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**74,702 REASONS FOR ACTION: THE LEGAL GROUNDS FOR POTENTIAL
U.S. FORCE AGAINST DRUG CARTELS**

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ABSTRACT

The fentanyl crisis in the United States claims over 74,000 lives annually, a tragedy fueled by Mexican drug cartels in collaboration with Chinese precursor chemical manufacturers. Cartels leverage their status as non-state actors to traffic synthetic opioids across the U.S. border, raising critical legal questions about a nation's right to defend itself. This paper examines whether international law, particularly the United Nations Charter and customary law, provides legal grounds for the United States to employ military force against Mexican drug cartels. By analyzing the nature of the fentanyl crisis and the applicability of the doctrine of self-defense under Article 51 of the United Nations Charter, this paper argues that the United States has a legitimate basis to invoke the right to self-defense. As part of this analysis, it explores whether the host State, Mexico, is "unable or unwilling" to suppress the cartels, and whether the use of force is both necessary and proportional under international law. This paper draws no conclusions as to what policy measures U.S. officials should enact but, instead, explicates the international legal structure for addressing the fentanyl crisis.

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I. THE STATE OF THE FENTANYL CRISIS IN THE UNITED STATES

A. *The Role of Chinese and Mexican Actors in the U.S. Fentanyl Crisis*

In 2023, 74,702 Americans died after foreign actors trafficked weapons of mass destruction across the United States' border.¹ This is not Pearl Harbor. This is not 9/11. This is the U.S. fentanyl crisis, and the entire nation serves as the battlefield.

Mexican cartels produce and transport fentanyl, the deadliest drug that the United States has ever faced, across the Southwest Border.² Fentanyl is a synthetic drug 100 times more potent than morphine, posing a grave threat to U.S. communities because of its lethality and ease of distribution.³ Forty-two percent of pills tested for fentanyl in a Drug Enforcement Agency ("DEA") analysis contained potentially lethal fentanyl doses, where only two milligrams of the substance can kill someone, depending on a person's past use, weight, and tolerance.⁴ Fentanyl's potency benefits cartels because of the reduced mass needed to create a certain amount of doses, which makes transporting fentanyl easier than other illicit drugs.⁵ For instance, while the cartel might require several large truckloads to satisfy a city's heroin supply, a sedan's trunk is sufficient for an equivalent fentanyl supply.⁶ Further, whereas cocaine and heroin producers must monitor weather patterns, crop cycles, and general growing conditions, fentanyl makers only require chemicals, equipment, and basic know-how.⁷ Cartels, thus, can produce fentanyl anywhere at any time.

The Sinaloa Cartel and the Cartel Jalisco Nueva Generación ("CJNG") command the flow of nearly all illicit drugs into the United States.⁸ They manage vast international supply chains that span from precursor chemicals to manufacturing sites, while coordinating a sophisticated network of accomplices.⁹ This network includes global shippers, cross-border couriers, corrupt officials, tunnel constructors, front companies, and, critically, Chinese precursor chemical

¹ Press Release, CDC, Nat'l Ctr. for Health Statistics, Off. of Commc'n, U.S. Overdose Deaths Decrease in 2023, First Time Since 2018 (May 15, 2024), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2024/20240515.htm; see 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/executivemanagement/Multistate%20WMD%20Policy%20Letter_9.15.22_18%20AGs.pdf (describing fentanyl as a "weapon of mass destruction" in a joint letter, signed by a bipartisan group of 18 U.S. state Attorney Generals).

² DRUG ENF'T ADMIN., U.S. DEP'T OF JUST., 2024 NATIONAL DRUG THREAT ASSESSMENT 1 (2024) [hereinafter NATIONAL DRUG THREAT ASSESSMENT].

³ *Facts About Fentanyl*, U.S. DRUG ENF'T AGENCY, <https://www.dea.gov/resources/facts-about-fentanyl> (last visited Oct 16, 2024).

⁴ *Id.*

⁵ *Heroin and Fentanyl in Washington State*, UNIV. OF WASH. (July 4, 2024), https://adai.washington.edu/WAdata/heroin_versus_fentanyl.htm.

⁶ Jamie Smyth, *et al.*, *The Global Network Behind the Fentanyl Crisis*, FIN. TIMES (Nov. 8, 2023), <https://ig.ft.com/fentanyl-crisis/>.

⁷ NATIONAL DRUG THREAT ASSESSMENT, *supra* note 2.

⁸ *Id.*

⁹ *Id.* at 2.

makers.¹⁰ The Chinese chemical makers offer their products to the cartels at very competitive prices, in part, because of a supportive government.¹¹ The Chinese Communist Party (“CCP”) offers direct subsidies, including tax rebates, to companies that manufacture and export synthetic narcotics prohibited in the United States.¹² Notably, companies only receive these incentives if they export their product—the CCP censors content pertaining to drug sales and aggressively prosecutes those selling drugs domestically.¹³ Given this financial backing and low Chinese production costs, manufacturers can sell a kilogram of precursor for \$800.¹⁴ A kilogram of precursor produces roughly 415,000 pills, which street dealers sell for about three dollars each in New York City (equivalent to \$1,250,000 of revenue per kilogram of precursor).¹⁵

The cartels often rely on willing shippers to transport the precursors to Sinaloa and Jalisco-controlled ports and air cargo facilities; indeed, a London-based study found ninety suppliers willing to ship Chinese precursor overseas.¹⁶ Shipping vendors use a variety of phrases to signal their disregard for customs regulations by marketing their services with offers to “disguise” package contents.¹⁷ Once the cartels take delivery, cartel “cooks” synthesize fentanyl by combining the precursor chemicals at secret laboratories based primarily in the Mexican state of Sinaloa; each cook can make up to 100,000 pills per day.¹⁸ Finally, the cartels transport the product across the border via tunnels, points of entry, and, less frequently, with drones or catapults.¹⁹ The Sinaloa Cartel, in particular, exerts almost complete control over Mexican land bordering Arizona, relying on official points of entry as bases from which to distribute fentanyl pills across the United States.²⁰

While, in many respects, the major Mexican cartels resemble legitimate transnational business organizations, they violently attack rivals, law enforcement, and civilians in furtherance of their drug trafficking interests.²¹ For instance, the CJNG downed a Mexican army helicopter, killing six soldiers in 2015, and attempted to assassinate the Mexico City police chief in 2020.²² The cartels have also employed weaponized drones, including near U.S.-Mexico border areas, to

¹⁰ *Id.*

¹¹ Smyth, *supra* note 6.

¹² STAFF OF SELECT COMM. ON THE STRATEGIC COMPETITION BETWEEN THE U.S. AND THE CHINESE COMMUNIST PARTY, 118TH CONG., SELECT COMMITTEE INVESTIGATES: THE CCP’S ROLE IN THE FENTANYL CRISIS, at 9 (Apr. 18, 2024) [hereinafter SELECT COMMITTEE INVESTIGATES: THE CCP’S ROLE IN THE FENTANYL CRISIS].

¹³ *Id.*

¹⁴ Smyth, *supra* note 6.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See SELECT COMMITTEE INVESTIGATES: THE CCP’S ROLE IN THE FENTANYL CRISIS, *supra* note 12, at 28 (providing examples of claims, like “100% pass customs,” that shippers use to advertise their disregard for customs regulations).

¹⁸ Smyth, *supra* note 6.

¹⁹ NATIONAL DRUG THREAT ASSESSMENT, *supra* note 2, at 9.

²⁰ *Id.*

²¹ *Id.* at 15.

²² *Id.*

attack their rivals.²³ In September 2024, warring factions of the Sinaloa cartel killed at least 50 and wounded dozens, with some corpses showing signs of torture.²⁴ Although the cartels operate more clandestinely in the United States, some violence has crossed the border. For example, in his testimony before members of Congress, a California game warden recounted how cartel members ambushed his officers with military-grade weapons.²⁵ He further testified that cartels assembled Vietnam War-era punji sticks—sharpened stakes concealed in small pits to penetrate boots and feet—near drug-related facilities in California.²⁶ Some national security experts warn that cartel violence will continue to increase in the United States as cartel members become emboldened by Mexico’s failure to contain such brazen acts.²⁷

B. *Mexico’s Role Combatting the Cartels*

Mexico has grappled with drug-trafficking organized crime since the first cocaine cartel’s formation in the 1980s.²⁸ In 2006, President Felipe Calderón declared a “war on drugs,” which spiraled the country into violence.²⁹ His war effort failed, with the nation’s post-2009 murder rates soaring at least two-times higher than the 2006 rate.³⁰ With U.S. support, Mexico long-engaged in a “kingpin” strategy, where the military targeted high-profile leadership to reduce the scale of the country’s cartels.³¹ However, this strategy contributed to the fragmentation of criminal groups and more violence as warring factions fought for control.³² Upon former Mexican President Andrés Manuel López Obrador’s election in 2018, the country adopted a new policy: “hugs not bullets.”³³ The plan sought to reduce

²³ Karol Suárez, *Drug Cartels Attack Enemies and Spread Terror with Weaponized Drones in US, Mexico*, COURRIER J. (May 24, 2021, 6:01 AM), <https://www.courrier-journal.com/story/news/crime/2021/05/24/el-mencho-cjng-mexican-drug-lords-use-drones-spread-terror/5131708001/>.

²⁴ Elías Cambaji, *The Trail of El Mayo and Los Chapitos in Sinaloa: Narco-Blockades, Executions and More Than 50 Dead*, EL PAÍS (Sept. 23, 2024, 12:13 PM), <https://english.elpais.com/international/2024-09-23/the-trail-of-el-mayo-and-los-chapitos-in-sinaloa-narco-blockades-executions-and-more-than-50-dead.html>.

²⁵ *Securing Our Border, Saving Our National Parks Before the Oversight and Investigations Subcomm.*, 118th Cong. (2023) (statement of Lt. John Nores Jr. (ret.), Cal. Dep’t of Fish and Wildlife).

²⁶ *Id.*

²⁷ Andrew Dorn, *Are Mexican Cartels Carrying Out More Violence on U.S. Soil?*, NEWSNATION (Jan. 20, 2023, 4:01 PM), <https://www.newsnationnow.com/crime/are-mexican-cartels-carrying-out-more-violence-on-us-soil/>.

²⁸ Cleve Jones, *Mexico’s Drug Cartels Are Thriving*, FIN. TIMES (May 21, 2024), <https://www.ft.com/content/fe04c6ed-73f8-4e17-852b-ce16fd6c3515>.

²⁹ *Id.*

³⁰ *Intentional Homicides (per 100,000 people) Mexico*, WORLD BANK GRP., <https://data.worldbank.org/indicator/VC.IHR.PSRC.P5?locations=MX> (last visited Oct 16, 2024).

³¹ Jane Esberg, *Why Mexico’s Kingpin Strategy Failed: Targeting Leaders Led to More Criminal Groups and More Violence*, MODERN WAR INST. AT WEST POINT (June, 9, 2022), <https://mwi.westpoint.edu/why-mexicos-kingpin-strategy-failed-targeting-leaders-led-to-more-criminal-groups-and-more-violence/>.

³² *Id.*

³³ Jones, *supra* note 28.

violence by minimizing law enforcement's direct confrontation with cartels.³⁴ López Obrador's successor, Claudia Sheinbaum, has doubled down on this policy.³⁵ While official reports show that the murder rate has declined since 2020, the number of missing people has reached an all-time high.³⁶ Notably, in June 2023, a key Mexican official tasked with collecting crime data resigned after alleging the government pressured her to lower official statistics.³⁷

The cartels pose an ever-increasing threat to Mexico's security. According to Head of U.S. Northern Command, General Glen VanHerck, up to thirty-five percent of Mexico qualified as "ungoverned" space in 2021.³⁸ Further, ahead of the 2024 Mexican election, criminal groups murdered thirty-six candidates and forty-five individuals connected to the election.³⁹ A former Sinaloa state deputy declared that "there has been exponential deterioration. . . . Mexico is becoming a failed state."⁴⁰ In the midst of collapsing security, the Mexican government has grown reluctant to cooperate with the United States. In May 2022, the Mexican government denied the U.S. DEA landing rights to conduct anti-narcotics operations within the country.⁴¹ Moreover, Mexican officials have deflected blame for Mexico's role in the U.S. fentanyl crisis. López Obrador stated that fentanyl production does not occur in Mexico, instead insisting that Mexico is merely a transit location for illicit drugs.⁴² He also claimed that drugs are a U.S. problem, not a Mexican one, and that Mexicans "will not act as policemen for any foreign government."⁴³

Beyond a failed war on drugs, Mexican government officials have many disincentives from meaningfully and directly engaging with the cartels. These include fears of scaring away tourists or investors and a desire to preserve peace among cartels that ultimately provide socioeconomic opportunities to otherwise impoverished areas.⁴⁴ Nonetheless, as Mexico demonstrates its limited desire to contain a fentanyl crisis fueled by cartels, some U.S. legislators have called for the United States to take a more forceful stance against the cartels.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ JUNE S. BEITTEL, CONG. RSCH. SERV., R41576, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS 2 (2022).

³⁹ Patrick J. McDonnell, *Bullets Before Ballots: Dozens of Mexican Candidates Have Been Killed as Cartels Seek More Control*, L.A. TIMES (May 30, 2024, 6:47 AM), <https://www.latimes.com/world-nation/story/2024-05-29/mexico-election-violence-cartel-killings-candidates>.

⁴⁰ Jones, *supra* note 28.

⁴¹ Beittel, *supra* note 38, at 5.

⁴² CLAIRE RIBANDO SEELKE & LIANA W. ROSEN, CONG. RSCH. SERV., IF10400, ILLICIT FENTANYL AND MEXICO'S ROLE 2 (2024).

⁴³ Mark Stevenson, *Mexico's President Says He Won't Confront Cartels on U.S. Orders*, PBS NEWS (May 22, 2024, 5:47 PM), <https://www.pbs.org/newshour/world/mexicos-president-says-he-wont-confront-cartels-on-u-s-orders>.

⁴⁴ José de Córdoba, *Betrayal and Capture of Sinaloa Cartel Leaders Spark Fears of Turf War*, WALL ST. J. (Aug. 12, 2024, 11:00 PM), <https://www.wsj.com/world/americas/betrayal-and-capture-of-sinaloa-cartel-leaders-spark-fears-of-turf-war-d1a805f8>.

C. *A Call to Arms*

In January 2023, Representatives Dan Crenshaw and Michael Walz proposed a joint resolution authorizing the president to use force against Mexican drug cartels.⁴⁵ Later, in November 2024, Representative Crenshaw shared his intent to introduce legislation that would establish a House select committee focused on combatting Mexican drug cartels.⁴⁶ President Donald Trump, in his 2024 election campaign, discussed his plan “to make appropriate use of special forces” to attack cartel leadership and infrastructure.⁴⁷ He has also suggested deploying the U.S. Navy to enforce a blockade against the cartels.⁴⁸ Shortly after assuming office, Trump signed an executive order designating international cartels as terrorist organizations.⁴⁹ Predictably, López Obrador and Scheinbaum protested against any U.S. action targeting cartels on Mexican soil.⁵⁰

This paper seeks to analyze whether international law would permit the United States to use force against “organized armed groups,” which, here, are the Mexican drug cartels.⁵¹ While this paper will consider policy arguments at a high level, it primarily seeks to evaluate the legal arguments that the United States could bring forth on the international stage. As such, this paper is not designed to *advocate* a certain policy outcome. Part I has introduced the scope of the fentanyl crisis and how relevant parties have responded. Part II will examine applicable international law, particularly the United Nations Charter (“Charter”), International Court of Justice (“ICJ”) advisory opinions, and customary international law. Part III will apply that law to address whether the United States can use any force against Mexican actors. Part IV will offer policy considerations and concluding thoughts. Ultimately, this paper argues that the United States can use force against Mexican cartels under international law because the fentanyl crisis qualifies as an “armed attack” against the United States.

⁴⁵ H. J. Res. 18, 118th Cong. (2023).

⁴⁶ Jorge Ventura, *Texas Republican to Propose House Committee Targeting Cartels*, NEWSNATION (Nov. 16, 2024, 7:35 PM), <https://www.newsnationnow.com/politics/dan-crenshaw-committee-cartels/>.

⁴⁷ Gram Slattery, *Trump's Foreign Policy: Rethink NATO, Troops to Mexico, Boost Tariffs*, REUTERS (Sept. 10, 2024, 6:11 AM), <https://www.reuters.com/world/us/trumps-foreign-policy-rethink-nato-troops-mexico-boost-tariffs-2023-12-18/>.

⁴⁸ *Id.*

⁴⁹ Exec. Order No. 14,161, 90 Fed. Reg. 8451 (Jan. 20, 2025).

⁵⁰ Julia Shaper, *Mexican President Slams U.S. Lawmakers For Suggesting Military Action Against Cartels*, THE HILL (Mar. 9, 2023, 6:11 AM), <https://thehill.com/policy/international/3892997-mexican-president-slams-us-lawmakers-for-suggesting-military-action-against-cartels/>.

⁵¹ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 (referencing the application of international law to territories affected by “organized armed groups”).

II. INTERNATIONAL LAW ON THE RIGHT OF SELF-DEFENSE

A. *What is a Non-State Actor?*

Before invoking their right to self-defense, a victim State must consider *who* exercised the impermissible force. If the force emanated from somewhere other than a State's official military, the victim State faces a more involved analysis in determining whether a State-affiliated actor or a non-state actor ("NSA") executed the attack. Humanitarian and criminal law offer guidance on the international community's agreed-upon definition of armed NSAs.⁵² Additional Protocol II of the 1949 Geneva Conventions broadly provides that armed NSAs are "dissident armed forces or other organized armed groups."⁵³ This definition begs the following questions: what qualifies as an "armed group," and what constitutes a "dissident" force?

On the first question, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") defined an "organized armed group" as having the following: (1) a command structure; (2) headquarters; (3) territorial control; (4) weapons and military training access; (5) negotiation capability; and (6) military-like strategy and logistics ability.⁵⁴ The United Nation's ("U.N.") Manual on Humanitarian Negotiations with Armed Groups includes similar elements, like a group identity, a chain of command, and an ability to procure arms to achieve political or economic objectives.⁵⁵

On the question of attribution, the U.N.'s commentary Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA") provides that "certain acts of individuals or entities which do not have the status of organs of the State may be attributed to the State in international law."⁵⁶ Article 8 of the ARSIWA specifies that groups become State actors when taking action "under the direction or control of" the State.⁵⁷ Further, Article 3 of the Charter defines aggressive State actions as either directly involving a country's "armed forces" or "irregular" actors acting "by or on behalf of a State." Thus, to attribute a group's action to a State, the State must have some level of "control" over the group.

⁵² See *infra* notes 53-55 (defining armed NSAs as having several common features, including an organized structure and military-like ability).

⁵³ Protocol II, *supra* note 51.

⁵⁴ *Prosecutor v. Haradinaj*, Case No. IT-4-84-T, Judgment, ¶ 64 (Int'l Crim. Trib. for the Yugoslavia Trial Apr. 3, 2008), <https://ucr.irmct.org/scasedocs/case/IT-04-84#trialJudgement>.

⁵⁵ U.N. Off. for the Coordination of Humanitarian Affs., *Humanitarian Negotiations with Armed Groups: A Manual for Practitioners*, at 14–15 (Jan. 1, 2006), <https://www.unocha.org/publications/report/world/humanitarian-negotiations-armed-groups-manual-practitioners> [hereinafter *U.N. Humanitarian Negotiations Manual*].

⁵⁶ *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 57, U.N. Doc. ST/LEG/SER.B/25/Rev.1.

⁵⁷ *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").

International legal bodies have adopted two key approaches to determine if a State controls an armed group: the “effective control” and “overall control” tests. The ICJ has developed several factors to evaluate if the State exercised “effective control” over an actor, including whether the State: (1) created the group; (2) provided more than training or financial assistance; (3) exercised complete control; and (4) paid or chose the leaders of the group.⁵⁸ When relying on the “effective control” test, the ICJ found that States must give specific instructions to the group for each of its allegedly illegal operations rather than general operational support.⁵⁹ Some judges criticize the ICJ’s rigidity. They suggest that, under the effective control test, States can avoid responsibility by providing sympathetic NSAs with resources and intelligence, even if the States do not directly orchestrate specific acts.⁶⁰ For this reason, the ICTY proposed an “overall control” test, which only requires that the State had “a role in organizing, coordinating, or planning the military actions of [a] military group.”⁶¹ While the two tests offer differing views of “control,” both approaches require a State to exercise at least supervisory control over a group in order for the group’s acts to be imputed to the State; otherwise, the group qualifies as an NSA.

B. *The Right of Self-Defense Under the Charter*

Once a victim State identifies the attacking party, it must evaluate the legality of responding to the aggressor with force. Article 2(4) of the Charter provides that States must generally refrain from “*the threat or use of force* against the territorial integrity or political independence of any State.”⁶² However, the Charter permits exceptions to this guiding principle where either the U.N. Security Council authorizes force under Article 42 or a State relies on force in self-defense under Article 51.⁶³ States may also consent to another State using force in its territory to combat NSAs.⁶⁴ Given the unlikelihood of the U.N. Security Council or

⁵⁸ See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 216 (June 27) [hereinafter *Nicaragua*] (providing the factors that comprise the “effective control” test).

⁵⁹ 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 (Feb. 26) (determining that States do not have “effective control” of a group where the group demonstrates at least some discretionary decision-making, despite State-funded support).

⁶⁰ See *id.* at ¶ 39 (Al-Khasawneh, dissenting) (writing that “[t]he inherent danger in such an approach is that it gives States the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility therefore”).

⁶¹ *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, ¶ 64 (Int’l Crim. Trib. for the Yugoslavia Trial July 15, 1999), <https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf> [hereinafter *Tadić*].

⁶² U.N. Charter art. 2, ¶ 4 (emphasis added).

⁶³ See *id.* art. 42, 51.

⁶⁴ See TERRY D. GILL & KINGA TIBORI-SZABÓ, *THE RIGHT OF SELF-DEFENCE: ESSENCE, FUNCTION, LEGAL FOUNDATION, REQUIREMENTS FOR EXERCISE, SCOPE AND MODALITIES OF APPLICATION* 94–142 (2023) (providing customary international law’s self-defense requirements).

host State consenting to force in the present context, this paper will examine the self-defense framework provided by Article 51.⁶⁵

Article 51 permits self-defense only when a State faces an “armed attack.”⁶⁶ Customary international law requires a three-part inquiry before taking any defensive action: (1) the defense must arise out of *necessity*; (2) prove *proportionate* to the threat; and (3) occur at a point sufficiently close to the moment of attack (*i.e., immediacy*).⁶⁷ The necessity element provides that no feasible alternative exists to neutralizing the threat.⁶⁸ If the State has exhausted diplomatic discussions, economic sanctions, and other non-forceful means in the State-to-State context, the State satisfies the necessity requirement.⁶⁹ However, when confronted with NSAs, the inquiry changes. The victim State must first evaluate whether the NSA’s use of force necessitates a response, and then the State must analyze the conditions within the host State.⁷⁰ If the host State is “unable or unwilling” to quell the threat posed by the NSA, the victim State may respond with force.⁷¹ Notably, only some countries, including the United States, assume the position that a State can invoke the Article 51 right to self-defense against NSAs.⁷² Other States, including Mexico, argue that applying force in this scenario violates Article 2(4)—they contend that the victim State violates the host State’s sovereignty by directing force at an NSA within the host State’s borders.⁷³ Proportionality then regulates the scope of defensive measures: the response must correspond to the attack’s scale and should only aim to neutralize the threat.⁷⁴

In determining whether the United States can rely on Article 51 to use force against cartels, this section will evaluate: (1) what qualifies as an “armed attack;” (2) whether NSAs fall under the Article 51 framework; and (3) how States should apply the “unable or unwilling” doctrine.

⁶⁵ See Ashley Deeks & Matthew Waxman, *Using Force Against Mexican Drug Cartels: Domestic and International Law Issues*, LAWFARE (Dec. 13, 2023, 1:58 PM), <https://www.lawfaremedia.org/article/using-force-against-mexican-drug-cartels-domestic-and-international-law-issues> (discussing Article 51 as the most viable way by which a State could claim self-defense against an NSA).

⁶⁶ U.N. Charter art. 51 (emphasis added).

⁶⁷ See GILL & TIBORI-SZABÓ, *supra* note 64 (providing the three elements of an Article 51-exercise of self-defense).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VA. J. INT’L L. 495 (2012) (explaining the process by which a victim State will assess the availability of self-defense in the NSA context).

⁷¹ *Id.*

⁷² See 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> (discussing international disagreement regarding the legitimacy of the “unable or unwilling” doctrine).

⁷³ *Id.*; see Mexico, Statement on Agenda Item 85: “Report of the Special Committee on the Charter of the United Nations” at the Sixth Committee of the 73rd Session of the U.N. General Assembly (Oct. 12, 2018), <https://statements.unmeetings.org/media2/19409927/mexico-s-.pdf> (explaining Mexico’s position that invoking Article 51 against an NSA undermines the host State’s territorial integrity).

⁷⁴ GILL & TIBORI-SZABÓ, *supra* note 64.

1. *Defining “Armed Attack.”* The Charter does not provide a clear definition of what constitutes an “armed attack” or when one occurs.⁷⁵ Whereas the phrase’s plain meaning indicates that an “armed attack” is “the sending of an army or similar unit across a border to engage in warlike conduct,” States take a variety of views as to what actions permit States to invoke Article 51.⁷⁶ For instance, the United States assumes the view that any use of force qualifies as an armed attack. William Taft, a former State Department Legal Adviser, stated, “[t]he gravity of an attack may affect the proper scope of the defensive use of force . . . , but it is not relevant to determining whether there is a right of self-defense in the first instance.”⁷⁷ However, the ICJ contends that only the “gravest forms of force” rise to the “scale and effect” of armed attack.⁷⁸ On the other hand, other States suggest a middle ground. In a letter to the U.N. Security Council, the Netherlands wrote that “the use of force must have a certain scale and effects in order to constitute an armed attack.”⁷⁹ However, the Netherlands also noted that “[a]t the same time, the very nature of self-defense requires that it is able to deal with contemporary threats.”⁸⁰

The ICJ’s advisory opinion in the 1986 *Nicaragua* case sets a high threshold for the existence of an armed attack.⁸¹ The ICJ ruled that U.S. actions, including mining Nicaragua’s harbors and supporting Contra rebels, violated international law due to the U.S.’s disproportionate use of force.⁸² The United States claimed it acted in collective self-defense after Nicaragua supplied logistical support and weapons to insurgents in El Salvador.⁸³ The Court concluded that a “mere frontier incident” does not qualify as an armed attack.⁸⁴ The ICJ illustrated examples of what attacks satisfy the threshold, including a State deploying regular armed forces across a border.⁸⁵ The Court also included Article 3(g)’s definition of aggression as an example of an armed attack: “the sending by or on behalf of a State of armed bands . . . which carry out acts of armed force against another State.”⁸⁶ Conversely, according to the ICJ, if a group or State provides material support (*e.g.*, weapons or logistics) to another State, this does not qualify as an armed attack.⁸⁷ The *Nicaragua* Court ultimately insists that the armed attack must at least have the same

⁷⁵ *Id.*

⁷⁶ *Attack*, BLACK’S LAW DICTIONARY (12th ed. 2024).

⁷⁷ William H. Taft, IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE J. INT’L L. 295, 300 (2004).

⁷⁸ *Nicaragua*, *supra* note 58, at ¶ 191.

⁷⁹ Letter dated Feb. 24, 2021 from the Deputy Permanent Representative of the Kingdom of the Netherlands to the United Nations addressed to the Secretary-General, U.N. Doc. S/2021/247 (Feb. 24, 2021) [hereinafter *Arria Formula Letter*].

⁸⁰ *Id.*

⁸¹ *Nicaragua*, *supra* note 58, at ¶ 191.

⁸² *Id.* at ¶ 229.

⁸³ *Id.* at ¶ 195.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

“scale and effect” as a military operation performed by a State’s military forces.⁸⁸ This restrictive interpretation of Article 51 has attracted substantial criticism, namely for its lacking basis in customary international law, inflexibility to the realities of modern-day conflict, and susceptibility to abuse.⁸⁹

The *Nicaragua* Court divines a new standard for defining illegal force and dispenses with the internationally-accepted aggression test, which provides States a right of self-defense against continuing acts of aggression.⁹⁰ In fact, the French articulation of Article 51 permits self-defense in response to an “aggression armée,” which literally translates to “armed aggression.”⁹¹ Both English and French versions assume equal authority.⁹² Judge Schwebel, who authored a dissent to the *Nicaragua* opinion, argued that the advisory opinion’s distinction between the “most grave” uses of force and lesser uses lacks basis in the Charter or customary international law.⁹³ He refers to the Charter’s definition of aggression, Article 3(g), in his dissent, noting that “it specifies as an act of aggression a State’s ‘*substantial involvement*’ in the sending of armed bands.”⁹⁴ Therefore, according to the plain language of the Charter, a country need not send troops into a State to commit an act of aggression. “Substantial involvement” is sufficient. Further, the ICJ has confused its own jurisprudence by writing in *Oil Platforms* (Iran v. U.S.), Judgment, 2003 I.C.J. 161, (Nov. 6) that “the mining of a single military vessel might be sufficient to bring into play ‘the inherent right of self-defense.’”⁹⁵ This language seemingly conflicts with the ICJ’s assertion in *Nicaragua* that “frontier incidents” do not equate to armed attacks.

Another dissenting justice to the *Nicaragua* opinion, Judge Sir Robert Jennings, criticized the Court’s high threshold, arguing its inapplicability to modern warfare.⁹⁶ Indeed, technological advancements add a challenge to the standard introduced by the *Nicaragua* Court. While kinetic military operations provide a clear nexus between an attack and the effect of an attack, cyber activities can pose more indirect but still devastating effects.⁹⁷ Harold Hongju Koh, a former State Department Legal Adviser, provided the United States’s view that “[c]yber activities that proximately result in death, injury, or significant destruction would

⁸⁸ *Id.*

⁸⁹ See generally John Norton Moore, *Jus ad Bellum Before the International Court of Justice*, 52 VA. J. INT’L L. (2012) (criticizing the ICJ’s *Nicaragua* decision as undermining Article 2(4)’s general prohibition on the use of force).

⁹⁰ *Id.* at 953.

⁹¹ *Id.* at 933.

⁹² *Id.* at ¶ 25.

⁹³ See *Nicaragua*, *supra* note 58, at 558–637 (Schwebel, J., dissenting) (arguing that the *Nicaragua* opinion “is inconsonant with generally accepted doctrine, law and practice”).

⁹⁴ *Id.*; Definition of Aggression Resolution, G.A. Res. 3314, U.N. Doc. A/9631, at 142–43, (Dec. 14, 1974).

⁹⁵ *Oil Platforms* (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 25 (Nov. 6).

⁹⁶ See *Nicaragua*, *supra* note 58, at 533–557 (Jennings, J., dissenting) (rejecting the *Nicaragua* opinion as “neither realistic nor just in the world where power struggles are in every continent carried on by destabilization, interference in civil strife, comfort, aid and encouragement to rebels, and the like.”).

⁹⁷ See Deeks & Waxman, *supra* note 65 (discussing how cyber-attacks can lead to potentially devastating downstream effects, like electric grid failure).

likely be viewed as a use of force.”⁹⁸ A panel of NATO-invited legal experts drafted the Tallin Manual 1.0, a manual on international law governing cyber warfare, and similarly found that “any use of force that injures or kills persons or damages or destroys property would satisfy the scale and effects requirement.”⁹⁹ They additionally noted that “all reasonably foreseeable consequences” qualify as effects of a forceful act.¹⁰⁰ While some States expand the definition of “attack” in the cyber context to include “loss of functionality” of cyber infrastructure, most agree that cyber operations resulting in death or injury qualify as attacks.¹⁰¹

Finally, the ICJ’s approach in *Nicaragua* widens the gap between prohibited force under Article 2(4) and the concept of an armed attack under Article 51.¹⁰² In its 2022 review of Article 2(4), the U.N. Security Council agreed that States should “refrain from or prevent the provision of any form of support or assistance to armed groups.”¹⁰³ The implication here is that the very type of support that Nicaragua offered to El Salvadorian insurgents runs contrary to the principles embedded in Article 2(4). Even though Nicaragua used impermissible force under Article 2(4), this force apparently did not rise to the level of “armed attack.”¹⁰⁴ Thus, the *Nicaragua* Court denied El Salvador its right to self-defense. This incongruence runs contrary to the Charter’s prohibition of aggression, by removing means by which countries can effectively respond to such aggression.¹⁰⁵

Ultimately, the ICJ’s framework in *Nicaragua* proves unworkable for determining when a nation can legitimately invoke its right to self-defense because of its disregard for customary law, modern realities, and the Charter’s underlying policy considerations. Further, given their non-binding nature, ICJ opinions provide a limited perspective on the current State of international law.¹⁰⁶ Such opinions have an even narrower impact when made by a divided court, like in the *Nicaragua*

⁹⁸ *Id.*

⁹⁹ TALLINN MANUAL ON INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (MICHAEL N. SCHMITT, ED., 2012).

¹⁰⁰ *Id.*

¹⁰¹ See Michael N. Schmitt, *A Policy Approach for Addressing the “Cyber Attacks” and “Data as an Object” Debates*, LIEBER INST. WEST POINT (Sept. 19, 2024), <https://lieber.westpoint.edu/policy-approach-addressing-cyber-attacks-data-object-debates/> (examining States’ competing views on what cyber operations amount to an “attack” and finding that even the most restrictive State perspectives would qualify an operation reasonably resulting in death as an “attack”).

¹⁰² See Moore, *supra* note 89, at 952 (contending that the ICJ’s high threshold for acts rising to the level of “attack” sanctions aggressors’ use of force).

¹⁰³ U.N. DEP’T OF POLITICAL & PEACEBUILDING AFFS., REPERTOIRE OF THE PRACTICE OF THE SECURITY COUNCIL: SUPPLEMENT 2022, at 369, U.N. Sales No. E.24.VII.1 (2024).

¹⁰⁴ See *Nicaragua*, *supra* note 58, at 433 (stating that “[t]he factual allegations made against Nicaragua by the United States, even if true, fall short of an ‘armed attack’ within the meaning of Article 51”).

¹⁰⁵ See Moore, *supra* note 89, at 95 (“Tragically, a Court created to stand against aggression has instead through controversial and inverted use of force decisions undermined normative deterrence against aggression.”).

¹⁰⁶ See JOHN NORTON MOORE, THE VIRGINIA-GEORGETOWN MANUAL CONCERNING THE USE OF FORCE UNDER INTERNATIONAL LAW: RULES AND COMMENTARIES ON JUS AD BELLUM 21 (2024) (providing, “except between the parties to each of these cases, ICJ decisions have no binding force”).

case.¹⁰⁷ However, with the notable exception of the United States, States generally agree that only certain thresholds of force can trigger an armed attack.¹⁰⁸ Accordingly, this paper concludes that the best view of “armed attack” includes any use of force that reasonably foreseeably produces physical loss consistent with a kinetic attack, such as substantial injury, death, or property loss.

2. *Non-State Actors Under the Article 51 Framework.* The international legal community disagrees over whether victim States can invoke Article 51 against NSAs. Notably, Article 51 does not specify that a State must face an “armed attack” by *another State* to invoke the right of self-defense.¹⁰⁹ The language in Article 51 contrasts with Article 2(4), which specifies that member States must refrain from “use of force against . . . any [S]tate.”¹¹⁰ Whereas Article 2(4) defines illicit force as occurring between two States, Article 51, on its face, does not contain a State-on-State requirement. The presumption of consistent usage provides that adjudicative bodies should not read a requirement into a statutory provision when that requirement appears elsewhere in a statute.¹¹¹ Thus, here, one might presume that the drafters of the Charter intentionally left out a State-on-State requirement in Article 51. While the international community has failed to reach a broad consensus on the issue, conflicting ICJ jurisprudence and States’ varying approaches at least permits the possibility that Article 51 applies to NSAs.

The ICJ takes the position that a State can only invoke Article 51 against other States.¹¹² In the *Wall* case, the ICJ responded to a request from the U.N. General Assembly, which sought to determine the legality of Israel’s border wall.¹¹³ The wall partially crossed into Israeli-occupied West Bank territory.¹¹⁴ Israel argued that its barrier kept out West Bank militants and averted more suicide attacks against its citizens.¹¹⁵ The ICJ concluded that “attacks against [Israel] are not attributable to a foreign State Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.”¹¹⁶ The Court directly quoted Article 51 and then read in a requirement that Article 51 only applies in the event of an armed attack on one State by another State.¹¹⁷ It failed to cite any support for this

¹⁰⁷ See *id.* at 22 (explaining that ICJ cases may have more precedential value with a unanimous decision).

¹⁰⁸ See GILL & TIBORI-SZABÓ, *supra* note 64 (providing that most States do not view all uses of force as “armed attacks”).

¹⁰⁹ U.N. Charter art. 51.

¹¹⁰ *Id.* at art. 2, ¶ 4.

¹¹¹ Cf. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 112 (2012) (providing that “[w]here the legislature has specifically used a word or term in certain places within a statute and excluded it in another place, the court should not read that term into the section from which it was excluded”) (citation omitted).

¹¹² See *Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I.C.J. 136, ¶ 139 (July 9) [hereinafter *Wall*] (deciding that Article 51 has “no relevance” where an NSA initiated an attack).

¹¹³ *Id.* at ¶ 17.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at ¶ 138.

¹¹⁶ *Id.* at ¶ 139.

¹¹⁷ *Id.*

proposition. Judge Kooijmans and Judge Buergenthal, in their separate opinions, both criticized the advisory opinion's unfounded assertion that Article 51 only applies to State-on-State force.¹¹⁸

The ICJ grappled with a similar question when evaluating whether Uganda could invoke Article 51 against the Democratic Republic of the Congo ("DRC").¹¹⁹ Uganda claimed that it relied on self-defense after enduring armed attacks by the Allied Democratic Forces ("ADF"), a rebel group based in the DRC.¹²⁰ Once the Court decided that the attackers acted independently of the DRC's government, it dropped any inquiry into whether Uganda could rely on Article 51 against NSAs in the DRC.¹²¹ The Court proclaimed that "the 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-defense against large-scale attacks by irregular force."¹²² Given that the ICJ issued the *Armed Activities* decision over a year following the *Wall* opinion, one would presume that the ICJ considered this issue settled.¹²³ However, here the Court seems to suggest that the question of self-defense against NSAs remains an open issue.¹²⁴

The ICJ's rigid "effective control" test, which sets a high threshold for attributing certain acts to a State, only underscores the untenability of the *Wall* opinion.¹²⁵ A State could all but specifically order an armed group to attack another State by providing weapons and general operational advice. Then, the instigating State could hide behind the ICJ's reading of Article 51 by claiming that the armed group acted as an NSA. The ICJ's "effective control" test combined with its denial of a State's right to self-defense against NSAs thus creates an impossible standard.

Subsequent to the *Wall* case, State practice would support the notion that States can use force against armed attacks executed by NSAs. In 1837, Britain ordered Canadian forces to set an American-owned ship, the "Caroline," ablaze after American civilians used the ship to support rebels fighting against the Canadian government.¹²⁶ No evidence suggests the United States supported the sympathetic Americans, and the British never held the United States as responsible for arming rebel forces.¹²⁷ International legal scholars now often refer to the

¹¹⁸ See *id.* at ¶ 35 (separate opinion by Kooijmans, J.) (concluding that the ICJ overlooked more than 50 years of international legal precedent by reading a new requirement into Article 51); *id.* at ¶ 6 (separate opinion by Buergenthal, J.) (arguing that the advisory opinion read a non-existent requirement into Article 51).

¹¹⁹ *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*].

¹²⁰ *Id.*

¹²¹ *Id.* at ¶ 146.

¹²² *Id.* at ¶ 147.

¹²³ See NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 25–42 (2010) (explaining that "[i]f the Court had felt that the issue was satisfactorily addressed and decided in the Advisory Opinion on the Wall, then one might assume it would have repeated its earlier stated position").

¹²⁴ *Id.*

¹²⁵ See *Nicaragua*, *supra* note 58 (providing the "effective control" test factors, which include analyzing whether a State has "complete" control over the NSA).

¹²⁶ Matthew Waxman, *The 'Caroline' Affair in the Evolving International Law of Self-Defense*, *LAWFARE* (Aug. 18, 2018, 2:26 PM), <https://www.lawfaremedia.org/article/carolineaffair>.

¹²⁷ *Id.*

Caroline case—and the subsequent agreement reached between Britain and the United States—as defining the boundaries of the right to self-defense.¹²⁸ In short, the centuries-old *Caroline* case indicates historic acceptance of a State’s right to invoke self-defense against NSAs. More recently, the U.N. Security Council explicitly referred to a nation’s right of self-defense in its resolution condemning terrorist groups for the World Trade Center attack.¹²⁹ Several months later, the Security Council implicitly relied on a self-defense justification when it authorized a resolution to send international forces to Afghanistan.¹³⁰ Thus, State practice only further challenges the *Wall* proposition that self-defense exclusively exists in the context of State-on-State attacks.¹³¹

Attempting to quell this debate, Mexico convened an informal meeting of the U.N. Security Council to discuss whether the Charter permits the use of force against NSAs.¹³² Brazil, China, Mexico, and Sri Lanka rejected any use of force against NSAs without the consent of the host State.¹³³ Austria and Belgium assumed an intermediate position that States can attack NSAs in host States, when such host States have a “complete absence of State authority and effective control.”¹³⁴ Australia, Azerbaijan, Belgium, Denmark, Estonia, the Netherlands, Turkey, the United Kingdom, and the United States claimed a broad right to use force against NSAs in self-defense.¹³⁵ Accordingly, despite a lack of consensus, this paper grants the possibility that a State may invoke Article 51 against NSAs based on the plain language of the Charter, unsettled ICJ precedent, and customary law.

3. *The Unable or Unwilling Doctrine.* States often rely on the unable or unwilling doctrine (“UUD”) to support the proposition that the right of self-defense expands to NSAs. This doctrine arises where an NSA, based in one State, launches an attack against another State. The UUD provides that if the host State is *unable or unwilling* to suppress the threat posed by an NSA, the victim State may use force against the NSA.¹³⁶ Advocates of the UUD trace its roots to both the Charter and

¹²⁸ See Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT’L L. J. 17 (2003) (discussing the *Caroline* case’s modern-day applicability to NSAs: “[t]he threat in the *Caroline* case came from a non-state group of the kind most would probably call terrorist today”).

¹²⁹ See S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (providing the U.N. Security Council’s affirmation of “the inherent right of individual or collective self-defense in accordance with the Charter” following the World Trade Center attack).

¹³⁰ See S.C. Res. 1386, U.N. Doc. S/RES/1386 (Dec. 20, 2001) (noting the U.N. Security Council’s support of “international efforts to root out terrorism, in keeping with the Charter of the United Nations”).

¹³¹ *Id.* at 12.; see also MOORE, *supra* note 106, at 114 (concluding that “considerable State practice strongly support[s] the view that armed attacks in the sense of Article 51 can be carried out by NSAs acting on their own initiative against a State”).

¹³² Adil Ahmad Haque, *Self-Defense Against Non-State Actors: All Over the Map*, JUST SEC. (Mar. 24, 2021), <https://www.justsecurity.org/75487/self-defense-against-non-state-actors-all-over-the-map/>.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Deeks, *supra* note 70, at 499.

customary international law.¹³⁷ Some scholars view the UUD as implicit to a State's Article 51 right of self-defense.¹³⁸ UUD supporters might also refer to the long history of States' reliance on the UUD to suggest that the doctrine has become a feature of customary international law.¹³⁹ Critics of the UUD argue that it too willingly allows victim States to violate the sovereignty of the host State.¹⁴⁰ At the other extreme, some claim that temporary force against an NSA fails to rise to the type of force described in Article 2(4).¹⁴¹ They contend that the targeted exercise of force against NSAs does not challenge a State's "territorial integrity or political independence," rendering Article 2(4) as inapplicable and sidestepping the UUD analysis entirely.¹⁴²

Controversy surrounding the UUD extends beyond the scholarly community. At least fourteen States explicitly endorse the doctrine, three implicitly endorse it, and eight actively object to it.¹⁴³ Despite this disagreement, States have relied on the UUD since at least 1818, with more States recognizing the doctrine with the rise of terrorism.¹⁴⁴ In 1995, Turkey wrote a letter to the U.N. Security Council justifying its use of force against alleged Iraqi terrorists, proclaiming, "[n]o country could be expected to stand idle when its own territorial integrity is incessantly threatened by blatant cross-border attacks of a terrorist organization based and operating from a neighboring country, if that country is unable to put an end to such attacks."¹⁴⁵ Several years later, in 2001, the United States relied on a similar rationale when declaring its intent to launch attacks against Al-Qaeda installations in Afghanistan. In part, the United States claimed that "[d]espite every

¹³⁷ *Id.*

¹³⁸ See e.g., ALBRECHT RANDELZHOFFER, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 661–78 (1994) (stating that "it is compatible with Art. 51 and the laws of neutrality when a warring state fights hostile armed forces undertaking an armed attack from neutral territory on the territory of the neutral state, provided that the state concerned is either unwilling or unable to curb the ongoing violation of its neutrality"); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 250 (2010) (arguing that the United States can invoke its right to self-defense to deploy drones in Pakistan, without needing consent, to target al-Qaeda and Taliban fighters).

¹³⁹ See e.g., Kevin Jon Heller, *The Earliest Invocation of Unwilling or Unable*, OPINIO JURIS (Mar. 19, 2019) <http://opiniojuris.org/2019/03/19/the-earliest-invocation-of-unwilling-or-unable/> (discussing the Nixon Administration's attacks on North Vietnamese forces in Cambodia as an example of reliance on the UUD).

¹⁴⁰ See Lucy V. Jordan, *Unwilling or Unable*, 103 INT'L L. STUD. 151, 159 (2024) (explaining, "[s]ince Article 2(4) does not prohibit the use of force against an NSA, critics argue that invocation of the self-defense exception is irrelevant").

¹⁴¹ See Gabriella Blum & John C. P. Goldberg, *The Unable or Unwilling Doctrine: A View from Private Law*, 63 HARVARD INT'L L.J. 63, 67 (2022) (explaining the perspective of some international law scholars that exercising force against NSAs in a host States does not interfere with the borders or political control of the host State).

¹⁴² *Id.*

¹⁴³ Chachko & Deeks, *supra* note 72.

¹⁴⁴ See Jordan, *supra* note 140, at 162 (noting that the U.S. government invoked a UUD-type argument when crossing into Spanish territory to quell Seminole Tribe attacks on Spanish-occupied land).

¹⁴⁵ Deputy Permanent Rep. of Turkey to the U.N., Letter dated July 24, 1995 from the Deputy Permanent Rep. of Turkey to the United Nations addressed to the President of the Security Council, para. 2, U.N. Doc. S/1995/605 (July 24, 1995).

effort by the United States and the international community, the Taliban regime has refused to change its policy.”¹⁴⁶ During operations against the terrorist group Islamic State of Iraq and the Levant, Australia, Canada, and Turkey justified using force in Syria by explicitly stating that the Syrian government was “unable or unwilling” to prevent attacks originating from its territory. Others, including the United Kingdom, implicitly invoked the UUD when approving force against terrorists in Syria.

Beyond determining the UUD’s viability on the international stage, scholars have attempted to discern what “unable or unwilling” means in practice. The plain meaning of each term provides a starting point. “Unable” is “not having ability or power, to do or perform (undergo or experience) something specified.”¹⁴⁷ Thus, this element suggests that the State lacks the resources, rather than the motivation, to quell a threat. According to the ICJ in the *Armed Activities* case, the DRC exemplified a State completely unable to mitigate threats emerging from within its borders.¹⁴⁸ Somalia may serve as another example of a State lacking the capacity for basic governance in recent history.¹⁴⁹ However, a difficult line-drawing exercise arises on what counts as sufficiently “unable.” For instance, Russia attacked Chechen agitators in Georgia, dismissing Georgia’s own actions against the agitators as unsatisfactory.¹⁵⁰ The United States similarly launched drone attacks against terrorist groups in Pakistan, despite Pakistan’s insistence that it had the ability to combat terrorism within its borders.¹⁵¹ If, however, the United States accepted Pakistan’s claims but failed to see Pakistan take subsequent action, the United States might then assert Pakistan’s *unwillingness* to fight terrorism.

“Unwilling” is “not inclined, willing, or ready; averse, reluctant, loath.”¹⁵² This element might apply in a situation where the State might have appropriate resources but fails to discourage, or even actively encourages, threats stemming from within its borders. For example, Hezbollah, which the United States and many other countries consider as a terrorist group, controls seats in Lebanon’s parliament and fights alongside Lebanese soldiers in certain military efforts.¹⁵³ In practice, however, the unwillingness standard proves difficult to apply. A government’s

¹⁴⁶ Permanent Rep. of the United States of America to the U.N., Letter dated Oct. 7, 2001 from the Permanent Rep. of the United States of America to the United Nations addressed to the President of the Security Council, para. 3, U.N. Doc. S/2001/946 (Oct. 7, 2001).

¹⁴⁷ *Unable*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/unable_adj?tab=meaning_and_use#17141443 (last visited Oct. 18, 2024).

¹⁴⁸ *Armed Activities*, 2005 I.C.J. ¶ 342.

¹⁴⁹ See Blum & Goldberg, *supra* note 141, at 82 (providing Somalia as an example of a country with “a complete failure of government”).

¹⁵⁰ *Id.* at 96.

¹⁵¹ *Id.* at 97.

¹⁵² *Unwilling*, OXFORD ENGLISH DICTIONARY, https://www.oed.com/dictionary/unwilling_adj?tab=meaning_and_use#16133921 (last visited Oct. 18, 2024).

¹⁵³ See generally Kali Robinson, *What is Hezbollah*, COUNCIL ON FOREIGN RELS. (Oct. 4, 2024), <https://www.cfr.org/background/what-hezbollah#chapter-title-0-8> (describing Hezbollah’s role as a political party and paramilitary group within Lebanon).

unwillingness to fight NSAs may stem from its desire to preserve limited resources for other initiatives, which then shifts the calculus back toward ability.¹⁵⁴

Recognizing challenges in applying the UUD, Deeks suggests a factor-based test that victim States can apply in evaluating whether they can use force against NSAs.¹⁵⁵ Deeks recommends that victim States: (1) prioritize consent and cooperation with the host State; (2) evaluate the nature of the NSA's threat; (3) request the host State to provide a timely response to the threat; (4) reasonably assess the NSA's territorial State control; (5) evaluate the host State's proposed means to suppress the threat; and (6) consider prior interactions with the host State.¹⁵⁶ Deeks' framework recapitulates long-standing self-defense principles of necessity, proportionality, and immediacy and applies them to the NSA context. Michael Schmitt, another international law scholar, proposes a similar test that first requires the victim State to request consent or cooperation from the host State before engaging in an attack.¹⁵⁷

While the UUD remains the subject of substantial debate, the doctrine articulates an increasingly important and accepted principle of international law: international law is supposed to penalize harm-doers, regardless of whether the harm stems from a State or NSA.¹⁵⁸ The previously referenced controversy surrounding the definition of "armed attack" indicates an inherent issue with international law. When there exists any gray area in the application or meaning of a legal doctrine, States will seldom find complete agreement. But where multiple "specially-affected" states explicitly assume a position that has basis in the Charter and customary law, one must at least consider that the position has legitimacy on the international stage.¹⁵⁹ As such, this paper assumes that Article 51 permits the UUD's application.

III. APPLYING INTERNATIONAL LAW TO THE FENTANYL CRISIS

A. *Mexican Cartels as Non-State Actors*

When determining whether the United States can use force against Mexican drug cartels, the United States should first consider if the cartels qualify as armed

¹⁵⁴ See Blum & Goldberg, *supra* note 141, at 98 (discussing that states may technically have the resources to combat a possible threat but may rather allocate their scarce resources to "education, healthcare, infrastructure, and fighting crime").

¹⁵⁵ Deeks, *supra* note 70, at 506.

¹⁵⁶ *Id.*

¹⁵⁷ See Michael N. Schmitt, "Change Direction" 2006: *Israeli Operations in Lebanon and the International Law of Self-Defense*, 29 MICH. J. INT'L L. 127, 161 (2008) (stating that the victim State "must first demand that the State from which the attacks have been mounted act to put an end to any future misuse of its territory").

¹⁵⁸ See Moore, *supra* note 89, at 953 ("[I]t is imperative that the Court begin to sanction aggression rigorously through every part of the aggression continuum . . . including 'indirect aggression' and terrorism.").

¹⁵⁹ See *North Sea Continental Shelf Cases* (Fed. Republic of Ger./Den.; Fed. Republic of Ger./Neth.), Judgment, 1969 I.C.J. Rep. 42, ¶ 73 (articulating the Specially-Affected States Doctrine, a principle in international law that recognizes a heightened legal interest or responsibility for states that are uniquely impacted by a particular international situation or action).

NSAs. This qualification has two components: the cartels resemble an “organized armed group,” and they commit acts unattributable to the Mexican State.¹⁶⁰

An “organized armed group” possesses ranging capabilities, including territorial control and military-like ability, to further political *or economic* objectives.¹⁶¹ The Sinaloa Cartel and the CJNG, which together control the flow of most illicit drugs across the U.S.-Mexico border, satisfy these criteria.¹⁶² Sinaloa dominates in the Mexican states of Durango and Sinaloa, whereas CJNG exercises cartel control over Aguascalientes, Baja California Sur, Colima, Jalisco, Nayarit, and Querétaro.¹⁶³ While the extent of cartel control can vary by state, in some areas, the two cartels have taken over local government functions, including handing out social packages and punishing petty criminals.¹⁶⁴ Further, both organizations maintain a highly organized structure. The Sinaloa Cartel operates under an umbrella model, where four directors control each of the cartel’s regional factions.¹⁶⁵ The CJNG uses a franchise model, with one leader overseeing a group of commanders that manage smaller specialized organizations (*e.g.*, running methamphetamine labs).¹⁶⁶ The cartels have also learned military tactics. The CJNG boasts a well-trained mobile force designed to defend against concentrated threats.¹⁶⁷ Cartel arsenals contain rocket-propelled grenades, assault rifles and armored vehicles.¹⁶⁸

On attribution, both the “effective control” and “overall control” tests would fail to find that Mexico controls the cartels operating from within its borders. To be sure, the line between cartels and the Mexican government has blurred. A jury returned a guilty verdict against the former head of Mexico’s security forces in 2023, finding that he accepted millions of dollars in bribes in return for providing the cartels with police cars, uniforms, and other resources.¹⁶⁹ The United States government investigated allegations of López Obrador’s cartel connections, including claims that the former President’s sons collected drug money.¹⁷⁰ Some Mexican citizens also allege that cartels exert control over local state

¹⁶⁰ See U.N. Humanitarian Negotiation Manual, *supra* note 55 (defining the features of an “organized armed group”).

¹⁶¹ *Id.*

¹⁶² See NATIONAL DRUG THREAT ASSESSMENT, *supra* note 2 (describing the Sinaloa Cartel and the CJNG as the “main criminal organizations in Mexico, and the most dangerous”).

¹⁶³ Jones, *supra* note 28.

¹⁶⁴ Vanda Felbab-Brown, *How the Sinaloa Cartel Rules*, BROOKINGS (Apr. 4, 2022), <https://www.brookings.edu/articles/how-the-sinaloa-cartel-rules/>.

¹⁶⁵ NATIONAL DRUG THREAT ASSESSMENT, *supra* note 2, at 5.

¹⁶⁶ NATIONAL DRUG THREAT ASSESSMENT, *supra* note 2, at 12.

¹⁶⁷ Chris Dalby, *How Mexico’s Cartels Have Learned Military Tactics*, INSIGHT CRIME (Sept. 2, 2021), <https://insightcrime.org/news/interview/how-mexicos-cartel-have-learned-military-tactics/>.

¹⁶⁸ *Id.*

¹⁶⁹ Joe Miller & Christine Murray, *Mexico’s Former Security Chief Convicted in US of Helping Cartel Smuggle Drugs*, FIN. TIMES (Feb. 22, 2023), <https://www.ft.com/content/b18e77cc-5bfb-49a6-997c-d04c88accd3c>.

¹⁷⁰ Alan Feuer & Natalie Kitroeff, *U.S. Examined Allegations of Cartel Ties to Allies of Mexico’s President*, N.Y. TIMES (Feb. 24, 2024), <https://www.nytimes.com/2024/02/22/world/americas/mexico-president-drug-cartel.html>.

governments.¹⁷¹ However, despite these connections, even the less stringent “overall control” test requires evidence that the government had a role in “organizing” and “coordinating” the NSA’s actions.¹⁷² Despite corrupt conduct at an individual level, the evidence does not demonstrate a systematic approach by the Mexican government to oversee the cartels. The “effective control” test also certainly fails here given the lack of evidence suggesting that Mexico “created” or “completely controls” the cartels. Thus, Mexican drug cartels are armed NSAs, which, pursuant to the earlier discussion in Part II, subjects them to the Article 51 analysis.

B. The Fentanyl Crisis as an “Armed Attack”

Remember this paper’s assumed definition of an “armed attack:” any use of force that reasonably foreseeably produces physical loss consistent with a kinetic attack, such as substantial injury, death, or property loss.¹⁷³ Based on this interpretation, the Mexican drug cartels have actively engaged in an “armed attack” by distributing fentanyl into U.S. communities.

Of course, the definition of “armed attack” remains a flashpoint in international law with different States’ adopting a spectrum of approaches. At one end, States that subscribe to the ICJ’s *Nicaragua* framework likely would not qualify the cartels’ acts as an “armed attack.”¹⁷⁴ While devastating, the export of fentanyl into the United States is likely not equivalent to the “most grave forms of the use of force.” However, other States assume an intermediate view that the instigating party must exceed some threshold for its use of force to qualify as an armed attack.¹⁷⁵ Still adopting the “scale and effects” language from *Nicaragua*, the intermediate view finds that an operation that proximately causes substantial loss of life or property constitutes an armed attack.¹⁷⁶ Then, at the other extreme, the United States contends that any use of force qualifies as an armed attack and that the severity of the attack only dictates the proportionality of the victim State’s response.¹⁷⁷ If a State were to assume the latter two views, the cartels meet the “armed attack” threshold.

Critics might first contend that even the least demanding definition of “armed attack” requires a “use of force” directed toward American soil. The cartels exhibit extreme violence in Mexico, some of which has spilled over across the border; however, for now, spill-over violence remains minimal.¹⁷⁸ Nonetheless,

¹⁷¹ Mary Beth Sheridan, *Violent Criminal Groups Are Eroding Mexico’s Authority and Claiming More Territory*, WASH. POST (Oct. 29, 2024), <https://www.washingtonpost.com/graphics/2020/world/mexico-losing-control/mexico-violence-drug-cartels-zacatecas/>.

¹⁷² See *Tadić*, *supra* note 61 (defining the factors of the “overall control” test).

¹⁷³ See *supra* p. 13.

¹⁷⁴ *Nicaragua*, *supra* note 58, ¶ 195.

¹⁷⁵ See *Arria Formula Letter*, *supra* note 79 (describing the Netherlands’s view that an “armed attack” is a higher threshold than any use of force but must account for “contemporary” threats).

¹⁷⁶ *Id.*

¹⁷⁷ See Taft, *supra* note 77 (explaining the U.S. position that all uses of force can qualify as “armed attacks”).

¹⁷⁸ DRUG ENF’T ADMIN., U.S. DEP’T OF JUST., 2020 NATIONAL DRUG THREAT ASSESSMENT 69 (2021).

with the increasing threat of cyber-warfare, international legal experts recognize that non-kinetic acts can still qualify as a “use of force.”¹⁷⁹ Deeks provides a useful analogy to the cyber-context when discussing whether Article 51 applies against Mexican drug cartels.¹⁸⁰ In Deeks’s first scenario, a party hacks a nuclear reactor, causing a catastrophic system failure and subsequent loss of life. Deeks stresses that this likely constitutes an armed attack because of the act’s intentionality and the proximate causation between the cyber tool and the resulting harm.¹⁸¹ In a second scenario, a party hacks a State’s electric grid, causing significant economic costs and, through a chain of events like traffic light failures and hospital shutdowns, loss of life.¹⁸² Deeks likens this second event to economic sanctions, which can produce harm “through an attenuated causal chain” but do not rise to an armed attack.¹⁸³

While Deeks argues that the fentanyl crisis resembles the latter scenario, the first scenario represents the better analogue. Deeks’s argument hinges on the “attenuated” nature of the harm and the fact that cartel members do not actively desire fatal outcomes.¹⁸⁴ This argument might better apply if the United States tried to hold Chinese precursor chemical makers accountable under Article 51. Even though they produce the deadly precursors for fentanyl pills, the nexus between the chemical makers’ acts and American deaths may prove too weak. Only the cartels can control the amount of fentanyl in each pill; thus, an attempt to rely on Article 51 against chemical makers likely fails for lack of proximate cause.

Here, though, Mexican drug cartel members intentionally sell drugs that proximately cause death. Fentanyl trafficking does not cause death through an “attenuated” chain of events. Recall that forty-two percent of pills tested for fentanyl contain potentially lethal fentanyl doses.¹⁸⁵ Fentanyl dealers increasingly face homicide—not manslaughter—charges in the United States for overdose deaths, because these individuals act out of extreme recklessness that shows disregard for human life.¹⁸⁶ Even if the street-level dealer is not a formal cartel member, the Charter’s own definition of “aggression” only requires “substantial involvement.”¹⁸⁷ And nobody could credibly argue that the cartels do not demonstrate substantial involvement in fentanyl trafficking, by virtue of the cartels controlling nearly every stage of production and distribution. Further, the fact that cartels do not actively intend death plays a limited role in the “armed attack” analysis. Even the most rigid *Nicaragua* standard calls for analyzing an attack by

¹⁷⁹ See TALLINN MANUAL ON INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed., 2012) (evaluating the ways in which non-kinetic cyberattacks can have the effect of an “armed attack”).

¹⁸⁰ Deeks & Waxman, *supra* note 65.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Facts About Fentanyl*, *supra* note 3.

¹⁸⁶ Carter Evans, *Fentanyl Dealers Increasingly Facing Homicide Charges over Overdose Deaths*, CBS NEWS (Feb. 20, 2024), <https://www.cbsnews.com/news/fentanyl-deaths-homicide-chargers-for-dealers/>.

¹⁸⁷ Definition of Aggression Resolution, *supra* note 94.

its “scale and effects.”¹⁸⁸ 74,702 American deaths in 2023 alone would easily satisfy *the loss of life consistent with a kinetic attack* threshold.

C. *Is Mexico “Unable or Unwilling to Help?”*

Once a victim State determines the origin of the force (*i.e.*, whether the force emanates from a State or NSA) and that the force rises to an “armed attack,” the State must then consider Article 51’s implicit three-factor test: is the act of self-defense necessary, proportional, and imminent?¹⁸⁹

Proportionality simply dictates the scope of the response. To sidestep a thorny debate on what exactly would constitute a proportional response in the present context, this paper accepts that indiscriminately bombing Mexican communities clearly is not proportional. However, use of special forces and cyber warfare may prove proportional if they are the minimum force necessary to mitigate the threat posed by Mexican drug cartels.¹⁹⁰ Further, imminence is easily satisfied here, given the ongoing threat posed by the cartels.

The “necessity” factor requires the most involved analysis to determine whether the United States can respond with any force against Mexican drug cartels. As discussed, this element requires a two-step inquiry in the NSA context. The victim State must first determine whether the NSA’s actions warrant a forceful response, and then, the victim State must analyze the host State’s position.¹⁹¹ If one accepts the premise that the Mexican cartels have engaged in an armed attack against the United States, the analysis shifts to the second inquiry: is Mexico unable or unwilling to mitigate the threat stemming from within its borders?¹⁹²

On unable, one could refer to Mexico’s failure to stop the rise of cartel control in recent history. Despite Mexico’s “war on drugs,” billions of dollars in American aid, and judicial system reforms, the results speak for themselves.¹⁹³ Cartels control vast swaths of the country, threatening politicians and businesses that reject their demands.¹⁹⁴ Their impunity has empowered them to use any means necessary to further fentanyl production and trafficking.¹⁹⁵ One might also argue that Mexico has become increasingly unwilling to address the problem with López

¹⁸⁸ *Nicaragua*, *supra* note 58, at ¶ 195.

¹⁸⁹ See GILL & TIBORI-SZABÓ, *supra* note 64 (providing the three factors that States generally evaluate before invoking their right to self-defense).

¹⁹⁰ See Asawin Suebsaeng, *Trump Is Planning to Send Kill Teams to Mexico to Take Out Cartel Leaders*, ROLLING STONE (May 7, 2024), <https://www.rollingstone.com/politics/politics-features/trump-mexico-kill-teams-drug-cartels-1235016514/> (discussing proposals by President Trump to rely on “kill teams” or cyber operations in combatting Mexican cartels).

¹⁹¹ See Deeks, *supra* note 70 (providing the “unable or unwilling” test).

¹⁹² *Id.*

¹⁹³ Diana Roy, *Mexico’s Long War: Drugs, Crime, and the Cartels*, COUNCIL ON FOREIGN RELS. (Aug. 5, 2024), <https://www.cfr.org/background/mexicos-long-war-drugs-crime-and-cartels>.

¹⁹⁴ Alfredo Peña, *Extortion and Gang Violence are Hitting Even Big Corporations and Business Leaders In Mexico*, AP NEWS (Aug. 1, 2024, 12:37 PM), <https://apnews.com/article/mexico-gang-cartels-extortion-corporations-nuevo-laredo-aaca6d35532e6cef30e172920fe6d7d3>.

¹⁹⁵ Natalie Kitroeff & Emiliano Rodríguez Mega, *A Wave of Violence Terrorizes Mexico as Criminals Kill with Immunity*, N.Y. TIMES (Dec. 20, 2023), <https://www.nytimes.com/2023/12/20/world/americas/violence-mexico-killings.html>.

Obrador’s “hugs not bullets” approach. His approach sought to maintain the status quo, by appealing to cartels to maintain peace.¹⁹⁶ He has explicitly rejected confronting cartels on U.S. orders.¹⁹⁷ His successor, Sheinbaum, expressed her intent to continue López Obrador’s strategy of avoiding direct confrontation with the cartels, with some referring to her security plan as “more of the same.”¹⁹⁸ While the Mexican government made abstract commitments to curb drug trafficking in meetings with the U.S., López Obrador’s commentary demonstrated ambivalence, at best, to meaningfully deterring the threat posed by cartels.¹⁹⁹

At a high level, Mexico appears unable, if not unwilling, to quell an armed attack arising from within its borders. Deeks’s multifactor application of the UUD could also prove instructive. Regarding preference for consent or coordination, the United States has cooperated intensely with the Mexican government to investigate drug trafficking. Since 2007, the United States has appropriated more than \$3.5 billion for a bilateral drug partnership with Mexico.²⁰⁰ However, López Obrador staunchly rejected any U.S. military action against cartels, referring to them as an “offense.”²⁰¹ On request to address the threat, the United States has repeatedly asked for Mexico to address the threat stemming from its territory; despite ideological agreement between the countries on the need to temper the flow of drugs, the Biden administration noted an “unwillingness” by Mexico to devote sufficient resources to the crisis.²⁰² When reasonably assessing territorial control and State capacity, U.S. officials could refer to U.S. military estimates, finding that cartels control up to thirty-five percent of Mexican territory.²⁰³

In the present context, one can combine the final two factors Deeks introduces: proposed means to suppress threat and prior interactions with the territorial State.²⁰⁴ For the last two decades, the United States has initiated a variety of cooperative measures between the two nations, which the Mexican government has receded from in recent years. In addition to blocking the DEA’s aerial narcotics operations in Mexico in 2022, Mexico shut down an elite drug investigations unit

¹⁹⁶ Associated Press, *Mexico’s President Lays Out A Plan To Combat Cartel Violence. But It Looks Like More Of The Same*, AP NEWS (Aug. 5, 2024, 1:34 PM), <https://apnews.com/article/mexico-president-sheinbaum-cartel-violence-strategy-d7c03d1bdfd3985f58b1f5a935c564af>.

¹⁹⁷ Stevenson, *supra* note 43.

¹⁹⁸ Associated Press, *supra* note 196.

¹⁹⁹ See Press Release, U.S. Dep’t of State, Joint Statement: U.S.-Mexico High Level Security Dialogue 2023 (Oct. 13, 2023) <https://www.state.gov/joint-statement-u-s-mexico-high-level-security-dialogue-2023/> (providing the “high level” goals agreed to by the U.S. and Mexico, including commitments to “devote additional resources to investigations” and “to strengthen trust” between law enforcement).

²⁰⁰ Roy, *supra* note 193.

²⁰¹ Brendan O’Boyle, *Mexico President Rebukes Calls For U.S. Military Action Against Cartels As An ‘Offense’*, REUTERS (Mar. 9, 2023, 11:22 AM), <https://www.reuters.com/world/americas/mexico-president-rejects-us-lawmakers-calls-military-intervention-against-2023-03-09/>.

²⁰² Matt Spetalnick, *US Presses Mexico To Devote Sufficient Resources Against Fentanyl*, REUTERS (Sept. 7, 2023, 2:50 PM), <https://www.reuters.com/world/us/us-presses-mexico-devote-sufficient-resources-against-fentanyl-official-2023-09-07/>.

²⁰³ BEITTEL, *supra* note 38.

²⁰⁴ Deeks, *supra* note 70.

that same year.²⁰⁵ The Mexican, DEA-trained unit collaborated with the United States since 1997, until López Obrador’s administration “shatter[ed] the bridges [the United States and Mexico] spent decades putting together.”²⁰⁶ Mexico also removed U.S. drug agents’ diplomatic immunity and now requires them to share all intelligence with Mexican authorities, increasing the risk that corrupt officials share confidential information with cartel members.²⁰⁷ While the Mexican government has destroyed some fentanyl production facilities in the intervening years, drug lab raids declined during López Obrador’s presidency.²⁰⁸ One former agent describes the DEA’s relationship with the Mexican government as “the worst it’s been in decades,” noting a “complete pullback” in information sharing.²⁰⁹ Though this paper only can rely on publicly-available information, the United States’s diplomatic attempts to assuage the threat posed by Mexican drug cartels have evidently failed. Thus, Deeks’ test indicates that the United States has likely satisfied Article 51’s implicit “necessity” requirement.

IV. POLICY CONSIDERATIONS AND CONCLUDING THOUGHTS

Notably, this paper does not take a position on the wisdom of using force against Mexican drug cartels. In fact, there exist many policy arguments against it. For one, such an act would likely fracture an already fragile U.S.-Mexico relationship. Further, American citizens exhibit trepidation about sending any troops abroad, meaning such a move might prove politically unpopular.²¹⁰ Additionally, while the United States’s Colombian drug-fighting campaigns in the 1990s may have seemed immediately successful, in the long-run, they simply shifted drug trafficking to other nearby countries (of course, one might argue that the United States could avoid this result in the present context with better strategy).²¹¹ Finally, the United States may not wish to set a precedent for performing military missions across the Southern Border without host State consent; for instance, Mexico now blames the United States for allowing military-grade weapons to fall into the hands of cartel members.²¹² Regardless of the

²⁰⁵ Drazen Jorgic, *U.S. Anti-Drugs Agency Pulls Plane from Mexico in Fresh Cooperation Blow*, REUTERS (May 11, 2022, 9:53 AM), <https://www.reuters.com/world/americas/exclusive-us-anti-drugs-agency-pulls-plane-mexico-fresh-cooperation-blow-2022-05-11/>.

²⁰⁶ *Id.*

²⁰⁷ Associated Press, *Mexican Senate Approves Law Limiting U.S. Agents*, APNEWS (Dec. 10, 2020, 8:10 AM), <https://apnews.com/article/mexico-bills-drug-cartels-laws-e670f398214881228499bc4b2a0fee0f>.

²⁰⁸ Adriana Barrera & Lizbeth Diaz, *US, Mexico Agree to Ramp Up Fight Against Fentanyl and Arms Trafficking*, REUTERS (Apr. 13, 2023, 10:52 PM), <https://www.reuters.com/world/americas/us-mexico-agree-ramp-up-fight-against-fentanyl-arms-trafficking-2023-04-14/>.

²⁰⁹ *Id.*

²¹⁰ Arshad Mohammed, *Most Americans Want More Diplomacy, Many Want Fewer Troops Abroad*, REUTERS (Sept. 28, 2021, 4:19 PM), <https://www.reuters.com/world/us/most-americans-want-more-diplomacy-many-want-fewer-troops-abroad-survey-2021-09-28/>.

²¹¹ See generally RICHARD MILLET, *COLOMBIA’S CONFLICTS: THE SPILLOVER EFFECTS OF A WIDER WAR* (2002).

²¹² Associated Press, *Mexico Demands Investigation Into US Military-Grade Weapons Being Used By Drug Cartels*, APNEWS (Jan. 22, 2024, 7:35 PM), <https://apnews.com/article/mexico-military-weapons-drug-cartels-united-states-659fecf40efc9977e8b127aed3ee5254>.

veracity of those claims, the United States likely would not want to give Mexico any justification for performing its own military missions in the United States.

This paper appreciates the policy arguments against responding forcefully to Mexican cartels and admits its reliance on uncertain international law precedent: Article 51's definition of "armed attack" and its applicability to NSAs remain hotly contested issues. But this paper also presents a framework for confronting a confused jurisprudence, by relying on the Charter, international customary law, and States' interests as support. Thus, the use of force, perhaps highly selective, is a legally plausible option for decision-makers.

"[I]f [international law] de-legitimizes defensive action while ignoring aggression, it will have effectively thrown its weight on the side of aggression."²¹³ Indeed, international law is supposed to penalize harm doers.²¹⁴ No nation should sit by, defenseless, as thousands of its citizens die because of the intentional and damaging acts of ill-willed actors. The Mexican drug cartels, particularly the Sinaloa and CJNG cartels, have intentionally trafficked highly fatal fentanyl pills across the U.S.'s borders, proximately causing American deaths. Proportional use of force in response to what, legally speaking, is an armed attack would surely satisfy Article 51's necessity and imminence requirements. Now equipped with a detailed approach by which the United States *could* justify force against cartels, the United States has an effective bargaining chip: "Mexico, take action against the cartels, and if you don't, we *can* and will."

²¹³ Moore, *supra* note 89, at 906.

²¹⁴ *See id.* at 953.