] where he broke with 61 years of post-revolutionary tradition by wearing a full military uniform and marching alongside armed forces officials.[345] On that moment Calderón became the first President since 1946 to publically dress in military attire, making a statement, whether wittingly or not, regarding his role as the Commander in Chief.[346] The symbolism was unmistakably powerful but nonetheless reaffirmed via speech: "(…) *I come today as Supreme Commander* to recognize your work, to exhort you to keep ahead with your firmness (…)".[347] He concluded his intervention authoritatively: "as your Supreme Commander (…)" he said, "(…)I instruct you to keep serving Mexico with justice, valor and integrity (…)".[348] The uniform and his self-reference as "Supreme Commander", paired with the repetition of the term "battle" five times, set the tone for the six years to come.

As has been done in the previous sections, a selection must be made from the available citations. Once again, Calderón devised a simple discursive formula that was to be constantly repeated throughout the years. On December 19, 2006, only eighteen days after taking office, Calderón addressed Navy officers "as Supreme Commander of the Armed forces [and]

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[343] Presidencia de la República, *El Presidente Calderón en el Desayuno con Motivo del Día del Ejército Mexicano*, *op. cit*.
[344] : Miguel David Norzagaray López, *op. cit.* p. 189.
[345]Claudia Herrera, Ernesto Martinez, *Vestido de military, Calderón rinde "tributo" a las fuerzas armadas*, La Jornada (Jan. 3, 2007).
[346]Leticia Robles de la Rosa, *Felipe Calderón fue, ante todo, un comandante en jefe*, Excelsior (November 30, 2011).
[347] Presidencia de la República, *El Presidente de México, Lic. Felipe Calderón, Durante la Visita y Saludo a las Fuerzas Federales… op. cit.*
[348] *Ibid.*

orer[ed] them to keep acting with a high sense of justice, discipline and delivery".[349] The structure would be the same all throughout: Calderón would remind the audience that he addressed them as "the Supreme Commander of the Armed Forces" and would follow with an order or instruction. Such was the case on the "Day of the Army" on February 19, 2007, where the president admonished that "the challenges that the nation today faces are big (…) for which, as Supreme Commander, I instruct you to double your efforts (…)".[350] A similar phrase would be repeated every year on the same date: "as your Supreme Commander", he said in 2008, "I instruct you to continue your task of serving the nation with loyalty (…) because only then can we defeat our motherlands' new enemies".[351] The same statement, with few tweaks, was pronounced on that same date in 2009,[352] 2010[353] and 2011.[354] Such formula was not restricted, of course, to the "Day of the Army". I identified this pattern, with very few, uncreative variations, on *forty-one occasions* throughout his presidency. In each of these opportunities the President would highlight his role as Supreme Commander, as to then 'order' or 'instruct' "to keep serving Mexico with integrity (…)",[355] "to show faith and unity

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[349] Presidencia de la República, *El Presidente de los Estados Unidos Mexicanos, Lic. Felipe Calderón, Durante el Desayuno de Fin de Año que Tuvo con Personal Naval de la Armada de México*, (Dec. 19, 2006). http://calderon.presidencia.gob.mx/2006/12/el-presidente-de-los-estados-unidos-mexicanos-lic-felipe-calderon-durante-el-desayuno-de-fin-de-ano-que-tuvo-con-personal-naval-de-la-armada-de-mexico/

[350] Presidencia de la República, *Palabras del Presidente Felipe Calderón Durante el Desayuno Conmemorativo del Día del Ejército*, (Feb. 19, 2007). http://calderon.presidencia.gob.mx/2007/02/palabras-del-presidente-felipe-calderon-durante-el-desayuno-conmemorativo-del-dia-del-ejercito/

[351] Presidencia de la República, *El Presidente Calderón en el Desayuno Conmemorativo del Día del Ejército*, (Feb. 19, 2008). http://calderon.presidencia.gob.mx/2008/02/el-presidente-calderon-en-el-desayuno-conmemorativo-del-dia-del-ejercito/

[352] Presidencia de la República, *El Presidente Calderón en el Desayuno con Motivo del Día del Ejército Mexicano,* (Feb. 19, 2009), *op. cit.*

[353] Presidencia de la República, *El Presidente Calderón en el Desayuno del Día del Ejército* (Feb. 19, 2010). http://calderon.presidencia.gob.mx/2010/02/el-presidente-calderon-en-el-desayuno-del-dia-del-ejercito/

[354] Presidencia de la República, *El Presidente Calderón en la Ceremonia del Día del Ejército Mexicano*, (Feb. 19, 2011). http://calderon.presidencia.gob.mx/2011/02/el-presidente-calderon-en-la-ceremonia-del-dia-del-ejercito-mexicano/

[355] Presidencia de la República, *El Presidente Calderón en la Entrega de Créditos Hipotecarios para las Fuerzas Armadas,* (July 23, 2007). http://calderon.presidencia.gob.mx/2007/07/el-presidente-calderon-en-la-entrega-de-creditos-hipotecarios-para-las-fuerzas-armadas/

(…)",[356] "to write new pages of glory in defense of the nation",[357] or any other exhortation of the sort. In consonance with this research, Norzagaray concludes that "Calderón turned out to be a lot more self-referential" than previous presidents, since the beginning "positioning himself as the maximum and unquestionable chief of the Armed Forces".[358] In a similar vein, Astorga observes that the President's "intention to truly exercise his attributions as Supreme Commander of the Armed Forces was explicit".[359]

Bourdieu's concept of fields and his work on the economic exchanges of language help capture the relevance of Calderón's role as the Supreme Commander of the Armed Forces. Language can be understood as a social field where agents occupy different positions and compete for symbolic power. Under this framework, the weight of language as symbolic capital is "not reduced to linguistic competences", but depends also on "recognition, institutionalized or otherwise".[360]In this sense, "anyone can emit a judgment or injunction, but the effect will not be the same if we're dealing with a judge or a common passerby".[361] This framework gains importance in the context of the "Mexican Drug War", where President Calderón enjoys a dominant status, making his discourse highly 'valued' in the Bourdieusian sense. His symbolic power is further heightened by the "Supreme Commander of the Armed Forces" frame, for it reaffirms his authority relative to other actors within the field. This framework complements the cognitive science theory of frames by inserting them into a logic

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[356] Presidencia de la República, *El Presidente Calderón en el Evento del Día de la Fuerza Aérea Mexicana*, (Feb. 10, 2010). http://calderon.presidencia.gob.mx/2010/02/el-presidente-calderon-en-el-evento-de-el-dia-de-la-fuerza-aerea-mexicana/

[355] Presidencia de la República, *El Presidente Calderón en la Ceremonia de Clausura y Apertura de Cursos del Sistema Eduativo Militar… op. cit.*

[358] Miguel David Norzagaray López, *op. cit.,* p. 217.

[359] Luis Astorga, *¿Qué Querían que Hiciera?... op. cit.,* p. 21.

[360] Pierre Bourdieu, *C'est Que Veut Dire Parler…op. cit.,* p. 10. ["La rapport de forces linguistique ne se réduit donc pas aux compétences linguistiques en presence, il est pondéré par la detention d'un capital symbolique par les agents, 'c'est à dire de la reconnaissance, institutionnalisée ou non (…)"].

[361] *Ibid*. p. 10. ("Aunsi, n'importe qui peut émettre un jugement ou une injunction, mais l'effet, le profit ne seront pas le mêmes selon qu'il s'agit d'un juge ou d'un simple passant").

of competition under Bourdieu's mechanics, whereby "framing power" – as Pan and Kosicky call it – is established through mutually-determined relations within the linguistic field.[362] The Supreme Commander's discourse has greater "market value" and has therefore greater "framing power" than that of other actors.

It is also worth expanding on the framing of the Mexican Armed Forces as heroes. On the one hand they are framed as such in contradistinction to organized criminals, who were adeptly framed as 'national enemies'. Take the following as an example: in contrast to "the enemy that (…) stagnates the future of many people" and that "place[s] the future of the country in danger",[363] the men and women of the Armed Forces "safeguard the hope of all Mexicans for a better future".[364] On the other hand, the Mexican Armed Forces are posited as heroes by analogy, mainly through comparisons to combatants in emblematic battles of Mexico's past and to international soldiers in contemporary wars such as that of Iraq. We had made this point in the examples of the French invasion of 1862 and the American invasion of 1914 above. In remembrance of the "Battle of Puebla" for example, Calderón compared the olden invaders to "the new enemies that threaten our future",[365] and told the armed forces that "today our nation demands of Mexicans to form a single front against the enemies of Mexico; like the brave [soldiers] of the Battle of Puebla".[366]Then on September 12, 2008 Calderón recognized that "today our country wages a very distinct war to that faced

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[362] Zhongang Pan and Gerald M. Kosicky, *op. cit.,* p. 35-66.
[363] Presidencia de la República, *Palabras del Presidente Calderón Durante el Desayuno Conmemorativo al Día de la Fuerza Aérea Mexicana… op. cit.*
[364] Presidencia de la República, *El Presidente Calderón en la Ceremonia Conmemorativa del XCVI Aniversario de la Defensa del Puerto de Veracruz y Jura de Bandera de los Cadetes de Primer Año de la Escuela Naval Militar*, (April 21, 2010). http://calderon.presidencia.gob.mx/2010/04/el-presidente-calderon-en-la-ceremonia-conmemorativa-del-xcvi-aniversario-de-la-defensa-del-puerto-de-veracruz-y-jura-de-bandera-de-los-cadetes-de-primer-ano-de-la-escuela-naval-militar/
[365]Presidencia de la República, *El Presidente Calderón en la Ceremonia Conmemorativa al CXLV Aniversario de la Batalla del 5 de Mayo…op. cit.*
[366] *Ibid.*

by insurgents in 1810,[367] a war distinct to that of the cadets of the Military School 161 years ago; *but* the effort and the valor," he said, "the rectitude, the dignity, the loyalty and the vocation of service of our soldiers is the same (…)".[368] These comparisons equate today's soldiers – in theory carrying out police functions – to those considered as heroes in history books for having "fought to defend the sovereignty of our country"[369] against full-out invasions.

In the second half of his term President Calderón opted for more modern comparisons. On December 1, 2010 he stated that in contrast to the Americans in Iraq, "we [Mexicans] are not looking for war thousands and thousands of kilometers away (…)". Instead, he declared, "we send our soldiers and marines to defend our land and what is at stake is our families, and its our people that we defend".[370] A similar yet less explicit allusion to the American intervention in Iraq was made eleven months earlier, when the President underlined that "this is not a war that we're waging in a foreign land, looking to keep a resource that is not ours, be it petroleum or anything else, nor trying to free another nation". In turn, "(…) it is a fight in which the security, [and] the tranquility of Mexican families is at stake, in our homes and

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[367] He's alluding to Mexico's war of Independence.

[368] Presidencia de la República, *El Presidente Calderón en la Ceremonia de Clausura y Apertura de Cursos del Sistema Eduativo Militar… op. cit.*

[369] Presidencia de la República, *El Presidente Calderón en el 98 Aniversario de la Defensa del Puerto de Veracruz*, (April 21, 2012). http://calderon.presidencia.gob.mx/2012/04/el-presidente-calderon-en-el-98-aniversario-de-la-defensa-del-puerto-de-veracruz/

[370] Unfortunately, this speech can no longer be found in the government's database for unknown reasons. The statement is instead transcribed (and translated) from Carlos Bravo Regidor's work, written not long after the statements were made. Carlos Bravo Regidor, *Una ayudadita de memoria para Felipe Calderón*, La Razón (Jan. 28, 2011). ["Algunas veces se ha comparado lo que nosotros estamos haciendo en materia de seguridad con este tema y se empezaba a comparar, por ejemplo, que estaba el Gobierno, pues para qué pelear una guerra como la de Irak, y que nuestras tropas era como haberlas mandado a Iraq y que era el mismo problema que tuvo el Gobierno de Estados Unidos, de mandar soldados a Iraq, etcétera. No, señores. Nosotros no estamos buscando una guerra a miles y miles de kilómetros de aquí. Nosotros no estamos en un enredo de carácter político internacional y diplomático. Nosotros enviamos a nuestros soldados y a nuestros marinos a defender nuestra tierra y la que está en juego son nuestras familias, y es nuestro pueblo al que defendemos"].

in our cities".[371] Not only is the "Mexican Drug War" compared to internationally recognized armed conflicts, but it is also affirmed to be a more just or legitimate war, chiefly for being fought in "our cities" and in the name of "our people", rather than "thousands and thousands of kilometers away" and for questionable motives. These statements thus complement and complete the semantic role of 'heroes' assigned to the Mexican Armed Forces in Calderón's public discourse.

Several conclusions stem from the three frames hereby purported: (1) The much repeated 'cost formula' likened the loss of human lives to a Law of Armed Conflict logic by referencing deaths in terms of *necessary* and *proportional* sacrifices relative to "a war of this dimension (…)".[372] The same could be said about explicit comparisons to wars of Mexico's past and to contemporary armed conflicts such as that in Iraq. (2) Calderón fabricates an enemy that threatens Mexican institutions, poisons and enslaves Mexican children, and overall endangers the country's future, thus eliciting an aggressive response reflected in the country's lethality rate. This enemy is portrayed as a combatant rather than as a criminal, also explaining the acceptance of figures such as that of *arraigo*. (3) Calderón's self-reference as the Supreme Commander reflects the importance of the war narrative in presidential speech, enhances his authority and potentiates his frame-setting power (especially in martial contexts). (4) The Mexican Armed Forces are framed as heroic combatants in an armed conflict rather than as public security agents – role that would under no means make these individuals any less heroic. (5) These frames are tightly interconnected and inevitably overlap

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[371] Presidencia de la República, *El Presidente Calderón en la Comida de Trabajo con Motivo de la XXI Reunión de Embajadores y Cónsules de México*, (Jan. 8, 2010). http://calderon.presidencia.gob.mx/2010/01/el-presidente-calderon-en-la-comida-de-trabajo-con-motivo-de-la-xxi-reunion-de-embajadores-y-consules-de-mexico/

[372] Presidencia de la República, *El Presidente Calderón en la Comida con Motivo del Foro el Economista…op. cit.*

with each other in some ways, nonetheless conforming a coherent whole known as the "Mexican Drug War". (6) The war narrative is also achieved via the relentless repetition of the terms 'war', 'battle', and 'fight'/ 'struggle', which are ubiquitous throughout the construction of all three frames. (7) Lastly, in the form of a general conclusion, I argue that these frames, together conforming "Mexican Drug War" narrative, allowed the Mexican government to frame its actions within the IHL realm without undergoing the legal and political costs attached to being in an armed conflict.

The next section will analyze the language used in key official documents, including the National Development Plan ("Plan Nacional de Desarrollo") and the National Program for Public Security ("Programa Nacional de Seguridad Pública"). Do these security-related documents reinforce the language propounded in public discourse and strengthen the previously outlined frames? The answer is not straightforward: drug-trafficking is portrayed as a grave threat to national security but without ever assimilating it to a war, as was done in public discourse.

B. Language in Official Documents

We are once more drawn to the initial question of why did Felipe Calderón deny referring to violence in the country as a war on January 12, 2011. A member of the audience inquired on the President's repeated use of the term 'war', to which Calderón responded:

> "I have not used it and I can invite you to revise the entirety of my public and private records. You say that I chose the concept of war. No. I did not choose it.

I have permanently used the terms fight against organized crime and fight for public security, and I will keep using these terms".[373]

Two observations are verifiable and for that uncontestable: the first is that the President spoke of a war in several occasions, a war composed of casualties, enemies and heroes; the second is that he did not admit to employing such a term, despite overwhelming evidence showing that he did. What remains unknown is the reason behind this inconsistency. That is, the reason behind doing one thing and pretending to do another. A viable hypothesis is that the government had word of the accusations to be brought forward before the ICC eleven months later and that it thus tried to distance the President from the war narrative. Such assertion, however, cannot be qualified as more than mere conjecture, made mostly on the basis of speculation. The epistemological roadblock reached at this instance is unsurmountable: declarations, actions and statements can be observed, but intentions, beliefs and motivations cannot. There is evidence for what Calderón said and did, but any claim about the reasons guiding these statements is unavoidably limited to what Max Weber called *verstehen*, that is, to "the interpretation of meaning through empathetic understanding and pattern recognition (…)".[374]

An indispensable piece of the puzzle for such an interpretation to be more complete is an overview of the language utilized in security-related documents related to security during Calderón's administration. The President's claim of having "permanently used the terms

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[373] Presidencia de la República, *Segunda Intervención del Presidente Calderón en Diálogo por la Seguridad. Hacia una Política de Estado*, (Jan. 12, 2011). http://calderon.presidencia.gob.mx/2011/01/segunda-intervencion-del-presidente-calderon-en-dialogo-por-la-seguridad-hacia-una-politica-de-estado/

[374] Judith Goldstein and Robert O. Keohane, *Ideas and Foreign Policy: Beliefs, Institutions and Political Change*, (Ithaca: Cornell University Press 27).

fight against organized crime and fight for public security (…)", while false in public discourse, may hold true for word choice in official documents. The National Development Plan ("Plan Nacional de Desarrollo"), the National Program for Public Security ("Programa Nacional de Seguridad Pública"), and the Sectorial Program for National Defense ("Programa Sectorial de Defensa Nacional") reveal a distinct pattern as compared to that found in the President's speeches. These documents were chosen for providing the clearest window into Calderón's security strategy and for, not coincidentally, being the ones in which the term 'narcotraficantes' (drug traffickers) is the most abundant.

The argument purported in this section is that the language imprinted in official documents precludes the classification of Mexico's state of violence as an armed conflict, mainly by avoiding explicit reference to the frames above outlined. Emphasis is therefore placed not on what these documents say, but rather on what they omit. What becomes interesting is not that official documents employ the terms "fight against organized crime" and "fight for public security", but rather that they avoid the terms 'war', 'enemy', 'Supreme Commander of the Armed Forces', and the "cost formula" altogether. Berman's theory of strategic oscillation and cognitive theories on framing converge at this point. We can observe the oscillation between a war-laden rhetoric, advanced in public discourse, and a more nuanced (yet nonetheless aggressive) organized crime language, instilled in official documents at the federal level. An *a priori* critique to be made of this compare-and-contrast method is that programmatic, administrative and legal documents are different in nature to political speeches, for which shifts in the language utilized should not be attributed to strategic considerations but rather to inherent differences between written and spoken language. This is a valid concern that should be addressed but that does not suffice to nullify the applicability of Berman's strategic instrumentalization of law to Mexico's case-study.

For strategic instrumentalization to be pertinent we must demonstrate that public and official discourse allow for the oscillation between IHL and IHRL by conflating war and peace to convenience. Any inherent differences between public discourse and official documents may enhance this instrumentalization rather than hinder it. Moreover, the official documents analyzed below should reveal that dissimilarities with public discourse go beyond what could be attributable to intrinsic particularities of either written or spoken language.

Key passages from each document will be reviewed separately but a single conclusion will be drawn for all of them due to their overarching commonalities. The first document to be analyzed is the National Development Plan (2007-2012), which was defined at the time as "a clear and viable strategy to advance Mexico's transformation (…)".[375] As the very title suggests, this document outlined the administration's development plan for the country, it is therefore the most general overview of the President's plan for transforming the nation during his time in office. It revolves around five main axes: (1) Rule of Law and security, (2) Competitive economy and job generator, (3) Equality of opportunity, (4) Environmental sustainability, and (5) Effective democracy and responsible foreign policy. Only the first of these is relevant for our purpose; it covers the administration's plan of action on corruption, impunity, trust in public institutions, human rights protections, defense of the nation's sovereignty, and most importantly, organized crime.[376]

A first observation is that the terms 'war', 'enemy' and 'Supreme Commander of the Armed Forces' are not included in the entirety of the 323-page document. This is not to say that the National Development Plan is devoid of any allusion to organized crime as a great threat to the nation's sovereignty and to its citizens. On the contrary, drug-trafficking is

[375] Poder Ejecutivo Federal, *Plan Nacional de Desarrollo 2007*-2012, (2007): 11.
[376] *Ibid.* 41- 81.

explicitly referred to as a threat to national security. The document defines drug traffickers as "one of the most harmful manifestations of organized delinquency, not only for the high level of violence that they imply, but also because of the threat they represent to the physical, emotional, and moral health of an important number of Mexicans".[377] Drug traffickers also "seek to diversify their channels of distribution and amplify the number of potential addicts, as well as invade public spaces such as schools, parks and recreation sites".[378] This is supported by the empty fact that "the number of addicts to a drugs *or to alcohol* has increased in the country", [379] without venturing to give estimates as was done in public discourse. Finally, drug-trafficking "challenges the State and becomes a strong threat to national security".[380]

The National Public Security Program (2008-2012) defines the necessary mechanisms to achieve the security objectives put forward in the National Development Plan, placing particular attention on the role of the police forces. There is once again no mention of a 'war', 'enemies', or 'costs' in terms of human lives. It does, however, restate the objective to "regain the State's strength and security (…) through the frontal combat of drug trafficking (…)",[381] without specifying what is meant by this. In contrast to the National Development Plan, the National Public Security Program does not mention the existence of a 'threat' nor does it speak of levels of drug consumption in the country. The document places emphasis on its commitment to "unrestricted respect of human rights",[382] a striking statement in light of the

[377] *Ibid*., p. 46.
[378] *Ibid*., p. 46-47.
[379] *Ibid*.
[380] *Ibid*., p. 58.
[381] Secretaría de Seguridad Pública, *Decreto por el que se aprueba el Programa Nacional de Seguridad Pública 2008-2012,* Diario Oficial de la Federación (March 23, 2009).
[382] *Ibid*.

President's declared conviction of "(…) using all of the State's force"[383] and willingness to undergo the necessary costs to winning this 'war'.

At last, the Sectorial Program of National Defense (2007-2012) "specifies the objectives, strategies and lines of action of the Army and Air Force to achieve its National Defense Objectives (…)", including the "combat against drug trafficking and organized delinquency".[384] It refers to an "integral combat against drug-trafficking" through the capacitation of troops, the betterment of military technology, and the "mining of the drug trafficker's economic base by cyclically impeding drug harvests".[385] Pertaining to this last point, the Sectorial Program of National defense sets the goal of "diminishing the area of sowing drugs by 70%".[386] The document reaches its most belligerent tone when stating that the Armed Forces will "(…) recover the spaces that have been sequestered by drug traffickers and other delinquent organizations (…)".[387] Alike other governmental documents, it does not employ any term that explicitly reinforces the war narrative fabricated in public discourse.

These documents reinforce the notion of drug trafficking as a grave threat to national security and feed the unfounded fear of increased consumption in the country, yet do so without reifying the war narrative constructed throughout public discourse. The language utilized in these documents thus suggests the tacit rejection of war. Unlike what Calderón claimed to do in public discourse, these documents indeed limit themselves to the expressions of "fight against organized crime" and "fight for public security". The omission of bellicose vocabulary is not accidental nor is it the product of limitations to legal, programmatic or

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[383] Presidencia de la República, *El Presidente Calderón en el Evento Acciones Sociales en Baja California…op. cit.*
[384] Secretaría de la Defensa Nacional, *Decreto por el que se aprueba el Programa Sectorial de Defensa Nacional 2007-2012*, Diario Oficial de la Federación.
[385] Secretaría de la Defensa Nacional, *op. cit.*
[386] *Ibid*.
[387] *Ibid.*

administrative language. It is rather the product of a policy decision, chiefly that of rejecting the NIAC classification.

Colombia's clear-cut classification as a NIAC provides an apt comparison to the Mexican case. The Colombian equivalent of the National Development Plan for the same time-period reveals that war-rhetoric is not a prerogative of public discourse and shows how word-choice is in fact the reflection of a deeper policy choice, in this case that of whether to be recognized as an armed conflict or not. Colombia's Strategy for Strengthening Democracy and Promoting Social Development (2007-2013) speaks of a "war on drug trafficking", a "war on terrorism", a "war on narco-terrorist groups", and a "war on the global drug problem".[388] Similarly, numerous laws and presidential decrees make explicit mention of an armed conflict in the country.[389] There is no rift between public discourse and official documents in Colombia, for the existence of an armed conflict is never negated nor camouflaged. All this to say that the differences between written and spoken language in Mexico's drug-related rhetoric are not due to inherent variations in official language *vis à vis* public discourse. They are rather the means through which the "sweet spot" between 'war' and 'not war' is achieved. They are the mechanism through which the Mexican optimum is attained.

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[388] National Planning Department (DNP) and Department of Justice and Security (DJS), *Colombia's Strategy for Strengthening Democracy and Promoting Social Development (2007-2013)*, (Feb. 2007).

[389] For recent examples see: Ministerio de Justicia y del Derecho, *Decreto Número 298 Por el cual se efectúa el nombramiento de Directora de la Unidad de Búsqueda de Personas dadas por Desaparecidas en el contexto y en razón del conflicto armado,* (Feb. 19, 2018). http://es.presidencia.gov.co/normativa/normativa/DECRETO%20298%20DEL%2019%20FEBRERO%20DE%202018.pdf ; Ministerio de Hacienda y Crédito Público, *Decreto 292 "Por el cual se modifica el articulo 2 del Decreto 1915 de 2017 que establece la transitoriedad del banco de proyectos de inversión en las Zonas más Afectadas por el Conflicto Armado*, (Feb. 15, 2018). http://es.presidencia.gov.co/normativa/normativa/DECRETO%20292%20DEL%2015%20FEBRERO%20DE%202018.pdf ; El Congreso de Colombia, *Acto Legislativo No- 01 "Por medio del cual se crea un título de disposiciones transitorias de la constitución para la terminación del conflicto armado y la construcción de una paz estable y duradera y se dictan otras disposiciones",* (April 4, 2017). http://es.presidencia.gov.co/normativa/normativa/ACTO%20LEGISLATIVO%20N%C2%B0%2001%20DE%204%20DE%20ABRIL%20DE%202017.pdf

At this point we have unearthed the basic dynamics behind the strategic instrumentalization of international law. I have proposed the existence of three frames that together make up the "Mexican Drug War" narrative, likening violence in the country to actions regulated under IHL. These frames are accompanied by an implicit rejection in official documents of the legal classification of an armed conflict, amounting to a confusion that is politically and legally favorable as according to the costs and benefits outlined in the previous chapter. In the form of a summary, the government has benefited from a wider range of action inasmuch the use of force and detentions are concerned, while being able to shield itself from crimes of war accusations along with the other political and economic costs that recognition of a NIAC implies. The legal ambiguity attached to phenomena of drug-related violence allows for political manipulation, which I argue in Mexico was achieved through the use of language in public discourse and official documents throughout Calderón's administration. The question remains of whether the same dynamic was followed by Calderón's successor, President Enrique Peña Nieto (20012-2018). The next section will argue that Peña Nieto's administration combined Calderón's security policy with an attenuated discourse, resulting in a "silent war". This approach becomes patent in the Internal Security Law, passed on December 2017.

C. Continuity or Rupture? Peña Nieto's Silent War (2012-2018)

The purpose of this section is to compare Peña Nieto's security strategy to that of Calderón. I will argue that although there is discontinuity in discourse there is an underlying continuity in policy. In other words, Peña Nieto continued the militarization of the country as done by

Calderón but did so without referring to a war in public discourse. Most importantly, President Peña Nieto's administration institutionalized Calderón's failed security policy by way of the highly controversial Internal Security Law.

The most salient difference in President Enrique Peña Nieto's approach to the fight against drug cartels is his distancing from the martial rhetoric of which his predecessor abused. The reasons behind this rupture cannot be ascertained but a series of factors should be considered as plausible explanations, among which Calderón's accusations before the ICC in 2011 cannot be discarded. Letting go of the war narrative was also an intelligent way of turning the "Mexican Drug War" into "Calderón's war", as it is now called by many.[390] By the time Peña Nieto took office there was already an important number of critics to Calderón's strategy,[391] whose ultimate result had been an unprecedented increase in the level of violence in the country without any measurable improvement in the rule of law or life quality of its citizens to make up for it.[392] There was no reason for Peña Nieto to appropriate the war label and thus inherit *ipso facto* the criticisms that Calderón had accumulated throughout his six years in office due to this very approach.

Peña Nieto's administration thus brought with it a sharp rupture in drug-related rhetoric. He erased all allusions to a war, all mentions of an enemy, and all references to loss in human life from public discourse. He did away with the frames brought forward by Calderón, consequently breaking with the "Mexican Drug War" narrative. His administration

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[390] For examples see: Saúl Hernández, *Las 5 Cosas que no sabías y tienes que saber de la guerra en el periodo de Felipe Calderón*, Animal Político (Jan. 28, 2007); *La Guerra de Calderón Archivos*, Proceso http://www.proceso.com.mx/category/la-guerra-de-calderon ; Raymundo Riva Palacio, *La Guerra de Calderón*, El Financiero (Aug. 15, 2014); Associated Press, *La guerra de Felipe Calderón solo aumentó la violencia: CIDE*, Aristegui Noticias (Jan. 31, 2017).

[391] Elisa Alanís, *Fin de la 'guerra' de Calderón. Ganaron los narcos*, El Universal (Dec. 9, 2016); Rubén Aguilar y Jorge Castañeda, *La guerra antinarco, el gran fracas de Calderón*, Proceso (Oct. 17, 2012).

[392] Rubén Aguilar y Jorge Castañeda, *Los saldos del narco…op. cit.*

announced the creation of a National Program for the Social Prevention of Violence and Delinquency ("Programa Nacional de Prevención de la Violencia y la Delincuencia") – which would "address the social roots" of violence – and announced the creation of the National Gendarmerie ("Gendarmería Nacional"), which would be a civil police force (with military training) meant take over the role of the Armed Forces in the fight against DTOs.[393]

With less than one year to go of his administration, Peña Nieto's National Gendarmerie, considered by international observers at the time as "the most tangible aspect of [his] strategy",[394] cannot be qualified as anything other than a failure. Originally thought to be composed of 40,000 effectives, the Gendarmerie recruited less than 5,000 members, [395] whose deployment in fact increased deaths in 50% of the federal entities in which it intervened.[396] The Gendarmerie has simply become another branch of the federal police, failing to substitute the Armed Forces in the combat against organized crime, which continue their regular operations throughout the country.[397]

In this sense, Peña Nieto's security strategy can be better understood as a continuation of Calderón's "Mexican Drug War", the only difference being that Peña Nieto has kept silent about it, avoiding the frames that Calderón exploited. I argue that what has ultimately occurred is the preservation of Calderón's security strategy, albeit in a less outspoken fashion. Peña Nieto thus achieved a subtler "instrument" through which to exploit the shortcomings of international law, this being the aforementioned Internal Security Law. Whereas Calderón

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[393] José Roberto Cisneros, *Los 3 ejes de seguiridad de Peña Nieto: ¿Estrategia diferente o déjà vu?*, Expansión (Dec. 19, 2016).
[394]Associated Press, *The Feds ride out: Mexico gets a new police force. It needs a new policing strategy*, The Economist (Aug. 23, 2014).
[395] Associated Press, *Gendarmería de Peña Nieto, un fracaso: The Economist*, El Economista (March 17, 2014).
[396] Jorge Monroy, *Gendarmería, sin impacto tangible contra delitos: ASF*, El Economista (June 28, 2017).
[397]Jorge Carrasco Araizaga, *Fracasada la Gendarmería Nacional, ahora una policía fronteriza*, Proceso (Nov. 29, 2017).

instrumentalized the burry limits between IHL and IHRL through public discourse, Peña Nieto's administration conflated peace and war in a binding document, thus perpetuating Calderón's security strategy and legalizing the undefined militarization of the country.

A complementary factor to take into account is the "stickiness" of frames. That is, the pervasiveness of mental frames once these have successfully created a coherent narrative for interpreting independent events. Although "research has yet to shed light on the potential impact of sequentially encountered frames", most studies suggest that "once an individual conceptualizes or labels an object in a particular way, that label can stick, making it difficult to reconceptualize the concept differently".[398] This becomes pertinent regarding the question of continuity and rupture in drug-related speech because it helps us probe the impact of Peña Nieto's discursive shift, especially if assuming that the "Mexican Drug War" label was already well-instilled within the population's collective unconscious. Given the likely pervasiveness of frames according cognitive scientists,[399] we may theorize that President Peña Nieto's linguistic prudence was in fact ineffectual in transforming the citizens' interpretation of witnessing the army and marine patrol the streets on a daily basis. Following this reasoning, the "Mexican Drug War" remained so despite Peña Nieto's passive attempt of distancing the country from this narrative.

Another possibility thus arises, one whereby the instrumentalization of law in President Peña Nieto's administration is achieved through the aggregate effect of the Internal Security Law *and* the sticky frames inherited by Calderón, an explanation that is in my view more likely. In any case, the Internal Security Law is sufficient in itself in exposing the conflation

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[398] Alison Ledgerwood and Amber E. Boystun, *Sticky Prospects: Loss Frames are Cognitively Stickier than Gain Prospects*, Journal of Experimental Psychology (2013): 2.
[399] *Ibid.*

between war and 'no war'. It amounts, in my view, to the codification of Calderón's security strategy; a strategy conveniently oscillating between IHL and IHRL, which – although it may be too early to tell – should result in the continued aggravation of human rights in the country. In the meanwhile, a succinct analysis of this law should uncover the continuity between Calderón's and Peña Nieto's military approach, despite their discursive differences.

The Internal Security Law, passed by congress amidst fervent protests, states as its purpose to "regulate the functions of the State to preserve internal security, as well as to establish the bases, procedures and modalities of coordination between the Federation, the federal entities and the districts [*municipios*] in this matter".[400] The passing of this law can be explained by two interrelated factors: the first and most important relates to an issue of (in)constitutionality. Article 21 of the Mexican constitution states that "public security institutions must be of a civilian character (…)",[401] meaning that matters related to public security must be dealt with by the police and other civilian bodies; not by the army nor the marine.[402]

President Calderón was well aware of this constitutional conundrum and sought to to bypass it in 2009 by signing a decree that would reform the Law of National Security as to include a new figure called a "declaration of the existence of an affectation of internal security",[403] which some commentators at the time said would "legalize the illegal".[404]

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[400] Ley de Seguridad Interior, *op. cit.*
[401] Constitución Política de los Estados Unidos Mexicanos, Art. 21.
[402] Article 21 defines public security as comprising the "prevention of crimes; the investigation and persecution to make it effective, and the sanctioning of administrative infractions, in the terms st forward by the law (…). The actions of public security institutions will be directed by the principles of legality, objectivity, efficiency, professionalism, honor, and respect to human rights as recognized in this constitution".
[403] Presidencia de la República, *Oficio con el que remite la siguiente iniciativa: Proyecto de decreto por el que se reforma la ley de seguridad nacional*, (April 21, 2009).
[404] Cecilia Barría, *Calderón propone reformar Ley de Seguridad*, BBC (April 24, 2009); Marcos Pablo Moloeznik, *Apuntes Críticos Sobre Las Más Recientes Iniciativas de Reformas Legislativas del Presidente Felipe Calderón Hinojosa en Materia de Seguridad y Modelo Policial,* Letras Jurídicas N. 12 (2011).

Calderón's proposal – while very similar to the law passed in 2017 – was rejected by congress. President Calderón's constitutional argument relied in turn on a jurisprudential thesis by the Supreme Court which interpreted article 129 of the Constitution as authorizing *auxiliary* actions by the Armed Forces when and as solicited by civil authorities.[405] Calderón concluded his time in office under this constitutional quandary, relying on the Supreme Court ruling to justify the deployment of the army across the country. The Internal Security Law would eventually resolve this issue in a similar way to what Calderón tried to do in 2009.

The second factor that contributes to explaining the passing of the Internal Security Law is the unregulated nature of military action when relating to public security. Simply put, military confrontations against drug cartels were not clearly delineated under the law, leading the very members of the Armed Forces to be unsure about the legality of their actions. In a clear example of this, twenty members of the Armed Forces that were charged for human rights violations wrote a public letter directed at President Peña Nieto. "We were used by the Mexican State", declared the military men. "We were trained for one function and ordered to do a very different one (…)". They added that they were "(…) used by the Mexican State in a failed experiment that resulted in a great number of *collateral victims* and dozens of low-ranking soldiers in prison", and affirmed that "Mr. Felipe Calderón, ex-Supreme Commander of the Armed Forces declared war on drug cartels, it was a very unfortunate term". [406] General Salvador Cienfuegos, Secretary of Defense under President Peña Nieto, acknowledged that "soldiers are beginning to doubt on whether to continue to fight these groups, [aware of] the

[405] Tesis Jurisprudencial num. P/J. 38/2000 de Suprema Corte de Justicia de la Nación
[406] Associated Press, *"Fuimos usados epor el Estado Mexicano en un fallido experimento", acusan militares*, Proceso (Jan. 2, 2017).

risk of being processed for a crime that has to do with human rights".[407] This is related, declared Cienfuegos, to the fact that "we [soldiers] did not study to persecute delinquents".[408] It is in this context that the Secretary of Defense lobbied for a law that would provide the actions of military-men involved in security and law-enforcement tasks with a clear framework separating what is allowed from what is not; a law that would eliminate the uncertainty attached to waging war under the guise of policing by labeling military participation as "internal security actions", rather than as public security ones.

Internal security actions are defined in the Internal Security Law as those "realized by federal authorities, including the Armed Forces, (…) oriented to identifying, preventing, attending, reducing and containing risks and threats to interior security".[409] In turn, *interior security* is defined in a similar fashion to that proposed by Calderón eight years earlier, as a "condition provided by the Mexican State that safeguards the permanence and continuity of its levels of government and institutions, as well as [safeguarding] national development by way of the preservation of the constitutional order, the rule of law and democratic governability in the entirety of the national territory (…)".[410] Legal analyst Alejandro Madrazo Lajous observes that this law employs "vague definitions (…) and imprecise verbs that easily overlap with the tasks that [the military] already carries out and that already fall under the constitutional definition of public security".[411] Article 18 exposes the law's objective of forcefully differentiating internal security from public security in an attempt to circumvent the constitution: "under no circumstance (…)" it warns, "(…) shall the actions of

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[407] Associated Press, *Militares no estudiamos para perseguir delincuentes: titular de Sedena pide regresar a los cuarteles*, (Dec. 8, 2016).
[408] *Ibid.*
[409] Ley de Seguridad Interior, *op. cit.*
[410] *Ibid*.
[411] Alejandro Madrazo Lajous and Jorge Javier Romero Vadillo, *Seguridad Interior: La regresión*, Nexos (Feb. 2018).

internal security carried out by the Armed Forces be considered as of public security".[412] It is at this point that the law's cynicism becomes impossible to ignore, for "year after year military activities have been explicitly registered as *public security* tasks in the [nation's] budget".[413] Madrazo's interpretation of the law can be therefore summarized in that it "does not prohibit the Armed Forces from carrying out tasks of public security, it prohibits others from calling [these tasks] by their name".[414] This captures, in my view, the substance of the Internal Security Law for what it is: a stratagem meant to render the use of military force constitutional by simply calling it internal security instead of public security. The CNDH agrees in that the "extremely ample and ambiguous definition of internal security allows any conduct to be configured as a risk to internal security, without any objective criteria but rather a generic and discretional faculty".[415]

There are also other, more specific issues for which the law has been heavily criticized. These include preoccupations regarding the flexibility with which the President may make use of the armed forces and concerns about the collection of private information by federal forces for intelligence purposes. Concerning the first point, Article 11 establishes that "the President of the Republic may order by him/herself (…) the intervention of the Federation in the realization and implementations of *internal security actions* in the territory of a state (…)".[416] Similarly, Article 16 deems that "in those cases in which the *threats to internal security* represent a grave threat to the integrity of people or the functioning of fundamental government institutions, the President of the Republic (…) may order immediate action by

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[412] Ley de Seguridad Interior, *op. cit.*
[413] Alejandro Madrazo Lajous and Jorge Javier Romero Vadillo, *op. cit.*
[414] *Ibid.*
[415] Comisión Nacional de los Derechos Humanos, *Posicionamiento de la CNDH ante la inminente discusión de la propuesta de ley en material de seguridad interior en el Senado de la República*, (Dec. 4, 2017). Available at: http://www.cndh.org.mx/sites/all/doc/Comunicados/2017/Com_2017_411.pdf
[416] Ley de Seguridad Interior, *op. cit.*

(…) the Armed Forces".[417] Opposition members presented an appeal before the Supreme Court arguing that these articles allow for the President to make unrestricted use of the Armed Forces and consequently infringe on the rights of states as according to the federal pact enshrined in the Constitution.[418]

In what concerns the governmental disposal of private information, the National Institute for Transparency and Access to Information (INAI) appealed the Internal Security Law before the Supreme Court on the bases of its Articles 9 and 31. Article 9 posits that "the information related to the application of the present law will be considered of national security",[419] therefore implying that it can be withheld from public scrutiny. INAI denounces this as an "undue exception to [the right] to access public information".[420] On the other hand, Article 31 establishes that "in matters of internal security, federal authorities and autonomous organs must provide the information required by the authorities that intervene in the terms of the present law".[421] The preoccupation here lies in that not all information can be simply handed in to the intervening authorities, for certain personal data is protected under the law and requires the consent of those concerned.

In response to these and other issues, a group of ten international NGOs have formed a coalition with the purpose of monitoring the state of human rights in the country following the approval of the law.[422] These groups announced the creation of an International

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[417] *Ibid.*
[418] Associated Press, *Senadores presentaron acción de inconstitucionalidad contra Ley de Seguridad; quebranta el pacto federal, argumentan*, Aristegui Noticias (Jan. 19, 2018).
[419] Ley de Seguridad Interior, *op. cit.*
[420] Associated Press, *INAI impugna ante la Corte 2 artículos de la Ley de Seguridad Interior*, Aristegui Noticias (Jan. 22, 2018).
[421] Ley de Seguridad Interior, *op. cit.*
[422] José Meléndez, *NGOs create International Human Rights Observatory on Mexico,* El Universal English (Dec. 20, 2017). The coalition is comprised of Amnesty International (AI), the Center for Justice and International Law (CEJIL), the Due Process Law Foundation (DPLF), Peace Brigades International (PBI), the German Coordination for Human Rights in Mexico, the Washington Office for Latin America (WOLA), the

Observatory on Mexico as a direct response to the Internal Security Law, which they warned is a "turning point for a country already reeling from unprecedented levels of violence and widespread human rights violations".[423] The coalition concludes that the "militarized strategy has terrorized Mexico's population for over a decade through well-documented cases of extrajudicial execution, enforced disappearance, torture, including sexual violence, amongst other human rights violations".[424] As has been posited throughout, the real danger of this law lies in the perpetuation of these violations as a consequence to the legalization of military intervention. Such danger can be best comprehended as the formalization of Calderón's failed security strategy, which is founded on the deployment of the Armed Forces as the main pillar to fighting DTOs.

As we have seen throughout the chapter, the Armed Forces have been granted war-like faculties since 2006. Calderón began the "Mexican Drug War" by combining military operations with a bellicose rhetoric, but without achieving a sound constitutional justification. Peña Nieto continued this 'war' without the discursive tools employed by Calderón (although probably benefiting from the sticky narrative he inherited), but rather relying on a legal foundation that Calderón could not pass under his presidency. Through different means, both Presidents were able to navigate – maybe unwittingly – the turbid waters of international law, ultimately arriving at an optimum where both IHL and IHRL are applicable. In the form of an overview, the next chapter will draw a link between this "optimum" and the concrete costs it carries in terms of human rights violations.

Open Society Justice Initiative (OSJI), the Organización Mundial Contra la Tortura (OOMTC) and the Robert F. Kennedy Human Rights group.

[423] *Ibid.*

[424] *Ibid.*

Chapter 4: Human Rights Implications – The Consequences of Legal Indeterminacy

There is an important element missing to our analysis. Nay, a critical one. Up until now I have proposed a framework for interpreting the actions (and statements) of the Mexican government through the lens of international law. More precisely, I have advanced the hypothesis that the Mexican government has instrumentalized the grey area inherent to the classification of permanent states of drug-related violence. This has been achieved, in the simplest terms, by conflating IHL and IHRL, being able to apply both to convenience. If granting the viability of the arguments presented to this point, what is left is to understand the impact that such instrumentalization of law has had on the lives of Mexican citizens. The present chapter's purpose is therefore to understand the price of living under a state of legal uncertainty; which is to say, to understand the price of living in a limbo between war and peace.

This chapter offers an overview for how the protection of human rights has deteriorated in Mexico ever since Calderón launched his now famous "war" and builds the case for a link between this worsening and the President's militarized strategy. As done in previous chapters, special focus is placed on actions attributed to the government and particularly to the Armed Forces. This, of course, without prejudice to macro-level indicators such as the overall rise in homicides, which are also important elements in assessing Mexico's state of affairs since 2006. The point, however, is to establish a clear connection between the increase in human rights violations and the government's militarized policy – along with its discursive and legal corollaries. This is best-achieved by pointing to the sharp rise in human rights

abuses on behalf of the federal forces; hence the proposed focus. In order to do so, I will draw on reports by Human Rights Watch (HRW), Amnesty International (AI), the Inter-American Commission of Human Rights (CIADH), the National Commission on Human Rights (CNDH) and the Open Society Justice Initiative (OSJI), as well as from government data and external sources. The aim is not to draft an exhaustive list of human rights violations in Mexico, for such would be an encyclopedic feat. It is rather to highlight key figures and relevant information that indicate a correlation between the country's militarization and an increase in human rights violations.

We may recall from chapter 2 that already in the late 1970s there is record of systematic human rights violations by the Armed Forces. Richard B. Craig accounts for how the military's first formal participation in anti-drug operations resulted in accusations of "physical and mental torture, coerced confessions (…) patently unconstitutional pre-trial detentions", extortion and rape.[425] The lesson should have been clear from the start: although we cannot affirm that the use of Armed Forces in public security tasks *necessarily* implies disrespect for human rights, domestic and international experience shows that "soldiers involved in policing are notoriously unable to relinquish the military paradigm".[426]

Notwithstanding, more than forty-years later these problems seem to have been exacerbated in the country, where evidence points to a sharp increase in extrajudicial killings, enforced disappearances, illegal detentions, and torture by the hands of federal and local forces since 2007. As Aguilar and Castañeda note, "all the data points to the fact that starting in 2007 there has been an exponential rise to human rights abuses, despite the government's

[425] Richard B. Craig, *op. cit.*
[426] United Nations General Assembly, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns*, A/HRC/26/36/Add.1 Human Rights Council Twenty-sixth session (April 28, 2014).

constant effort to affirm that all actions by the State are carried out according to international standards (…)".[427] A relevant indicator is that the number of complaints brought forward to the CNDH against army and marine abuses rocketed from 182 in 2006, to 1,626 in 2011.[428] In 2011 alone, "a total of 1,695 complaints of abuse committed by the army and 495 committed by the navy were lodged with the CNDH", according to AI.[429] Then, from 2012 to 2015, the CNDH received 2,007 complaints of abuses attributed to army personnel, including accusations of extrajudicial killings, rape, torture, and enforced disappearances.[430] What is worse, these figures go hand in hand with daunting levels of impunity, which is well exemplified by the fact that out of the 3,671 accusations of abuse by the army against civilians brought forward to the Office of the Attorney General of Military Justice between 2007 and 2011, only a few more than twenty soldiers were prosecuted.[431]

Inasmuch the use of force is concerned, HRW has consistently found that "security forces resort to lethal force against civilians when it [is] *unnecessary* to prevent loss to life or serious injury to themselves or others", contrary to what IHRL prescribes.[432] Well in line with this observation, "soldiers shot dead 3,321 alleged criminals" in only the first five years of Calderón's administration.[433] As has been discussed at length throughout this work, the high number of criminals shot dead "raises questions about whether the government is treating the cartel threat as a criminal problem as it claims, or as a question of national security in which

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[427] Rubén Aguilar and Jorge Castañeda, *Los Saldos del Narco…op. cit.*
[428] International Crisis Group*, op. cit.,* p. 28. In 2007, there were 367 complaints; in 2008, 1,230; in 2009, 1,800; in 2010, 1,415.
[429] Amnesty International, *Amnesty International Report 2012: The State of the World's Human* Rights, Amnesty International Ltd (2012): 23.
[430] Comisión Interamericana de Derechos Humanos, *Situación de derechos humanos en México,* OEA/Ser.L/V/II.Doc,44/15 (Dec. 31, 2015): 36; Human Rights Watch, *Neither Rights Nor Security…op. cit.*
[431] Rubén Aguilar and Jorge Castañeda, *Los Saldos del Narco…op. cit.*
[432] Human Rights Watch, *Neither Rights Nor Security… op. cit.,* p. 167.
[433] International Crisis Group*, op. cit.,* p. 29

troops can fire at will against an enemy".[434] Indeed, I have tried to make the point throughout previous chapters that the creation of the "Mexican Drug War" narrative goes beyond mere rhetoric, arguing that the frames I have exposed have a direct influence on the behavior of the parties involved and more specifically on their use of force considerations. It has also been posited before that Mexico's excessive lethality rate in encounters between government forces and alleged criminals is a reflection of the pervasive war narrative, guided by the frames outlined above.[435] It therefore comes as no surprise that the official count of deaths in encounters between the military and civilians from 2007 to 2012 is of 158 members of the Armed Forces as compared to 2,959 of alleged criminals.[436] All allegations of a law-enforcement paradigm on the use of force can be dismissed on the account of these figures.

Some instances of abuse of the use of force by the Armed Forces have caught more attention by domestic and international observers, becoming emblematic incidents for human rights advocates. Such is the case of the extrajudicial killings that took place in Tlatlaya and Tanhuato,[437]which occurred as follows: On June 30, 2014, the army's 102 Infantry Battalion engaged a group of alleged criminals, resulting in the death of 22 people in the municipality of Tlatlaya. Out of the 22 deceased, the CNDH affirms that 15 of them were summarily executed after being wounded.[438] Amongst the victims were a 15 year old girl, two 17 year old boys, and two brothers aged 18 and 20, all of which were unarmed according to the

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[434] *Ibid.*

[435] It comes in handy to remember that the Mexican army averaged a 7.9 lethality rate from 2007 to 2014, registering a constant increase from 2007 (1.6) to 2012 (14.7). See: Carlos Silva Forné, Catalina Pérez Correa, Rodrigo Gutiérrez Rivas, *op. cit.,* p. 343

[436] Secretaría de la Defensa Nacional, *Derechos humanos, Quejas y recomendaciones, Agresiones contra personal militar* (July 1, 2014). Available at: http://www.sedena.gob.mx/derechos-humanos/agresiones- contra-personal-militar

[437] The more famous Ayotzinapa case is best understood under the enforced disappearances category, which will be developed below.

[438] CNDH, *Recomendación No. 51/2014 Sobre los Hechos Ocurridos el 30 de Junio de 2014 en Cuadrilla Nueva, Comunidad San Pedro Limón, Municipio de Tlatlaya, Estado de México*, (October 21, 2014).

relevant reports.[439] In a similar happening in Tanhuato, Michoacán, the Federal Police exchanged fire with members of the Cartel Jalisco Nueva Generación. The death tally was of 42 alleged delinquents and one police man. Once again, the CNDH gathered enough evidence to conclude that 22 of the cartel-members were executed extra-judicially, given that they received lethal gunshots from behind at a distance of less than 90 centimeters.[440] As has occurred consistently, the federal forces attempted to manipulate the crime scene before the arrival of forensic authorities and the press.[441] It should be restated that these are only illustrative cases of which there have been unfortunately many more.[442]

Also on the rise are accusations of torture perpetrated by federal forces. In fact, the OSJI declares that "complaints to the CNDH regarding torture and ill-treatment more than *quadrupled* in the six years after the launch of the government's national security strategy".[443] In a similar vein, HRW concludes that the use of torture as a method to extract information and confessions "has increased since the Calderón government adopted a more aggressive counternarcotic strategy".[444] Already by 2011 no State security force was exempt from torturing civilians to obtain confessions or otherwise. HRW's investigation across five Mexican states revealed that "all security forces involved in counternarcotic operations; the Army, the Navy, the Federal Police, and state, municipal, and judicial investigative police are guilty of having used torture (…)".[445]Testimonies reveal that the most common technics

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[439] *Ibid.;*Associated Press, *¿Qué pasó realmente en Tlatlaya? Las versions de CNDH y PGR no coinciden*, Animal Político (Nov. 7, 2014).
[440] Associated Press, *10 Claves sobre la matanza en Tanhuato- Ecuandureo (Documento de CNDH)*, Aristegui Noticias (Aug. 19, 2016).
[441]*Ibid.*
[442] For more examples see: Human Rights Watch, *Neither Rights Nor Security… op. cit.,* p. 167-176.
[443] Open Society Justice Initiative, *Undeniable Atrocities: confronting crimes against humanity in Mexico – Executive Summary* (2015): 5.
[444] Human Rights Watch, *Neither Rights Nor Security… op. cit.,* p 32.
[445] *Ibid.* p. 28.

of torture employed by security forces are beatings, electric shocks, asphyxiation, sexual torture, and death threats or mock executions.[446]

As has been argued before, the constitutional figure of *arraigo* is a structural element that is highly explicative of the sharp rise in torture and ill-treatment on behalf of the State. While allowing the preventive detention of anyone *suspected* of belonging to organized crime for up to 80 days, "arraigo expands the possibilities of a person to be subject to torture or other cruel, inhuman or degrading treatment".[447] In line with this intuition is the fact that in several of the cases observed by HRW, those victims "who say were forced to confess to crimes under torture and death threats, were [first] subjected to *arraigo* detention and eventually charged with crimes (…)".[448] This also makes sense in light of the observation that torture is "most frequently applied in the period between the victims are detained, often arbitrarily, and when they are handed over to civilian prosecutors (…)".[449] The CIADH also coincides in that "in Mexico torture is generalized, and presents itself frequently between the moment of detention – that tends to be arbitrary – and before the person detained is placed at disposition of a judge".[450] A longer period between detention and prosecution thus results in a wider window for torture to be perpetrated.

The level of impunity regarding potential cases of torture also facilitates its incidence. The OSJI observes that according to the highest government figures from 2006 through the end of 2014, there were only 12 indictments and 8 judgments for torture out of a total of

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[446] *Ibid.* p. 29.
[447] Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, *Arraigo made in Mexico…op. cit.* p. 2.
[448] Human Rights Watch, *Neither Rights Nor Security…op. cit.,* p. 78.
[449] Human Rights Watch, *World Report 2018: Events of 2017* (2018): 368.
[450] Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, *Arraigo made in Mexico…op. cit.,* p. 14.

1,884 federal investigations on the matter.[451] Correspondingly, there were only six convictions for torture between January 2007 and April 2015.[452] This is partly due to the fact that "officials responsible for collecting data on torture and ill-treatment, including prosecutors and police, have been heavily implicated as perpetrators",[453] for which there are perverse incentives not to follow through with the investigations or to do so as a fig leaf. In response to this phenomenon, Calderón issued a Protocol for the Treatment of Detainees on his last year in office. Although well intended, most "human rights groups consider [the protocol] incomplete" in many ways.[454]

Time has proven critiques right, as the numbers hereby presented do not seem to show improvement in State behavior during the subsequent administration, proof to which are the 4,390 ongoing investigations into accusations of torture as of June 30, 2017.[455] That same month, the Mexican Congress passed a new General Law to Prevent, Investigate and Sanction Torture and Other Inhumane or Degrading Treatments.[456] We have yet to see the extent to which the law is respected and enforced, but reasons for optimism do not abound. Mexico's disregard for international obligations are enough reason to believe that this new law is no guarantee of future improvement. Mexico has been bound for years by article 7 of the International Covenant on Civil and Political Rights (ICCPR); article 5 of the American Convention on Human Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Inter-American Convention to Prevent and

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[451] Open Society Justice Initiative, *Undeniable Atrocities…op. cit.,* p. 5.
[452] *Ibid.*
[453] *Ibid.*
[454] International Crisis Group*, op. cit.,* p. 26.
[455] Human Rights Watch, *World Report…op. cit.* 368.
[456] Cámara de Diputados del H. Congreso de la Unión, *Ley General para Prevenir, Investigar y Sancionar la Tortura y Otros Tratos o Penas Crueles, Inhumanos o Degradantes*, Diario Oficial de la Federación (June 26, 2017).

Punish Torture. All these legal commitments have been to no avail, why would the law passed by congress be any different?

Last in our list of atrocity crimes is that of enforced disappearances, broadly defined as the involuntary disappearance of civilians carried out by State actors or with their (active) participation. There is again a pessimistic outlook, as "recorded numbers of missing persons have steadily risen since 2006, reaching a peak of 5,194 disappearances in 2014".[457] There are substantial reasons to believe that federal forces have been involved in a significant number of these disappearances. To begin with, "the numbers of complaints of enforced disappearances perpetrated by federal authorities reported to CNDH (…) increased significantly: 4 in 2006; 7 in 2007; 25 in 2008; 77 in 2009; 77 in 2010 and 134 from January to October 2011".[458] Although the CNDH recognizes that "there are no reliable figures or statistics on the subject",[459] most international observers agree in that Calderón's security strategy came paired with a rise in enforced disappearances. In this line, HRW declares that "since 2006, Mexico's security forces have carried out widespread enforced disappearances",[460] and the CIADH states that "enforced disappearances have augmented dramatically in the country".[461] This is likewise confirmed in the research conducted by HRW in five states of the Mexican republic, where out of a sample of 249 disappearances from the Calderón administration, State actors were involved in at least 149 of them.[462] Amongst these, HRW documented 95 instances in which "local police participated directly or indirectly

[457] Open Society Justice Initiative…, *op. cit.,* p. 4.
[458] Human Rights Watch, *Neither Rights Nor Security...op. cit.,* p. 125.
[459] CNDH, *Informe de Actividades del 1 de Enero al 31 de Diciembre 2015*, (Jan. 2016).
[460] Human Rights Watch, *World Report 2018…, op. cit.,* p. 365.
[461] Comisión Interamericana de Derechos Humanos, *Situación de derechos humanos en México…op. cit.,* p. 12.
[462] Human Rights Watch, *Mexico's Disappeared…, op. cit.,* p. 14.

(…)",[463] thirteen cases of enforced disappearances carried out by the federal police,[464] and at least 60 others in which there is "compelling evidence of cooperation between security forces and organized crime in disappearances".[465]

A high profile example of what is most likely a case of enforced disappearance is that of Ayotzinapa. I am obliged to write that it is *most likely* a case of enforced disappearance because although there are strong indications of participation by the local police in the disappearance of the 43 students, investigation on the case is still underway. By most accounts, the students were disappeared after the municipal police turned them in to a drug cartel called Guerreros Unidos.[466] More than three years since the tragedy, there is still no conclusive evidence about the students' whereabouts – with the exception of one of them whose bones were found at the bottom of a river – or about the specific role played by the Armed Forces; which were also present during the detention of the students according to an independent group of experts assigned by the Organization of American States (OAS).[467] The Spaniard Carlos Martín Beristain, a veteran member of the Interdisciplinary Group of International Experts (GIEI), insists that the Mexican government "has hidden key information about the army",[468] pointing towards the complicity of higher authorities to scuttle through with the investigation in an effort to protect the federal government from accusations.

With President Peña Nieto's term coming to an end, Ayotzinapa has become a symbol of impunity to the Mexican people, who demands answers. The disappearance of the 43 students seems to have been the straw that broke the camel's back, and rightly so. Ayotzinapa comes

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[463] *Ibid.,* p. 26.
[464] *Ibid.,* p. 28.
[465] *Ibid.,* p. 29.
[466] Esteban Illades, La *noche más triste*, Nexos (Jan. 1, 2015).
[467] Elena Reina, *La Masacre de Ayotzinapa, tres años sin respuestas*, El País (Sept. 26, 2017).
[468] Jan Martínez Ahrens, *El Gobierno ha ocultado información clave del Ejército sobre Ayotzinapa*, El País (Sept. 26, 2017).

after a large record of government impunity since the start of the "Mexican Drug War". Regarding enforced disappearances, OSJI affirms that "according to the highest government claims, as of February 2015 there had been only 313 federal investigations of which only 13 convictions for enforced disappearance".[469] A more astonishing fact is that "it took until 2015 for a single soldier to be convicted of the crime".[470] This observation is backed by HRW's claim that "the military [did] not sentence a single officer for the crime of enforced disappearance during the Calderón administration".[471] An important explanation to these levels of impunity is the fact that government authorities commonly dismiss disappeared citizens as abductions by organized crime members, avoiding other possibilities by precluding any serious investigation that may incriminate the government.[472]

In conjunction with these crimes, Mexico's human rights crisis is further evidenced by the persecution of journalists and human rights activists. Local media sources such as the newspaper *El Mañana* of Nuevo Laredo affirm that fear of reprisals for covering stories on drug-related violence has left entire zones of the country without information on these developments.[473] HRW also notes that "journalists, particularly those who report on crime and criticize officials, face harassment and attack by both government authorities and criminal groups".[474] Equally worrying is that "90 percent of crimes against journalists in Mexico since 2000 have gone unpunished, including 82% of killings and 100% of disappearances".[475] In this line, the the UN Special Rapporteur on the situation of human rights defenders recently concluded that "Mexico has become one of the world's most dangerous places for

[469] Open Society Justice Initiative, *op. cit.,* p. 2.
[470] *Ibid*.
[471] Human Rights Watch, *Neither Rights Nor Security…, op. cit.,* p. 129.
[472] *Ibid.,* p. 129.
[473] International Crisis Group*, op. cit.,* p. 32
[474] Human Rights Watch, *World Report 2018…, op. cit.,* p. 369.
[475] *Ibid.*

journalists".[476] Not only have they been physically threatened, they have also "been criminalized through the deliberate misuse of criminal legislation (…)", making it almost impossible for them to carry out their work.[477]

Having summarized the grim state of human rights in Mexico since 2006, allow me to offer a conclusive answer to the question of whether the war narrative and its accompanying militarization are at least partly to blame. At an intuitive level, it cannot be a coincidence that all of the human rights reports hereby synthesized pinpoint the end of 2006 and beginning of 2007 as the dawn of an impressive escalation of human rights abuses, especially by State forces. In line with this conclusion, to which I subscribe, Aguilar and Castañeda emphatically affirm that there can be "no doubt that [human rights] violations have increased dramatically" since Calderón's administration. While sufficient to understand the human rights consequences attached to militarizing public security, this level of analysis ignores deeper dimensions. We can, in my view, expand on this conclusion by drawing on the discursive and legal arguments that have been presented throughout previous chapters.

In the first place, these human rights figures fall in line with the hypothesis that Mexico has flirted with IHL and distanced itself from human rights law. Such hypothesis can be understood in light of the government's increased use of force – reflected in extrajudicial killings, lethality rate, etc. – and its POW treatment of criminals through the figure of *arraigo*. In the same way, these figures shed light on why despite approximating IHL through public discourse and the recent Internal Security Law, Mexico cannot accept the classification of an armed conflict under any circumstance, and thus prefers to float in between both legal regimes.

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[476] Human Rights Council, *Report of the Special Rapporteur on the situation of human rights defenders on his mission to Mexico*, A/HRC/37/51/Add.2 (Feb.12, 2018).
[477] *Ibid.*

Why? Because the overwhelming evidence of summary executions, torture and enforced disappearances could well constitute war crimes, each instance on its own right a war crime – in contrast to the "widespread and systematic" requirements imposed by crimes against humanity. We have reached full circle in that concrete human rights implications are a window into the war-like logic behind government's actions (evidence of approximating IHL), while they also remind us of the constraints imposed by the strategic context (rejection of NIAC classification), due to fear of facing war crime accusations. In this way, analyzing the human rights implications of the so-called "Mexican Drug War" reinforces the link between the strategic context, guided by the costs and benefits attached to the application of IHL and IHRL, and the government's strategy.

Chapter 5: Conclusion

The present dissertation has attempted to bridge a gap in the existing NIAC literature by arguing that Mexico, alike other countries in the global south, is caught in a legal grey area whereby the category of an armed conflict seems unfitting, despite the overwhelming level of violence. This, I argue, renders the debate over the classification of a NIAC fruitless under the current "factualist" paradigm in international law, leading to a never-ending discussion that divides jurists, academics and conflict research institutes alike. The point has been made that the legal indeterminacy to which Mexico has been subject allowed the construction of a legal regime that falls in between those of war and peace, activating them both jointly in what Berman calls the strategic instrumentalization of international law.

The heart of the matter is that the Mexican government will never accept the existence of an armed conflict. As has been shown, this is undesirable both from a political and a human rights protection stance, and unless the conflict changes dramatically in the future, neither Mexico nor the international community will ever admit to IHL as the body of law applicable in this metaphoric war. And yet, the bulk of the Mexican population speaks of a narco-war: criminals have morphed into enemies, public security has fused with military force and victims have become collateral damage. This language is not inconsequential. However accurate these terms may or may not be, the frames activated by them have drawn Mexico closer to a Law of Armed Conflict logic, de facto suspending peacetime rules on the use of force, detention and due process.

The main argument to be kept from this dissertation is that Calderón's administration fabricated this confusion by way of the parallel creation of the "Mexican Drug War" narrative

and the official rejection of a NIAC; a confusion later codified into the Law of Internal Security.

This work goes beyond existing literature in critical law studies by proposing a specific dynamic whereby the instrumentalization of law was achieved, particularly focusing in Calderón's presidency and the formation of the three inter-connected frames proposed. While this mechanism is for the most part context-sensitive, there are relevant lessons to be juxtaposed from the Mexican case unto other countries in the global south. Overall, the Mexican case illustrates the need for a political criterion as an auxiliary variable in the classification of a NIAC, as the International Law Association (ILA) has also suggested.[478] Introducing such variable would complement the failing *Tadic* criteria and lead to the categorical rejection of a NIAC in Mexico. The first step to correct the drastic humanitarian consequences to which this legal instrumentalization has given rise is to dissipate the frames and overarching narrative that propagate and justify the military response that Calderón devised and Peña Nieto continued. Mexico's example may serve as a timely warning to other countries fighting DTOs in times of peace, before de facto approximating an armed conflict as has occurred in Mexico since 2006.

This conclusion also sheds light on the public policy options available to Mexico in its struggle with drug-trafficking in the future. Despite what some have suggested, the "Mexican Drug War" was not necessary nor inevitable. It was rather facilitated by a war-laden rhetoric to which Mexico's society became inured and without which the full-out military approach would have been impossible. Only by overcoming the war narrative may Mexico begin to deal with DTOs for what they are. That is, as an organized crime

[478]International Law Association, *op. cit.,* p. 28.

phenomenon driven purely by monetary gains; political control being solely means to such end. Arriving at this diagnostic will enable Mexico to move away from the military approach, with time hopefully reversing the IHL-like behavior in public security operations and subjecting the entirety of the State's actions to the restrictions enshrined in IHRL.

Unfortunately, these possibilities are unviable as long as the military approach remains the predominant one. What is worse, human rights violations are sure to continue on the rise as long as State regulation continues to oscillate between IHL and IHRL, proof to which is the fact that 2017 was the most deadly year in Mexico for the past two decades.[479] More optimistic analysts view the much discussed prospect of a unified police command ("Mando Único") as a promising alternative to the country's militarization,[480] hoping that it will lead to the withdrawal of the Armed Forces from "law enforcement operations". Such reading equates the substitution of the army to a return to human rights and to a rebuff of IHL. While true in principle, I remain skeptical about the capacity of the federal police to act under a law enforcement ethos, especially considering that its lethality rate was even higher than that of the army during 2013 and averaged 4.8 from 2007 to 2014.[481] The police has become militarized along with the country, for which withdrawing the Armed Forces is an important decision in form but not in content. Doing so cannot ensure a return to a "law enforcement" logic unless the "Mexican Drug War" narrative is done without and the anti-cartel strategy is re-designed under a strict focus on human rights and the rule of law. The challenge is greater than ever under the Law of Internal Security.

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[479] David Marcial Pérez, *México cerrará 2017 como el más violento en 20 años,* El País (Dec. 23, 2017).
[480] The unified police force proposal would be subject to referendum. This motion is blocked in congress: Jorge Monroy, *Naufraga consulta popular del mando único en las eleciones del 1 de julio*, El Economista (Feb. 8, 2018).
[481] Carlos Silva Forné, Catalina Pérez Correa, Rodrigo Gutiérrez Rivas, *op. cit.,* p. 344

With the advent of terrorism and drug related violence, the instrumentalization of law is sure to remain a reality as long as there is no clear answer to the classification of violence in these postmodern conflicts. Extrapolating Mexico's paradigmatic case to other permanent states of drug-related violence may thus preclude similar outcomes in the future. For this to occur, however, the *Tadic* criteria must be overcome and the factualist paradigm reevaluated. Hopefully this dissertation provides insight into how to take this first step.

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