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# Bomb Thy Neighbor: How U.S. Military Force Against Mexican Drug Cartels in Self-Defense Would Violate International Law

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**BOMB THY NEIGHBOR: HOW U.S. MILITARY FORCE AGAINST MEXICAN DRUG  
CARTELS IN SELF-DEFENSE WOULD VIOLATE INTERNATIONAL LAW**

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ABSTRACT

*In response to the increasing frequency of opioid-related fatalities in the United States, some American political leaders have suggested using military force against drug cartels on Mexican soil. This proposal is invariably described as a use of military force in self-defense as permitted by the oft-cited Article 51 of the United Nations Charter. This paper evaluates the claim that Article 51's scope could encompass such a use of American military force by assessing the legal status of Article 51, as interpreted by the International Court of Justice and as articulated in recent instances of opinio juris, and applying it to the context of drug cartels in Mexico. Even more importantly, though, this paper demonstrates the shortcomings of international law's concept of the "armed attack" for purposes of distinguishing permissible and impermissible uses of force under Article 51. As the nature of conflict continues to evolve, the existing concept of the "armed attack" in international law must adapt or risk irrelevance.*

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## INTRODUCTION

More than one million Americans have died from drug overdoses since 1999.<sup>1</sup> For perspective, that is over 111 times the number of Americans killed and injured in the terrorist attacks of September 11, 2001.<sup>2</sup> Most of these fatal drug overdoses involve “synthetic opioids,” like fentanyl,<sup>3</sup> and most of that fentanyl – and the cocaine, methamphetamine, and heroin often accompanying it – originates from drug cartels operating in Mexico.<sup>4</sup> Consequently, the Biden Administration has described Mexican drug cartels as “the greatest criminal threat to the United States,”<sup>5</sup> and Congress has demonstrated increased interest in the dangers these cartels pose.<sup>6</sup>

With one fatal drug overdose occurring every five minutes in the U.S.,<sup>7</sup> some policymakers have advocated for the use of military force against Mexican drug cartels as a possible solution.<sup>8</sup> For instance, Congressmen Dan Crenshaw and Mike Waltz introduced a draft authorization for use of military force (“H. J. Res. 18”) in January 2023 that would have empowered the president “to use all necessary and appropriate force” against producers and traffickers of fentanyl, including nine specific Mexican drug cartels predetermined to meet this criteria.<sup>9</sup> H. J. Res. 18’s language mirrors that of the 2001 authorization for use of military force against those responsible for the terrorist attacks on 9/11,<sup>10</sup> and would similarly extend to both foreign “organizations” and “nations.”<sup>11</sup> Former U.S. Attorney General William Barr publicly endorsed H. J. Res. 18, calling it a “necessary step” to eliminating “narco-terrorist cartels.”<sup>12</sup> Furthermore, while running in the

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<sup>1</sup> OFF. OF NAT’L DRUG CONTROL POL’Y, EXEC. OFF. OF THE PRESIDENT, NATIONAL DRUG CONTROL STRATEGY 6 (2022).

<sup>2</sup> See Press Release, Sec’y of State Antony J. Blinken, 22nd Anniversary of the September 11, 2001 Attacks (Sept. 11, 2023), <https://www.state.gov/22nd-anniversary-of-the-september-11-2001-attacks/> (honoring the roughly 9,000 people killed or injured in the 9/11 attacks).

<sup>3</sup> NATIONAL DRUG CONTROL STRATEGY, *supra* note 1, at 8.

<sup>4</sup> *Id.* at 86.

<sup>5</sup> *Id.* See also *Countering Illicit Fentanyl Trafficking: Hearing Before the S. Comm. on Foreign Relations*, 118th Cong. (2023) (statement of Anne Milgram, Administrator, Drug Enf’t Admin., Dep’t of Just.) (“The DEA’s top operational priority is to defeat the two Mexican drug cartels – the Sinaloa cartel and Jalisco New Generation (Jalisco) cartel – that are responsible for driving the drug poisoning epidemic in the United States”).

<sup>6</sup> See, e.g., *Biden and Mayorkas’ Open Border: Advancing Cartel Crime in America: Hearing Before the H. Comm. on Homeland Sec.*, 118th Cong. (2023).

<sup>7</sup> NATIONAL DRUG CONTROL STRATEGY, *supra* note 1, at 6.

<sup>8</sup> See Michelle Hackman, *Republicans’ New Border Plan: Send Military Into Mexico*, WALL ST. J. (July 5, 2023, 11:40 AM), <https://www.wsj.com/articles/republicans-new-border-plan-send-military-into-mexico-42121a5e>.

<sup>9</sup> H. J. Res. 18, 118th Cong. (2023).

<sup>10</sup> See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>11</sup> H. J. Res. 18, 118th Cong, *supra* note 9.

<sup>12</sup> William P. Barr, *The U.S. Must Defeat Mexico’s Drug Cartels*, WALL ST. J. (Mar. 2, 2023, 1:04 PM), [https://www.wsj.com/articles/the-us-must-defeat-mexicos-drug-cartels-narco-terrorism-amlo-el-chapo-crenshaw-military-law-enforcement-b8fac731?mod=article\\_inline](https://www.wsj.com/articles/the-us-must-defeat-mexicos-drug-cartels-narco-terrorism-amlo-el-chapo-crenshaw-military-law-enforcement-b8fac731?mod=article_inline).

Republican presidential primary, Ron DeSantis,<sup>13</sup> Nikki Haley,<sup>14</sup> and Vivek Ramaswamy<sup>15</sup> each suggested (or promised) to leverage U.S. military force against drug cartels within Mexico's borders if elected.

Less directly, a bipartisan group of eighteen state attorneys general recently lobbied President Biden to classify fentanyl as a “weapon of mass destruction” (“WMD”).<sup>16</sup> Although this group did not promote using military force against Mexican drug cartels, the Department of Justice has previously opined that threats of items classified as WMDs, from any country or terrorist group, could justify the use of force in anticipatory self-defense under international law.<sup>17</sup> In sum, proposals to use military force against Mexican drug cartels have become “increasingly militaristic” and continue to gain support,<sup>18</sup> despite strong and repeated disapproval from the Mexican government.<sup>19</sup>

Besides diplomatic consequences, the prospect of using military force against drug cartels on Mexican soil directly implicates international legal rules on the use of force. Of course, the United Nations Charter (the “Charter”) prohibits the threat or use of force against other countries.<sup>20</sup> But exceptions to this general prohibition, provided for in the Charter and customary international law, remain hotly contested by statesmen and scholars.<sup>21</sup> Moreover, these disagreements about

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<sup>13</sup> Alex Tabet, *Ron DeSantis Says He's Open to Drone Strikes on Mexican Drug Cartels*, NBC NEWS (Aug. 10, 2023, 5:01 PM), <https://www.nbcnews.com/politics/2024-election/ron-desantis-says-s-open-drone-strikes-mexican-drug-cartels-rcna99305> (“We’re authorizing deadly force”).

<sup>14</sup> Joseph A. Wulfsohn, *Nikki Haley Doubles Down on Promise to Send Special Ops to ‘Eliminate’ Drug Cartels Across US-Mexico Border*, FOX NEWS (Aug. 27, 2023, 1:17 PM), <https://www.foxnews.com/politics/nikki-haley-doubles-down-promise-send-special-ops-eliminate-drug-cartels-mexico-border> (“I would send special operations [into Mexico] and eliminate [drug cartels] . . .”).

<sup>15</sup> Kyle Morris, *Vivek Ramaswamy Campaigns in Iowa, Suggests US Military Could be Used to ‘Annihilate’ Mexican Drug Cartels*, FOX NEWS (May 12, 2023, 12:26 PM), <https://www.foxnews.com/politics/vivek-ramaswamy-campaigns-iowa-suggests-military-used-annihilate-mexican-drug-cartels> (“If we can use our military to take out [Osama] bin Laden or [Ayman] al-Zawahiri or [Qasem] Soleimani or ISIS somewhere else in some other part of the world, then we are ready to use our military to annihilate the Mexican drug cartels south of our own border”).

<sup>16</sup> Letter from Ashley Moody, Fla. Att’y Gen., et al., to President Joseph R. Biden (Sept. 14, 2022), [https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Multistate%20WMD%20Policy%20Letter\\_9.15.22\\_18%20AGs.pdf](https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Multistate%20WMD%20Policy%20Letter_9.15.22_18%20AGs.pdf). See also H. Res. 1327, 117th Cong. (2022) (requesting that President Biden classify “synthetic fentanyl-related substances as weapons of mass destruction”).

<sup>17</sup> See Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, 26 Op. Off. Legal Counsel 197 (2002).

<sup>18</sup> Brian Finucane, *Dangerous Words: The Risky Rhetoric of U.S. War on Mexican Cartels*, INT’L CRISIS GRP. (July 17, 2023), <https://www.crisisgroup.org/united-states/dangerous-words-risky-rhetoric-us-war-mexican-cartels>.

<sup>19</sup> See Niha Masih & Mary Beth Sheridan, *Mexico’s President Rebukes GOP Push to Use U.S. Military Against Cartels*, WASH. POST (Mar. 10, 2023, 4:02 AM), <https://www.washingtonpost.com/world/2023/03/10/mexico-amlo-drug-cartel-fentanyl/>.

<sup>20</sup> U.N. Charter art. 2, ¶ 4.

<sup>21</sup> See, e.g., Andre de Hoogh, *Jus Cogens and the Use of Armed Force*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 1161, 1164 (Marc Weller ed., 2015) (noting that some scholars conclude that the prohibition on the use of force is a peremptory norm of international law that does not have any exceptions); YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENSE 111

the precise scope of the right to use force are particularly pronounced in the context of the use of force against non-state actors (“NSAs”)<sup>22</sup>, such as terrorist groups or drug cartels. Any serious U.S. proposal to use military force against drug cartels in Mexico must therefore grapple with whether such force is permissible under international law.

This paper proceeds as follows. Part I explains the current international legal rules on the use of military force against NSAs, with special reference to the Charter and opinions of the International Court of Justice (“ICJ”). Part II positions Mexican drug cartels, and the harm they inflict on U.S. citizens, within the international legal framework outlined in Part I. In doing so, Mexican drug cartels are analogized to other NSAs that have been the subjects of previous international legal discussions concerning the use of force. Part III acknowledges and rebuts additional legal arguments supporting a potential U.S. claim to use force against Mexican drug cartels. Finally, Part IV offers concluding thoughts on what this analysis means for the future of use-of-force rules under international law. Ultimately, this paper argues that using military force against drug cartels within Mexico’s borders, without approval from the Mexican government, would very likely violate international law because these drug cartels have not inflicted an “armed attack” against the United States sufficient to justify the use of force in self-defense.

Importantly, this paper does not attempt to resolve the nuanced diplomatic and public policy considerations that undoubtedly shape any country’s decision to use military force. Those considerations are best left to another, more qualified author.

## I. THE CURRENT STATE OF INTERNATIONAL LAW

“No topic is more emotive or attracts more attention in international law . . . than the use of force.”<sup>23</sup> This Part first defines NSAs for the purposes of this paper. It then examines the current legal state of the use of force against NSAs in both the Charter and opinions of the ICJ, with special emphasis on what constitutes an ‘armed attack’ under international law.

### A. *What is an NSA?*

There is no settled definition of what constitutes a non-state actor under international law, but a review of recent discussions about NSAs by international

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(6th ed. 2017) (acknowledging two express exceptions to the Charter’s general prohibition on force: self-defense and collective security); Elena Chachko & Ashley Deeks, *Which States Support the ‘Unwilling and Unable’ Test?*, Lawfare (Oct. 10, 2016, 1:55 PM), <https://www.lawfaremedia.org/article/which-states-support-unwilling-and-unable-test> (demonstrating a lack of international agreement on the alleged ‘unwilling and unable’ exception to the prohibition of the use of force).

<sup>22</sup> See Kimberley N. Trapp, *Can Non-State Actors Mount an Armed Attack?*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 679, 679-80 (Marc Weller ed., 2015).

<sup>23</sup> RUSSELL BUCHAN & NICHOLAS TSAGOURIAS, REGULATING THE USE OF FORCE IN INTERNATIONAL LAW xvi (2021).

bodies offers some insights. In one of its earliest advisory opinions, the ICJ acknowledged that there were entities acting on the international stage “which [were] not States.”<sup>24</sup> Therefore, at a fundamental level, though perhaps least insightful, NSAs are “all actors that are not States.”<sup>25</sup> Beyond this, a review of international legal documents also reveals one consistent element: NSAs’ actions cannot be attributed to an established State.

1. *The Principle of Non-Attribution.* The understanding that NSAs are entities whose actions cannot be attributed to, and are not controlled, directed, or managed by, an established State or government, is well-established in international law.<sup>26</sup>

For instance, the United Nations General Assembly (“General Assembly”) adopted a “Definition of Aggression” in 1974 to clarify which actions constituted the international crime of aggression.<sup>27</sup> Article 3(g) of this resolution qualified the sending of “armed bands, groups, irregulars or mercenaries,” “*by or on behalf of a State,*” as an act of aggression under the General Assembly’s adopted definition.<sup>28</sup> Whereas Article (3)(a)-(f) explicitly refer to a country’s “armed forces” or the actions of another “State,” Article 3(g) covers irregular combatants acting “by or on behalf of a State,” but that are impliedly separate from that State’s “armed forces.”<sup>29</sup> That the actions of these irregular combatants constitute acts of aggression attributable to a country when such groups are “sen[t] by or on behalf of [that] State” implies that States are themselves responsible for conduct that they initiate or control, even if taken by groups outside its official military apparatuses.<sup>30</sup> Presumably, then, NSAs – or entities “that are not States”<sup>31</sup> – are those whose conduct is *not* initiated or controlled “by or on behalf of a State,”<sup>32</sup> and is consequently unattributable to any State.

The ICJ has adopted this reading of Article 3(g) of the Definition of Aggression, and its implication that the actions of NSAs are not attributable to any established State, in a number of its judgments.<sup>33</sup> In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, the ICJ effectively categorized the Allied Democratic Forces (“ADF”) as an NSA by holding that there was no “satisfactory proof of the involvement in these attacks,

<sup>24</sup> See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 178 (Apr. 11).

<sup>25</sup> See Hum. Rts. Council, *The Duty to Cooperate and Non-State Actors*, U.N. Doc. A/HRC/EMRTD/7/CRP.3, at ¶ 15 (2023) (hereinafter *Duty to Cooperate*).

<sup>26</sup> See NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 14–15 (2010).

<sup>27</sup> G.A. Res. 3314 (XXIX) (Dec. 14, 1974).

<sup>28</sup> *Id.* at art. 3(g) (emphasis added).

<sup>29</sup> See *id.* at art. 3(a)-(g).

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

<sup>31</sup> See *Duty to Cooperate*, *supra* note 25.

<sup>32</sup> G.A. Res. 33149 (XXIX), at art. 3(g).

<sup>33</sup> See Trapp, *supra* note 22, at 686 (arguing that the ICJ has consistently held that the right of self-defense belonging to one country vis-à-vis another are absent when the victim country has been attacked by an NSA whose actions are non-attributable to the country from which it operates).

direct or indirect, of the Government of the DRC.”<sup>34</sup> Referencing Article 3(g) of the Definition of Aggression, the ICJ concluded that the ADF’s actions were “non-attributable” to the DRC, thereby indicating that the ADF was an entity separate and apart from the DRC.<sup>35</sup> The court similarly confirmed the legal separateness of NSAs and States, absent attribution of the actions of the former to the latter, in *Military and Paramilitary Activities in and against Nicaragua*.<sup>36</sup> There, the ICJ rejected Nicaragua’s claim that the U.S. was liable for violent acts committed by the so-called *contras*, paramilitary groups opposed to Nicaragua’s Sandinista government.<sup>37</sup> This holding hinged on the Court’s conclusion that despite some level of financial and material support, the *contras*’ violent acts could not be attributed to the U.S. because the U.S. did not have “effective control” of the *contras*’ paramilitary operations.<sup>38</sup> By implication, the Court concluded that the *contras* were NSAs.<sup>39</sup>

Even when later discarding *Nicaragua*’s “effective control” test in favor of a lower threshold of attributability from Art. 8 of the Articles on State Responsibility,<sup>40</sup> the ICJ’s implicit definition of NSAs in *Bosnia & Herzegovina v. Serbia and Montenegro* still centered on whether the group acted “on the instructions of, or under the direction or control of, [a] State . . . .”<sup>41</sup> Lastly, in its Advisory Opinion in *Construction of a Wall in the Occupied Palestinian Territory*, the ICJ noted that Israel’s legal claim of self-defense did not allege it suffered attacks “imputable to a foreign State,” again recognizing NSAs as separate entities on the international stage whose actions are non-attributable to any established State.<sup>42</sup>

In sum, this paper follows the definitional outlines etched by the General Assembly, ICJ, the United Nations Security Council (“Security Council”),<sup>43</sup> and

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<sup>34</sup> See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 146 (Dec. 19) (hereinafter *Armed Activities*).

<sup>35</sup> See *id.* (holding that Uganda’s claim of self defense against the DRC was undermined by the fact that the aggressor entity was ADF, an NSA whose actions as a separate entity were non-attributable to the DRC).

<sup>36</sup> See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 216 (June 27) (hereinafter *Nicaragua*).

<sup>37</sup> See *id.*

<sup>38</sup> See *id.* ¶ 115 (establishing that U.S. liability for the *contras*’ actions required that the U.S. exercised “effective control of the military or paramilitary operations in the course of which the alleged violations were committed”).

<sup>39</sup> See *id.* (holding, in effect, that the *contras*’ actions were legally distinct from any country, including the U.S.).

<sup>40</sup> *Report of the International Law Commission on the work of its fifty-third session*, [2001] 2 (Part II) Y.B. Int’l L. Comm’n 26 (Article 8 reads: “The conduct of . . . [a] group of persons shall be considered an act of a State under international law if the . . . group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”).

<sup>41</sup> See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 47, ¶ 407.

<sup>42</sup> See *Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (hereinafter *Wall*).

<sup>43</sup> See, e.g., S.C. Res. 1540, 1 (Apr. 28, 2004) (defining non-state actors consistent with this paper’s proposed definition in a footnote, but only for purposes of this resolution).

scholars<sup>44</sup> by defining NSAs as entities that act on the international stage, but whose actions are not attributable to, or controlled, directed, or managed by, any established State. A group's actions may initially satisfy this definition, but subsequent endorsement by an established State, implicitly or explicitly, can make that group's actions attributable to the complicit or endorsing State and eliminate its status as an NSA.<sup>45</sup>

### B. *The Use of Force Under the Charter*

Article 2(4) of the Charter stipulates the “fundamental principle of international law”<sup>46</sup> that countries “shall refrain from the threat or use of force against the territorial integrity or political independence of any *state* . . . .”<sup>47</sup> This prohibition of *inter-state* uses of force reflects the consensus after the Second World War that future threats to international peace would come from *countries* fighting other *countries*, not from *countries* fighting *NSAs*.<sup>48</sup> Many consider Article 2(4) to represent a “conspicuous example of a rule in international law having the character of *jus cogens*,”<sup>49</sup> an international legal rule from which no derogation is permissible.<sup>50</sup> However, several other provisions in the Charter also address the permissibility of the use of force in different circumstances.<sup>51</sup>

First, the document's Preamble maintains that one of the Charter's primary functions is “to ensure . . . that armed force shall not be used, save in the common interest . . . .”<sup>52</sup> Similarly, Article 1(1) emphasizes the collective nature of legitimate responses to threats or uses of “aggression or other breaches of the peace,”<sup>53</sup> highlighting the Charter's clear preference for cooperative action over unilateral initiative. Next, Articles 42 and 53(1) jointly outline instances where the Security Council, acting as an executive body, can authorize necessary uses of force “to maintain or restore international peace and security,”<sup>54</sup> including by empowering “regional arrangements” to take such action.<sup>55</sup> Determinations of when a “threat to

<sup>44</sup> See, e.g., BUCHAN & TSAGOURIAS, *supra* note 23, at 53–55; Vladyslav Lanovoy, *The Use of Force by Non-State Actors and the Limits of Attribution of Conduct*, 28 EUR. J. OF INT'L L. 563 (2017) (emphasizing the importance of attribution when analyzing NSAs).

<sup>45</sup> See United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, ¶ 76 (finding the Iranian government's public endorsement of militants' takeover of the U.S. embassy in Tehran, and refusal to intervene to release U.S. hostages, as breaches of international law attributable to Iran).

<sup>46</sup> Nico Schrijver, *The Ban on the Use of Force in the UN Charter*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 465, 484 (Marc Weller ed., 2015).

<sup>47</sup> U.N. Charter art. 2, ¶ 4 (emphasis added).

<sup>48</sup> See Trapp, *supra* note 22, at 679.

<sup>49</sup> See Report of the International Law Commission on the work of its eighteenth session, [1966] 2 Y.B. Int'l L. Comm'n 247, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

<sup>50</sup> Int'l L. Comm'n, Rep. on the Work of Its Seventy-Third Session, U.N. Doc. A/77/10, at 12 (2022).

<sup>51</sup> Schrijver, *supra* note 46, at 472.

<sup>52</sup> U.N. Charter pmb. l.

<sup>53</sup> See *id.* art. 1, ¶ 1 (suggesting the Charter's preference for multi-state action through the use of words such as “collective measures,” particularly when read in conjunction with the Charter's preambulatory language of “common interest”).

<sup>54</sup> See *id.* art. 42.

<sup>55</sup> See *id.* art. 53, ¶ 1.



the peace, breach of the peace, or act of aggression” has occurred also fall within the Security Council’s ambit.<sup>56</sup>

However, the most important Charter provision for purposes of considering the legality of the use of military force against NSAs is Article 51.<sup>57</sup> Article 51 stipulates that nothing in the Charter, including Article 2(4), “shall impair the inherent right of individual or collective self-defence if an *armed attack* occurs . . . .”<sup>58</sup> This inherent right expires once the Security Council takes “measures necessary to maintain international peace and security.”<sup>59</sup> Furthermore, any State exercising this inherent right to individual self-defense must “immediately report[] [its actions] to the Security Council,”<sup>60</sup> a requirement the ICJ considers legally suggestive of the validity of that States’s invocation of Article 51.<sup>61</sup>

For the purposes of this paper, two elements of Article 51 are most significant: (1) the requirement of an “armed attack” before self-defense can be invoked, and (2) the absence of language limiting its scope to inter-state uses of force. Each element is addressed in turn below. Before proceeding, though, it is worth recognizing that several other Charter provisions concern the use of force,<sup>62</sup> but they are irrelevant to the issue of the unilateral use of military force against NSAs and thus this paper omits them.

1. *What is an “Armed Attack” Under Article 51?* Though an armed attack must occur before a country can invoke Article 51 to justify using force in self-defense, “there are controversies as to what constitutes an armed attack” and the term remains undefined in the Charter.<sup>63</sup> A review of ICJ jurisprudence interpreting the term “armed attack,” as well as of the 2021 *Arria-formula* meeting on NSAs and legitimate self-defense, is therefore helpful. This analysis begins with the ICJ’s *Nicaragua* case.

The *Nicaragua* Court heard allegations by the U.S. that Nicaragua had committed armed attacks against El Salvador, Costa Rica, and Honduras, triggering those victim states’ right to collective self-defense under Article 51.<sup>64</sup> The U.S. position was supported by the ICJ’s findings that “an intermittent flow” of weapons

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<sup>56</sup> *Id.* art. 39.

<sup>57</sup> See Trapp, *supra* note 22, at 690 (explaining that the international community demonstrated a broad acceptance of a right to use force against NSAs under Article 51 in the aftermath of the 9/11 attacks).

<sup>58</sup> U.N. Charter art. 51 (emphasis added).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See *Nicaragua*, *supra* note 36, ¶ 235 (June 27) (noting that the U.S.’s failure to report its decision to use force in collective self-defense against Nicaragua undermined the U.S. position that it was acting in the context of Article 51).

<sup>62</sup> See, e.g., *id.* art. 44; *id.* art. 107; G.A. Res. 377 (V), at 10 (Nov. 3, 1950) (resolving that the United Nations General Assembly may consider threats to international peace and recommend collective measures in response should the Security Council fail to exercise its responsibilities under Articles 39, 42, or 53(1) of the Charter); G.A. Res. 3070 (XXVIII), at 78 (Nov. 30, 1973) (affirming countries’ right to provide “moral, material, and any other assistance” to populations struggling against “colonial and foreign domination”). See also Schrijver, *supra* note 46, at 474 (noting that neither G.A. Res. 377 (V) nor G.A. Res. 3070 (XXVIII) have ever actually been put into practice).

<sup>63</sup> CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 134 (4th ed. 2018).

<sup>64</sup> *Nicaragua*, *supra* note 36, ¶ 229.

through Nicaragua had supplied rebel groups in El Salvador<sup>65</sup> and that Nicaragua bore responsibility for cross-border military incursions into Honduras and Costa Rica.<sup>66</sup> Nevertheless, the court held that neither the flow of weapons through,<sup>67</sup> nor the cross-border military incursions by,<sup>68</sup> Nicaragua constituted armed attacks under the meaning of Article 51.<sup>69</sup> At most, Nicaragua's provision of weapons, logistical support, and border incursions were instead "threat[s] or use[s] of force" or "intervention[s]," implying that each of these terms lacked the severity of Article 51's "armed attack" requirement.<sup>70</sup> Even more directly, *Nicaragua* distinguished "armed attack[s]" from "mere frontier incident[s]" on the basis of the former's more significant "scale and effects."<sup>71</sup> This distinction coincided with the Court's stipulation that armed attacks consisted of only "the most grave forms of the use of force."<sup>72</sup> Thus, the *Nicaragua* Court's "scale and effects" language introduced a *de minimis* severity threshold for what could constitute an armed attack moving forward.<sup>73</sup>

The ICJ's next opportunity to refine the definition of "armed attack" came in its 2003 judgment in *Oil Platforms*. There, the United States accused Iran of firing a missile at the U.S.-flagged *Sea Isle City* tanker and laying underwater mines that struck the USS *Samuel B. Roberts* warship.<sup>74</sup> Following each incident, the United States attacked Iranian offshore oil production installations, charging that the *Sea Isle City* and *Samuel B. Roberts* episodes constituted armed attacks by Iran and triggered the United States' right to individual self-defense under Article 51.<sup>75</sup> Perhaps recognizing *Nicaragua*'s distinction of armed attacks from "mere frontier incident[s]," the United States insisted that while it viewed the *Sea Isle City* bombing on its own as an armed attack under Article 51, it was even more severe when viewed collectively with the mining of the USS *Samuel B. Roberts*.<sup>76</sup> The ICJ disagreed, concluding that "these incidents do not seem . . . to constitute an armed attack on the United States of the kind that the [*Nicaragua*] Court . . . qualified as

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<sup>65</sup> *Id.* ¶ 160 (stopping short of imputing this "intermittent flow of arms" to the Nicaraguan State, however).

<sup>66</sup> *Id.* ¶ 164.

<sup>67</sup> *See id.* ¶ 230 (adding that even if the flow of weapons through Nicaragua to insurgents in El Salvador was imputable directly to the Nicaraguan State, such arms support would still fall short of the threshold for an "armed attack" under Article 51).

<sup>68</sup> *See id.* ¶ 231.

<sup>69</sup> *Id.* ¶ 238 (holding that because Nicaragua had not committed an armed attack on El Salvador, Honduras, or Costa Rica, the United States could not invoke collective self-defense against Nicaragua under Article 51).

<sup>70</sup> *Id.* ¶ 195.

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

<sup>72</sup> *See id.* ¶ 191.

<sup>73</sup> *See* Chloe Goldthorpe, *The Armed Attack Requirement and Customary International Law: Whose Views Count?*, 10 J. ON THE USE OF FORCE AND INT'L L. 49, 52-53 (2023) (summarizing the impact of the *Nicaragua* court's distinction between armed attacks and mere frontier incidents).

<sup>74</sup> *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶ 25 (Nov. 6) (hereinafter *Oil Platforms*).

<sup>75</sup> *See id.* ¶ 48 (quoting the United States' letter to the Security Council justifying its attacks on Iranian oil installations on self-defense grounds under Article 51).

<sup>76</sup> *See id.* ¶ 62 (excerpting the United States' legal arguments from its letter to the Security Council formally invoking Article 51).

a ‘most grave’ form of the use of force.”<sup>77</sup> Importantly, though, the *Oil Platforms* court accepted the possibility that “the mining of a single military vessel,” like the USS *Samuel B. Roberts*, might *alone* be sufficient to constitute an armed attack,<sup>78</sup> slightly conditioning *Nicaragua*’s language about “scale and effects.”<sup>79</sup>

Quickly following the ICJ’s judgment in *Oil Platforms* was its advisory opinion in *Construction of a Wall in the Occupied Palestinian Territory* (“*Wall*”). At the request of the General Assembly, the *Wall* court was tasked with analyzing the legal consequences of Israel’s construction of a wall in occupied Palestinian territories.<sup>80</sup> Israel based its legal justification for the construction of this wall on Article 51’s recognition of each country’s inherent right to self-defense, citing that it had repeatedly suffered terrorist attacks since its establishment in 1948.<sup>81</sup> Presumably, then, Israel classified these terrorist attacks by stateless Palestinian groups as armed attacks when invoking Article 51.<sup>82</sup> However, the ICJ held that Israel had not been subject to any armed attacks sufficient to justify the use of force in self-defense under Article 51.<sup>83</sup> The *Wall* Court concluded that the attacks Israel complained of were not “imputable to a foreign State” and that Israel exercised control over the occupied Palestinian territory.<sup>84</sup> And in doing so, the *Wall* opinion highlighted the ICJ’s jurisprudential hesitance to identify an “armed attack” in cases other than traditional, inter-state clashes between regular armed forces.<sup>85</sup>

Lastly, the ICJ again wrestled with identifying armed attacks under Article 51 in *Armed Activities on the Territory of the Congo*. In *Armed Activities*, Uganda attempted to justify its use of military force against the Democratic Republic of the Congo (“DRC”) as self-defense.<sup>86</sup> In doing so, Uganda claimed it had suffered armed attacks from ADF insurgents which were imputable to the DRC.<sup>87</sup> The ICJ dismissed Uganda’s allegations, however, concluding that its use of force against

<sup>77</sup> *Id.* ¶ 64 (quoting *Nicaragua*, *supra* note 36, ¶ 191).

<sup>78</sup> *Id.* ¶ 72.

<sup>79</sup> Compare *id.* ¶ 72 (accepting that a single, isolated attack on a military vessel could constitute an armed attack triggering a country’s inherent right of self-defense under Article 51), with *Nicaragua*, *supra* note 36, ¶ 195 (distinguishing an armed attack from a “mere frontier incident” on the basis of the former’s “scale and effects”). But see Partial Award: Ethiopia’s Claims 1-8 (Eri. v. Eth.), 2005 Permanent Ct. of Arb. 1, ¶ 11–12 (Dec. 19) (reiterating *Nicaragua*’s ‘scale and effects’ test in finding that neither “localized border encounters between small infantry units, even those involving the loss of life” nor “geographically limited clashes between small . . . patrols along a remote, unmarked, and disputed border” consisted armed attacks under Article 51 of the Charter).

<sup>80</sup> *Wall*, *supra* note 42, ¶ 18.

<sup>81</sup> See *id.* ¶ 138 (summarizing Israel’s claims as presented at the United Nations).

<sup>82</sup> See *id.* ¶ 127 (quoting Israel’s complaint that it suffered “actual armed attacks” in its communication to the United Nations Secretary-General on Oct. 3, 1991).

<sup>83</sup> *Id.* ¶ 139.

<sup>84</sup> *Id.*

<sup>85</sup> See Christine Gray, *The International Court of Justice and the Use of Force*, in THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE 237, 251 (Christian J. Tams & James Sloan eds., 2013) (noting the ICJ’s difficulty in analyzing the claims of armed attacks in *Nicaragua*, *Oil Platforms*, *Wall*, and *DRC v. Uganda* “because in none of them was there a classic cross-border action by the regular armed forces of an aggressor state,” as implicitly contemplated in the Charter’s provisions on the use of force).

<sup>86</sup> *Armed Activities*, *supra* note 34, ¶ 43 (Dec. 19).

<sup>87</sup> See *id.* ¶ 131 (reciting Uganda’s allegation that ADF’s armed attacks were sustained and intensified because of support from the DRC).

the DRC was not justifiable under Article 51 because Uganda had not suffered an “armed attack” attributable to the DRC.<sup>88</sup> Furthermore, the court held that the DRC’s alleged inaction in preventing the ADF from operating on its territory did not equate to “tolerating or acquiescing [to]” the ADF’s actions.<sup>89</sup> Note that this judgment focused on the issue of attribution, and not on *Nicaragua*’s “scale and effects” test.<sup>90</sup> Thus, *Armed Activities* should not be read as modifying the ICJ’s precedents or holding anything other than that the DRC did not commit an ‘armed attack’ against Uganda; the court explicitly did *not* hold that the ADF was equally innocent of committing an ‘armed attack.’<sup>91</sup> This nuanced reasoning in *Armed Activities* leaves open the possibility that NSAs might be capable of inflicting armed attacks sufficient to trigger a victim country’s right to self-defense under Article 51.

In sum, the ICJ’s jurisprudence in *Nicaragua*, *Oil Platforms*, *Wall*, and *Armed Activities* primarily illustrates the types of actions that do *not* qualify as armed attacks. Nevertheless, we can extrapolate from these ICJ’s decisions that an armed attack principally: (1) meets some minimal level of severity, though the requisite severity remains open for debate;<sup>92</sup> and (2) that they may be committed by NSAs.<sup>93</sup>

In addition to this working definition derived from the ICJ’s opinions, it is also helpful to briefly consider the statements made by various countries participating in a 2021 *Arria-formula* meeting on this exact issue.<sup>94</sup> *Arria-formula* meetings are not formal meetings of the Security Council, but informal discussions convened by a Security Council member to evaluate other countries’ views on a matter within the Security Council’s competence.<sup>95</sup> In February 2021, Mexico convened an *Arria-formula* meeting to assess various countries’ opinions on “the use of force in international law, non-State actors, and legitimate self-defence.”<sup>96</sup> Although informal in nature, the statements made by participating countries’ in this *Arria-formula* meeting are particularly insightful for understanding the contours of contemporary *opinio juris* on what actions constitute an armed attack under Article 51.<sup>97</sup>

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<sup>88</sup> *Id.* ¶ 146.

<sup>89</sup> *See id.* ¶ 300-01.

<sup>90</sup> *See id.* (explaining the ICJ’s judgment with reference to the lack of proof that the DRC was involved in the “attacks” and to Article 3(g) of the Definition of Aggression).

<sup>91</sup> *See id.* ¶ 147 (“[T]he Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence [sic] against large-scale attacks by irregular forces”).

<sup>92</sup> *See supra* note 79 and accompanying text.

<sup>93</sup> *See supra* note 91 and accompanying text.

<sup>94</sup> *See* Permanent Rep. of Mexico to the U.N., Letter dated Mar. 8 2021 from the Permanent Rep. of Mexico to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. A/75/993-S/2021/247 (Mar. 16, 2021).

<sup>95</sup> *Repertoire of the Practice of the Security Council: Supplement 1993-1995*, [2009] Dept. of Pol. Affairs, U.N. Doc. ST/PSCA/1/Add.12, at 4.

<sup>96</sup> Permanent Rep. of Mexico to the U.N., *supra* note 94, at 1.

<sup>97</sup> *See* Goldthorpe, *supra* note 73, at 71 (suggesting that because the statements at Mexico’s 2021 *Arria-formula* meeting were made outside of any specific international incident, they provide unique insight into the participating countries’ *opinio juris* unclouded by political pressures often associated with specific conflicts).

Despite several statements about the general scope of self-defense, relatively few countries commented on “the severity or type of force that may constitute an armed attack.”<sup>98</sup> Nevertheless, there seemed to be consensus among countries that armed attacks require a *de minimis* use of force that separates them in severity and scale from more minor uses of force.<sup>99</sup> For instance, the Netherlands reiterated the ICJ’s general holding in *Nicaragua* that an armed attack “must have a certain scale and effects” and “must consist of more than isolated incidents . . . .”<sup>100</sup> Russia similarly stressed that countries had to consider “the magnitude of the event” before classifying it as an armed attack.<sup>101</sup> And no country explicitly advocated for eliminating the minimum severity threshold as articulated in *Nicaragua*.<sup>102</sup> The absence of any explicit debate about the meaning of “armed attack” under Article 51 at the 2021 *Arria-formula* meeting might suggest a consensus among participants that the term is already adequately defined under international law, namely by the ICJ opinions discussed earlier.

Taken together, ICJ jurisprudence and the most recent articulation of *opinio juris* on this subject from the 2021 *Arria-formula* meeting indicate that “armed attack” has a generally accepted scope under international law. A use of force is an armed attack if it satisfies the *de minimis* level of severity under the *Nicaragua* court’s “scale and effects” approach,<sup>103</sup> even if only consisting of a single incident,<sup>104</sup> and if it is committed by some foreign State<sup>105</sup> or NSA.<sup>106</sup> Equally important, a use of force is *not* an armed attack if it is a “mere frontier incident.”<sup>107</sup> Each of these elements may be undefined, but they provide a sufficient framework within which to analyze the proposed use of U.S. military force against Mexican drug cartels.

## 2. Article 51’s Right to Self-Defense is not Limited to Inter-State Force.

Commentators have recognized that the text of Article 51 requires the occurrence of an armed attack but says nothing about who that attacker must be.<sup>108</sup> This is theoretically consistent with the ICJ’s judgments in *Nicaragua* and *Armed Activities*. For instance, the ICJ’s conclusion that the DRC did not commit an armed attack against Uganda does not mean that the ADF was equally innocent.<sup>109</sup> In fact, the court’s judgments in *Nicaragua* and *Armed Activities* should be read narrowly

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<sup>98</sup> *Id.* at 64.

<sup>99</sup> *See id.*

<sup>100</sup> Permanent Rep. of Mexico to the U.N., *supra* note 94, at 54.

<sup>101</sup> *Id.* at 66.

<sup>102</sup> *See* Goldthorpe, *supra* note 73, at 64.

<sup>103</sup> *See Nicaragua*, *supra* note 36, ¶ 195.

<sup>104</sup> *See Oil Platforms*, *supra* note 74, ¶ 72.

<sup>105</sup> *See Wall*, *supra* note 42, ¶ 139 (rooting the ICJ’s analysis in the fact that the force Israel suffered was not “imputable to a foreign State”).

<sup>106</sup> *See, Armed Activities*, *supra* note 34, ¶ 147 (refusing to decide definitively that NSAs are incapable of committing armed attacks under international law).

<sup>107</sup> *See Nicaragua*, *supra* note 36, ¶ 195.

<sup>108</sup> Lindsay Moir, *Action Against Host States of Terrorist Groups*, in *THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW* 720, 720 (Marc Weller ed., 2015).

<sup>109</sup> *See Armed Activities*, *supra* note 34, ¶ 147 (limiting the ICJ’s holding to the question of whether the DRC committed an armed attack against Uganda).

as holding *only* that the actions of *those* NSAs did not constitute armed attacks attributable to the countries that were ultimately (and illegally) subject to military force under claims of Article 51 self-defense in those cases.<sup>110</sup>

Even more fundamentally, however, is the fact that separate legal responsibility for uses of force by NSAs is inherent in the General Assembly's 1974 "Definition of Aggression." First, the resolution's preamble positions "acts of aggression" as one type of multiple "uses of force contrary to the Charter . . ." <sup>111</sup> This signifies that entities that commit an act of aggression also necessarily commit some type of use of force in doing so. Second, Article (3), subsections (a)-(f), stipulate a country's legal responsibility for the acts of aggression committed by its "armed forces" or by the "State" itself.<sup>112</sup> Unsurprisingly, this simply means that a country is capable of committing an act of aggression under this General Assembly resolution. Third, and most importantly for this analysis, Article 3(g) confirms that a country may incur legal responsibility for acts of aggression committed by "armed bands, groups, irregulars, or mercenaries" when those entities are sent "by or on behalf of [the] State" itself.<sup>113</sup>

Two crucial implications are evident here. First, the fact that a country only incurs legal responsibility for the actions of these irregulars when it effectively directs<sup>114</sup> their actions suggests that, in the absence of that direction, the irregulars exist as distinct entities with their own spheres of responsibility. This would make these entities NSAs under this paper's proposed definition. Moreover, while Article 3(g) seems to suggest that NSAs cannot independently commit acts of *aggression*,<sup>115</sup> such a limitation does not necessarily mean that NSAs are legally incapable of committing one of the "*other uses of force contrary to the Charter . . .*" that the resolution mentions in its preamble.<sup>116</sup>

This close textual reading of the Definition of Aggression yields a profound conclusion when viewed jointly with this paper's discussion of what constitutes an armed attack under Article 51. If the Definition of Aggression does not preclude NSAs from unilaterally committing some kinds of *uses of force* other than

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<sup>110</sup> See Moir, *supra* note 108, at 736 ("The *Nicaragua* and *Armed Activities* cases both concerned action against host states, and it is important not to broaden their scope beyond reason").

<sup>111</sup> See G.A. Res. 3314 (XXIX), pmb. ¶ 3 (Dec. 14, 1974) (calling upon countries "to refrain from all acts of aggression and *other uses of force* contrary to the Charter of the United Nations . . .") (emphasis added).

<sup>112</sup> See *id.* at art. 3(a)-(f).

<sup>113</sup> See *id.* at art. 3(g).

<sup>114</sup> See *id.* (assigning responsibility to a country when the irregulars' actions are directed "by or on behalf of a State").

<sup>115</sup> See *id.* at art. 3(a)-(g) (excluding actions taken unilaterally by "armed bands, groups, irregulars, [and] mercenaries" from its enumerated list of conduct that "qualify as [acts] of aggression," though it is unclear whether the enumerated list of conduct in Article 3(a)-(g) is intended to be exhaustive).

<sup>116</sup> See *id.* at pmb. ¶ 3 (emphasis added). See also Jan Klabbbers, *Intervention, Armed Intervention, Armed Attack, Threat to Peace, Act of Aggression, and Threat or Use of Force: What's the Difference?*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 488, 489-90 (Marc Weller ed., 2015) (arguing that countries use terms like 'aggression' and 'use of force' deliberately to convey subtle differences in their stances depending on the situation, and that such different uses of seemingly similar terms are not arbitrary).

aggression,<sup>117</sup> and if armed attacks are “the most grave forms of the *use of force*,”<sup>118</sup> then it remains an open question of international law as to whether NSAs can commit armed attacks.<sup>119</sup> So long as that question remains open, this paper assumes that Article 51 allows for the commission of armed attacks by NSAs.

## II. ANALYZING THE USE OF FORCE AGAINST MEXICAN DRUG CARTELS

This section applies the international legal framework discussed in Part I to the proposed use of force against drug cartels in Mexico. It first confirms that these drug cartels are, in fact, NSAs. It then analyzes whether these NSAs have committed an armed attack against the U.S., such that the U.S. could justify its proposed use of force against them as individual self-defense under Article 51.

### A. *Are Drug Cartels in Mexico NSAs Under International Law?*

Recall that an NSA is a group whose actions are not attributable to, or controlled, directed, or managed by, any established State. An NSA’s actions may become attributable to the State in which they occur (the “Host State”) through that State’s subsequent endorsement or complicity of those actions. The principal question of this section, then, is whether the actions of drug cartels operating in Mexico are attributable to, or controlled, directed, or managed by, the Mexican government. The ICJ has endorsed two different standards for determining if an NSA’s actions are attributable to its Host State: (1) *Nicaragua*’s “effective control” test,<sup>120</sup> or (2) Article 8 of the Articles on State Responsibility’s “instructions, directions, or control” test (the “Article 8 Test”).<sup>121</sup>

Under *Nicaragua*’s “effective control” test, the Mexican State, through its official organs of government, must effectively control the operations of the drug cartels based within its borders for those cartels’ actions to be attributable to it. However, even the most fervent supporters of using U.S. military force against drug cartels would find it difficult to show that the Mexican government exercises such control. To the contrary, Mexican law enforcement officials actively fight against these drugs cartels in frequent, deadly clashes.<sup>122</sup> Moreover, between 2007 and 2012 alone, Mexico suffered 311 lethal criminal attacks by cartels against state government officials, mayors, municipal government officials, political candidates,

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<sup>117</sup> See *supra* note 116 and accompanying text.

<sup>118</sup> *Nicaragua*, *supra* note 36, ¶ 191 (emphasis added).

<sup>119</sup> This analysis is consistent with the ICJ’s narrow holding in *Armed Activities*, though the court there does not engage in an analysis of why it chooses to leave open the question of whether NSAs are capable of committing armed attacks. See *Armed Activities*, *supra* note 34, ¶ 147 (“[T]he Court has no need to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces”).

<sup>120</sup> *Nicaragua*, *supra* note 36, ¶ 115.

<sup>121</sup> See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 47, ¶ 407.

<sup>122</sup> See, e.g., Zolan Kanno-Youngs & Emiliano Rodriguez Mega, *13 Law Enforcement Officers Killed in Ambush in Mexico*, N.Y. TIMES (Oct. 23, 2023), <https://www.nytimes.com/2023/10/23/world/americas/mexico-police-attack.html>.

and activists – key organs of government.<sup>123</sup> That figure does not include the nearly 100 political candidates murdered by drug cartels during Mexico’s 2021 election season.<sup>124</sup> Although some Mexican government officials have used their government positions to protect drug cartels’ interests in exchange for financial bribes,<sup>125</sup> the overwhelming weight of evidence indicates that the Mexican State does not exercise “effective control” over drug cartels operating within its borders, nor does it endorse or remain complicit in the cartels’ actions. This weighs in favor of classifying these drug cartels as NSAs.

Relatedly, the Article 8 Test asks whether the drug cartels at issue act “on the instructions of, or under the direction or control of” the Mexico government.<sup>126</sup> Here, the ICJ’s application of the Article 8 Test in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* is instructive. In that case, it was alleged that the former Yugoslavia was responsible for the genocidal massacre at Srebrenica committed by the Army of the Republika Srpska (“ARS”), a secessionist military group of ethnic Serbs operating in the newly-formed Bosnia and Herzegovina.<sup>127</sup> Despite evidence of “strong and close” financial,<sup>128</sup> political, military, and logistical relations between the Yugoslav government and ARS, however, the ICJ held that ARS “could not be regarded as [a] mere instrument[]” of the Yugoslav government “lacking any real autonomy.”<sup>129</sup> It therefore concluded that ARS’ actions could not be attributed to the former Yugoslavia.<sup>130</sup> If Yugoslavia’s “strong and close” relationship with ARS was insufficient to satisfy the Article 8 Test, it appears very likely Mexico’s confrontational relationship with drug cartels would be insufficient too. For the reasons already discussed, the Mexican State not only lacks “effective control” over drug cartels, but actively and consistently combats them. Thus, applying the Article 8 Test here also weighs in favor of categorizing drug cartels as NSAs.

In sum, drug cartels in Mexico are very likely NSAs according to either *Nicaragua*’s “effective control” test or the Article 8 Test as promulgated by the ICJ. Consequently, and importantly, the actions of these drug cartels are not attributable to the Mexico as a Host State.

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<sup>123</sup> See Guillermo Trejo & Sandra Ley, *High-Profile Criminal Violence: Why Drug Cartels Murder Government Officials and Party Candidates in Mexico*, 51 *Brit. J. of Pol. Sci.* 203, 203 (2021).

<sup>124</sup> Juan Montes & Jose de Cordoba, *Dozens of Mexican Candidates Have Been Killed in a Bloody Election Season*, *WALL ST. J.* (May 25, 2021, 7:15 AM), <https://www.wsj.com/articles/dozens-of-mexican-candidates-have-been-killed-in-a-bloody-election-season-11621941312>.

<sup>125</sup> See *United States v. Luna*, No. 19-cr-576 (BMC), 2022 WL 17128815, at \*1 (E.D.N.Y. Nov. 22, 2022) (reciting the allegations that Genaro Garcia Luna, Mexico’s former Secretary of Public Security and head of the Federal Police Force, used his position to insulate the Sinaloa Cartel from law enforcement in exchange for millions of dollars in bribes, a crime for which Garcia Luna was ultimately convicted in 2023).

<sup>126</sup> *Report of the International Law Commission on the work of its fifty-third session*, [2001] 2 (Part II) Y.B. Int’l L. Comm’n 26.

<sup>127</sup> See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 47, ¶ 1.

<sup>128</sup> *Id.* at ¶ 387–388.

<sup>129</sup> *Id.* at ¶ 394.

<sup>130</sup> *Id.* at ¶ 415.



B. *Have Drug Cartels Committed Armed Attacks Against the U.S. Under Article 51?*

Determining whether the United States can use force against NSAs in Mexico under Article 51's inherent right to self-defense hinges on whether those NSAs have committed an armed attack against the United States.<sup>131</sup> This paper has already demonstrated that although a definition of "armed attack" is not codified anywhere in the Charter, a broadly accepted and judicially-applied scope of "armed attack" does exist.<sup>132</sup> Namely, an armed attack is: (1) a use of force, (2) committed by a foreign State<sup>133</sup> or NSA<sup>134</sup> (3) that is sufficiently severe in its "scale and effects,"<sup>135</sup> even if only a single incident,<sup>136</sup> to constitute one of "the most grave forms of the use of force."<sup>137</sup> This subsection analyzes each of these elements and concludes that, under this framework, it is clear that the harm inflicted on the United States by drug cartels in Mexico does not meet the threshold of an armed attack.

First, and perhaps determinatively, drug cartels in Mexico have not conducted any *use of force* against the United States at all. As the U.S. Department of Justice recognizes, drug-related armed violence by cartels is almost entirely confined within Mexico's borders.<sup>138</sup> And when "minimal spillover violence" is perpetrated by drug cartel members on U.S. soil, it is largely concentrated along the southwest border and mainly involves 'trafficker-on-trafficker' incidents.<sup>139</sup> Instead, the primary harm inflicted by these drug cartels against the United States arises from their trafficking of illegal drugs to willing U.S. buyers.<sup>140</sup> Drug trafficking and smuggling is fundamentally different from the militaristic, violent, and warlike conduct envisioned under international law as a "use of force."<sup>141</sup>

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<sup>131</sup> See Laurie R. Blank, *Irreconcilable Differences: The Thresholds for Armed Attack and International Armed Conflict*, 96 Notre Dame L. Rev. 249, 251–252 (2020) (emphasizing that an armed attack is the threshold for the use of force in self-defense).

<sup>132</sup> See, e.g., *Nicaragua*, *supra* note 36, ¶ 191–195 (June 27); Permanent Rep. of Mexico to the U.N., *supra* note 94.

<sup>133</sup> See *Wall*, *supra* note 42, ¶ 139 (rooting the ICJ's analysis in the fact that the force Israel suffered was not "imputable to a foreign State").

<sup>134</sup> See *Armed Activities*, *supra* note 34, ¶ 147 (refusing to decide definitively that NSAs are incapable of committing armed attacks under international law).

<sup>135</sup> See *Nicaragua*, *supra* note 36, ¶ 195.

<sup>136</sup> See *Oil Platforms*, *supra* note 74, ¶ 72.

<sup>137</sup> *Nicaragua*, *supra* note 36, ¶ 191.

<sup>138</sup> DRUG ENFORCEMENT ADMINISTRATION, U.S. DEP'T OF JUST., 2020 NATIONAL DRUG THREAT ASSESSMENT 69 (2021).

<sup>139</sup> *Id.*

<sup>140</sup> See NATIONAL DRUG CONTROL STRATEGY, *supra* note 1, at 86.

<sup>141</sup> See, e.g., G.A. Res. 3314 (XXIX) (Dec. 14, 1974) (providing examples of conduct qualifying as the crime of aggression, one type of use of force, including "invasion or attack," "bombardment," "blockade," and "armed force"). See also Antoine Perret, *Militarization and privatization of security: From the War on Drugs to the fight against organized crime in Latin America*, 105 Int'l Rev. of the Red Cross 828, 830 (2023) ("[D]espite the 'War on Drugs' label and the increasing use of military forces, [action against drug cartels] remains primarily a law enforcement initiative . . ."); Oliver Corten, *THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW* 61–66 (2021).

Moreover, the United Nations' three key treaties addressing the trans-border trafficking of illegal drugs are informative here.<sup>142</sup> Neither the U.N. Single Convention on Narcotic Drugs (1961)<sup>143</sup> nor the U.N. Convention on Psychotropic Substances (1971)<sup>144</sup> mentions the use of force anywhere in their provisions about trans-border drug trafficking. The U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), furthermore, repeatedly refers to "law enforcement" as the solution to combatting illegal drug trafficking.<sup>145</sup> Law enforcement activities are not the same as military activities conducted by a country's armed forces under international law.<sup>146</sup> Therefore, the first element of this paper's definition of an armed attack – that an armed attack be a use of force – is absent from the dynamic between Mexican drug cartels and the U.S. The harm caused by drug cartels appears to instead fall squarely within the international community's accepted understanding of law enforcement matters.

The second factor of this paper's definition of armed attacks requires that the activities in question be conducted by a foreign State or NSA. This paper has already demonstrated that the harm in question has been committed by Mexican drug cartels, and they can be properly classified as NSAs.

Lastly, a use of force must be sufficiently severe in its scale and effects in order to qualify as an armed attack. Here, it may be useful to analogize the severity of the drug cartels' operations with the severity of other potential armed attacks analyzed under international law. In *Nicaragua*, the ICJ held that despite finding Nicaragua had trafficked in weapons and engaged in cross-border military incursions, such conduct was not sufficiently severe to constitute an armed attack, even if it might have been a lower-severity type of use of force.<sup>147</sup> Nicaragua's actions, and particularly its military excursions within El Salvadorian territory, seem more violent than drug cartels' trafficking of illegal substances to a U.S. market replete with alacritous American buyers. Therefore, if Nicaragua's conduct lacks the requisite severity for an armed attack, it is unclear how drug cartels' illicit

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<sup>142</sup> See Neil Boister, PENAL ASPECTS OF THE UN DRUG CONVENTIONS, 1–2 (2001).

<sup>143</sup> See U.N. Single Convention on Narcotic Drugs, Mar. 30, 1961, 520 U.N.T.S. 151 (amended in 1972).

<sup>144</sup> See U.N. Convention on Psychotropic Substances, Feb. 21, 1971 1019 U.N.T.S. 175.

<sup>145</sup> U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 1582 U.N.T.S. 95, art. 9, ¶ 1–2 ("The Parties shall co-operate closely . . . with a view to enhancing the effectiveness of *law enforcement* action to suppress the commission of [international drug trafficking] offenses . . .") (emphasis added).

<sup>146</sup> See, e.g., Detention of Three Ukrainian Vessels (Ukr. v. Russ.), Order of May 25, 2019, 23 ITLOS 283, ¶ 63–75 (acknowledging "the distinction between military and law enforcement activities" for purposes of applying international law). See also *Operation Snowcap: Past, Present, and Future: Hearing Before the H. Comm. on Foreign Affairs*, 101st Cong. 10–13 (1990) (statement of David L. Westrate, Assistant Adm'r, Operations Div., Drug Enf't Admin.) (recognizing the different roles of law enforcement and forces by stating "[o]f course, direct U.S. *military* involvement in host government *law enforcement* operations [to combat drug manufacturing and trafficking] is generally not acceptable") (emphasis added). Westrate proceeded to explain that Operation Snowcap, in which the U.S. sent military personnel and equipment to certain Latin American countries to train and equip local forces to combat illicit drug manufacturing and trafficking, "is a law enforcement mission, complemented with military support resources."

<sup>147</sup> See *Nicaragua*, *supra* note 36, ¶ 195.

drug trafficking, absent substantial armed violence on U.S. soil,<sup>148</sup> could ever be severe enough to constitute an armed attack against the U.S.

Equally revealing, several international organizations implicitly, although not expressly, acknowledged that the terrorist attacks of September 11, 2001 constituted an armed attack by NSAs against the United States.<sup>149</sup> These attacks involved the premeditated and purposeful killing of U.S. civilians, but even then the international community refused to explicitly categorize it as an armed attack in official resolutions. If the purposeful slaughter of civilians only implicitly satisfies the sufficiently severe “scale and effects” test of the *Nicaragua* court, it is difficult to imagine drug cartels’ trafficking of illegal substances to an eager U.S. black market as meeting that same threshold. In fact, reason might suggest that drug cartels differ from the NSAs responsible for 9/11 namely in that drug cartels hope to avoid civilian deaths because they would reduce the cartels’ potential customer base.

Thus, Mexican drug cartels have not committed an armed attack against the United States within the meaning of Article 51 of the Charter. The actions of these cartels indeed have fatal effects on a large number of American citizens over decades, but they still lack both the requisite nature as a use of *force* and the requisite severe “scale and effects” under the *Nicaragua* decision to qualify as armed attacks. Until the actions of Mexican drug cartels meet those requirements of Article 51, their conduct remains a law enforcement issue, not a military issue. As such, the United States lacks a legal justification under Article 51’s right of individual self-defense to use military force against Mexican drug cartels without Mexico’s permission.

### III. COUNTERARGUMENTS

Having concluded that the U.S.’s use of force against Mexican drug cartels is not permissible as an act of self-defense under Article 51 of the Charter, this paper acknowledges and rebuts two counterarguments that suggest otherwise.

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<sup>148</sup> See 2020 NATIONAL DRUG THREAT ASSESSMENT 69 (2021).

<sup>149</sup> See S.C. Res. 1368 (Sept. 12, 2001) (“Recognizing the inherent right of individual . . . self-defense in accordance with the Charter,” but only referenced “terrorist attacks,” not armed attacks); S.C. Res 1373 (Sept. 28, 2001) (“Reaffirming the inherent right of individual . . . self-defense as recognized by the Charter,” but again referring to “terrorist attacks,” not armed attacks); Organization of American States [OAS], Permanent Council Res. 796 (Sept. 19, 2001). A limited number of U.S. allies did publicly refer to the terrorist attacks as “armed attacks,” but it remains telling that the international community as a whole did not. See Chargé d’affaires of the Permanent Mission of Canada to the U.N., Letter dated Oct. 24, 2001 from the Chargé d’affaires of the Permanent Mission of Canada addressed to the President of the Security Council, U.N. Doc. S/2001/1005 (Oct. 24, 2001) (referring to the “armed attacks in the United States on 11 September 2001” and noting NATO’s invocation of article 5 of the North Atlantic Treaty, which provides for a collective armed response to “armed attacks” on any NATO member State).

A. *Is Force Against Cartels Allowed Under the “Unwilling or Unable” Doctrine?*

Proponents of the use of military force against NSAs abroad, and especially against drug cartels in Mexico, may eagerly cite the “Unwilling or Unable” doctrine as additional grounds upon which to invoke Article 51’s self-defense powers. This doctrine posits that when State A is attacked by an NSA operating from within State B’s territory, and State B is either unable or unwilling to address the threat of that NSA, then State A is justified in using force against that NSA within State B’s territory and without State B’s consent.<sup>150</sup> The appeal of the “Unwilling or Unable” doctrine is self-evident: State A should not suffer armed attacks by an NSA, but be precluded from defending itself, when State B is unwilling or unable to eliminate the threat originating from within its borders. Applied to the issue at hand, proponents might argue that Mexico has demonstrated that it is unable to effectively eliminate the threat of drug cartels despite decades of trying, and thus the U.S. is justified in using force against drug cartels under the “Unwilling or Unable” doctrine. While facially convincing, the problem with such an approach is that the “Unwilling or Unable” doctrine is, unquestionably, *not* international law.

In 2012, former principal Legal Adviser of the U.K.’s Foreign and Commonwealth Office, Sir Daniel Bethlehem, included the “Unwilling or Unable” doctrine in his list of international legal principles “that apply, or ought to apply, to the use of force in self-defense against [an] armed attack by [NSAs].”<sup>151</sup> In doing so, Bethlehem noted that while his principles did not reflect the “settled view of any state” and “will undoubtedly prove controversial,” he hoped that someday they might “attract a measure of agreement” among States.<sup>152</sup> That same year, Professor Ashley Deeks suggested that the “Unwilling or Unable” doctrine had operated as an “unwritten” element within international legal rules and philosophy since Emer de Vattel’s canonical writings in the mid-18<sup>th</sup> century.<sup>153</sup> Furthermore, the United States formally adopted the “Unwilling or Unable” doctrine in its invocation of Article 51 as grounds to use military force against terrorist NSAs in Syria in 2014.<sup>154</sup>

None of this, however, changes the fact that the “Unwilling or Unable” doctrine “has not prevailed in State practice and has not become part of customary [international] law . . . .”<sup>155</sup> Several States explicitly reject the “Unwilling or

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<sup>150</sup> See Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. OF INT’L L. 487 (2012).

<sup>151</sup> See Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors*, 106 AM. J. OF INT’L L. 773–76 (2012).

<sup>152</sup> *Id.* at 773.

<sup>153</sup> See Deeks, *supra* note 150, at 499.

<sup>154</sup> See Letter dated Sept. 23, 2014 from the Permanent Representative of the U.S. to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/695 (Sept. 23, 2014) (“States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence [sic], as reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is *unwilling or unable* to prevent the use of its territory for such attacks”) (emphasis added).

<sup>155</sup> CONSTANTINE ANTONOPOULOUS, *NON-PARTICIPATION IN ARMED CONFLICT: CONTINUITY AND MODERN CHALLENGES TO THE LAW OF NEUTRALITY* 168 (2022).

Unable” doctrine as outside the legitimate uses of force prescribed under international law,<sup>156</sup> including Mexico,<sup>157</sup> and the 2021 *Arria-formula* meeting – the most recent evidence of *opinio juris* on this topic – did not even hint that any sort of consensus had formed around this doctrine.<sup>158</sup> “[This] evidence does not reflect the kind of widespread state practice and *opinio juris* that is typically required to corroborate claims regarding the establishment of new principles of customary international law.”<sup>159</sup>

Although justifying the use of military force against drug cartels in Mexico under the “Unwilling or Unable” doctrine has clear political, and perhaps even moral, appeal, it is not currently part of international customary law.

### B. *Using Force Against Cartels Is Okay Even If Force Against Mexico Isn't*

Other observers may criticize this paper for conflating the use of force against drug cartels in Mexico with the use of force against the Mexican State itself. This is an important, and valid, distinction, and this paper accepts that the use of force against an NSA, in response to an armed attack by that NSA, is legally separable from the use of force against the State from which a belligerent NSA operates. However, when considered in the context of using military force against drug cartels in Mexico, this distinction does not change this paper’s conclusion because drug cartels remain illegitimate targets of military force in self-defense under Article 51.

A State’s right to use self-defense under Article 51 requires first that an armed attack occur, or at the very least that an armed attack be imminent. Yet as this paper has discussed, drug cartels have not committed an armed attack on the U.S. Their illicit trafficking and smuggling of illegal drugs to an audience of willing American buyers simply cannot be characterized as an armed attack under the current state of international law and ICJ jurisprudence. Recall the ICJ’s decision in *Armed Activities*, where the Court refused to explicitly characterize the ADF’s deliberate, violent, and lethal attacks on Ugandan forces as armed attacks. The *Armed Activities* Court was faced with the traditional hallmarks of war – violence and bloodshed by armed groups intent on killing one another – and yet still the Court did not find that an “armed attack” had occurred. *Armed Activities* reminds us that the threshold of “armed attack” is extremely high, reserved only for those uses of force that are truly the “most grave.” Drug trafficking by Mexican cartels falls far short of that threshold.

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<sup>156</sup> See Chachko & Deeks, *supra* note 21.

<sup>157</sup> See Statement of Mexico at the United Nations General Assembly Sixth Committee (Oct. 12, 2018), <https://statements.unmeetings.org/media2/19409927/mexico-s-.pdf> (“My country considers that Article 51 of the Charter cannot be invoked to justify a response to an armed attack perpetrated by a non-state actor that has no relationship with the State, and, moreover, opens the door to undermining the territorial integrity of another State when the latter presents a lack of will or capacity (is “unable or unwilling”) to act against said private entities” (unofficial translation).

<sup>158</sup> See Permanent Rep. of Mexico to the U.N., *supra* note 94.

<sup>159</sup> Craig Martin, *Challenging and Refining the “Unwilling or Unable” Doctrine*, 52 VAND. J. OF TRANSNAT’L L. 414 (2019).

## CONCLUSION

In 2008, this author lost his aunt to an opioid addiction. In 2023, his cousin passed away from a heart condition complicated by using illegal drugs. Both were in their early thirties. And statistically, at least some of the substances involved in their deaths likely originated in Mexico – strikingly similar fates suffered by two generations in America. The excruciating harm inflicted on American families by Mexican drug cartels is not lost on this author. But recognition of this harm does not mean the U.S. should contort Article 51, or its requirement of an “armed attack,” to accommodate convenient military action against them.

There is a sense of unfairness in this conclusion; a sense that if this paper’s analysis is correct, international law must be *wrong*. And perhaps it is. Perhaps it is *morally* wrong for international law to prohibit the U.S. from using force against drug cartels while hundreds of thousands of its citizens suffer from drug-related deaths and addictions. Perhaps it is *morally* wrong to prohibit the U.S. from discriminately targeting drug cartel installations while Mexico fervently, but never successfully, attempts to combat them. And perhaps Prof. Moore is correct that the ICJ’s uninspiring jurisprudence defining “armed attack” under Article 51 actually undermines international security and the “normative deterrence against aggression.”<sup>160</sup> But none of this changes the actual, *legal* definition of “armed attack” for purposes of Article 51 self-defense in contemporary international law. The temptation to warp international law to satisfy these concerns – moral, political, and otherwise – must be resisted in purely legal analyses like this one. If we feel frustrated with this paper’s conclusion, our frustration ought to lie with the substance of the international legal framework on the use of force, and not this paper’s unbiased interpretation of that substance.

Thus, this *paper* concludes that the proposed use of U.S. military force in self-defense against drug cartels in Mexico would be illegal under international law. And yet this *author* notes, with some hope, that international law is always capable of evolving to accommodate justice.

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<sup>160</sup> See John Norton Moore, *Jus ad Bellum Before the International Court of Justice*, 52 VA. J. OF INT’L L. 953 (2012).