

America’s Modern Day Internment Camps: The Law of War and the Refugees of Central America’s Drug Conflict

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It was a hot evening, so we chose to have a drink and cool off at the betting parlor. . . . Before I was able to order my third

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beer, I heard the most horrible, terrifying, and loud noise I had ever heard. Time stopped, and every mille-second felt like an eternity.

That unfamiliar and annoying sound was the explosion of AK-47s firing. From the moment the assault rifles began, everyone just panicked. There were about twenty guys inside, and maybe four of them pulled out guns and prepared to defend themselves. In the meantime, a couple of strangers already inside the betting place went to the front entrance to take a peek at what was happening. They screamed, “¡Ahí vienen para acá!” [They’re coming this way!]. After those words, I felt a terror and fear I cannot compare to any threatening experience in my previous life. . . .

. . . [T]he shots ceased after a minute or two, although to me it was like an hour of wanting to cry, scream, kill, hide, disappear, defend myself, or just not wanting to be there. About twenty seconds after the shooting stopped, sirens could be heard, but only about two of them. I asked myself, “Will two police be able to protect me and the rest of the people?”

. . . .

. . . We stepped out to see what had happened, and with curiosity asked people around us One of the guys just pointed across the street at a dead body. It was a parquero [car parking attendant] whose life had been taken just for being at his job at the wrong time and in the wrong place. He had been standing or hiding close to where the shots were aimed, and they killed him. He was dead on the sidewalk next to a car and surrounded by his own pool of blood.

I felt bad for him but worse for his family. It was unfair. He was innocent. . . .¹

This author wishes that the above story were just an outlier. The opposite is true. In Mexico between 2006 and 2012 alone, the epidemic of drug violence took over 60,000 lives.² In 2006, with the election of President Felipe Calderón, Mexico “in conjunction with the United States, launched a massive crackdown against drug trafficking organizations” by “deploying tens of thousands of military personnel to supplement, and in many cases replace, local police forces, as well as to

¹ HOWARD CAMPBELL, *DRUG WAR ZONE 168–69* (1st ed. 2009) (recounting the story of a drug killing, as told by an anonymous citizen of Juarez, Mexico) (bracketed translations in original).

² HUMAN RIGHTS WATCH, *MEXICO’S DISAPPEARED: THE ENDURING COST OF A CRISIS IGNORED* 1 (2013), http://www.hrw.org/sites/default/files/reports/mexico0213_ForUpload_0_0_0.pdf, <<http://perma.cc/7URF-9GXW>>.

lead civilian law enforcement agencies.”³ But this problem is not just a “U.S.–Mexico” problem. Violence associated with drugs—and the gangs that profit and traffic drugs—has spread throughout Central America.⁴ The organized groups that Mexico and the United States are now battling with military might are transnational in character.⁵ Thus, considering the character of the current conflict, it is time that the United States acknowledges what many academic and media sources have already known for years: Central America’s drug conflict is a war, and should be legally treated as such.⁶

However, the focus of this Note is not on Central America’s Drug War itself, but on the people desperately fleeing the violence. With the rise in border apprehensions of children and their parents in the summer of 2014, many were saying the United States was facing an immigration crisis.⁷ However, these migrants “are fleeing not poverty, but violence. As a result, what the United States is seeing on its borders now is not an immigration crisis. It is a refugee crisis.”⁸ Unfortunately, when these immigrants do reach American borders to seek safe harbor, the United States has instituted a practice of incarcerating them in secure facilities, a practice known as immigration detention.⁹ This practice has also been described as the imprisonment of asylum seekers.¹⁰ But if Central America’s conflict with drug gangs and drug traffickers is a war, these immigrants can claim legally enforceable protections under the Geneva Conventions, and specifically, under Common Article 3—a provision the United States has ratified.¹¹

³ Brianna Lee, *Mexico’s Drug War*, COUNCIL ON FOREIGN REL. (last updated Mar. 5, 2014), <http://www.cfr.org/mexico/mexicos-drug-war/p13689>, <<http://perma.cc/9NGN-5QFE>>.

⁴ See John F. Kelly, *SOUTHCOM Chief: Central America Drug War a Dire Threat to U.S. National Security*, ARMY TIMES (July 8, 2014), <http://archive.armytimes.com/article/20140708/NEWS01/307080064/SOUTHCOM-chief-Central-America-drug-war-dire-threat-U-S-national-security>, <<http://perma.cc/5TD4-D2GW>> (indicating that the drug gangs of Central America are transnational in character).

⁵ *Id.*

⁶ See CAMPBELL, *supra* note 2, at 6 (using the term “Drug War Zone” to describe the world of Mexico’s drug trafficking and the relationship with law enforcement); Gabrielle D. Schneck, *A War on Civilians: Disaster Capitalism and the Drug War in Mexico*, 10 SEATTLE J. FOR SOC. JUST. 927, 928 (2012) (indicating that militarization in Mexico is on the rise in the wake of President Calderón declaring “war” on drugs); Jeremy Bender & Armin Rosen, *Mexico’s Drug War is Entering a Dark Phase*, BUS. INSIDER (Oct. 24, 2014, 10:53 AM), <http://www.businessinsider.com/mexicos-drug-war-is-entering-a-dangerous-phase-2014-10>, <<http://perma.cc/Q4ZA-F8ZC>> (calling the conflict in Mexico a “drug war”).

⁷ Sonia Nazario, *The Children of the Drug Wars: A Refugee Crisis, Not an Immigration Crisis*, N.Y. TIMES (July 11, 2014), <http://www.nytimes.com/2014/07/13/opinion/sunday/a-refugee-crisis-not-an-immigration-crisis.html>, <<http://perma.cc/N289-G7NK>>.

⁸ *Id.*

⁹ Nick Valencia, *‘Unjust’: Rights Groups Slam Spread of Facilities for Immigrant Families*, CNN (Dec. 20, 2014 1:40 PM) <http://www.cnn.com/2014/12/19/us/immigrant-family-detention-center/>, <<http://perma.cc/PQQ3-9VPW>>.

¹⁰ See Press Release, ALCU of Texas, ACLU sues Obama administration for detaining asylum seekers (Jan. 16, 2015), <http://www.aclutx.org/2015/01/16/aclu-sues-obama-administration-for-detaining-asylum-seekers-as-intimidation-tactic/>, <<http://perma.cc/8QSD-EXYZ>> (describing immigration detention as imprisonment).

¹¹ See generally THE BAR OF THE CITY OF NEW YORK, TASK FORCE ON NATIONAL SECURITY AND THE RULE OF LAW, REAFFIRMING THE U.S. COMMITMENT TO COMMON ARTICLE 3 OF THE GENEVA

Recognition that the Geneva Conventions apply is important because with their application comes a set of enforcement procedures.¹² For example, there has been a rise in litigation surrounding the Geneva Conventions in the United States due to the incarceration of suspected terrorists in Guantanamo Bay and other detention facilities.¹³ The same protections that benefit suspected terrorists in detention should protect asylum seekers in detention. The law surrounding detention has developed so that there are decisions that bind the United States to follow Common Article 3 of the Geneva Conventions.¹⁴ Courts have also found that the Geneva Conventions are self-executing.¹⁵ In other words, the Geneva Conventions grant an independent cause of action, and detainees can sue under the Geneva Conventions in order to force compliance with them.¹⁶ This Note, in part, will draw on this litigation surrounding the detention of suspected terrorists and the War on Terror and apply this body of law to immigration detention and Central America's Drug Conflict.

Thus, my thesis is this: the United States' current practice of detaining asylum seekers who are fleeing Central America's Drug Conflict violates the protections conferred to civilians under Common Article 3 of the Geneva Conventions. The purpose of this Note is to highlight those rights and indicate specifically how the Geneva Conventions apply to immigration detention. To that end, the first part of this Note will describe the practice of and problems with immigration detention in the United States. The second part of this Note will articulate why the law of war (also known as international humanitarian law) should be applied in this refugee context. The third section of this

CONVENTIONS: AN EXAMINATION OF THE ADVERSE IMPACT OF THE MILITARY COMMISSIONS ACT AND EXECUTIVE ORDER GOVERNING CIA INTERROGATIONS, http://www.nycbar.org/pdf/report/GC_Report0702_all.pdf, <<http://perma.cc/MET3-4CQG>> (describing the United States' commitment to the Geneva Conventions in relation to issues of detention and focusing on Common Article 3).

¹² See generally Thomas J. Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977*, 103 MIL. L. REV. 3 (1984) (discussing various enforcement mechanisms of the Geneva Conventions).

¹³ See Nathaniel H. Nesbitt, *Meeting Boumediene's Challenge: The Emergence of an Effective Habeas Jurisprudence and Obsolescence of New Detention Legislation*, 95 MINN. L. REV. 244, 246–48 (2010) (indicating that there has been an increase in litigation surrounding detention in Guantanamo Bay).

¹⁴ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (holding that the Geneva Conventions apply, and grants protections to detainees that are suspected terrorists); *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (applying principles of the Geneva Conventions to the length of detention for someone accused of terrorism).

¹⁵ *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 478–79 (D.D.C. 2005) *vacated sub nom.* *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723 (2008), and *vacated*, 282 F. App'x 844 (D.C. Cir. 2008), and *vacated sub nom.* *Al Odah v. United States*, 282 F. App'x 844 (D.C. Cir. 2008), and *vacated sub nom.* *Al Odah v. United States*, 559 F.3d 539 (D.C. Cir. 2009); *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 165 (D.D.C. 2004) *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd and remanded*, 548 U.S. 557 (2006); See also *Hamdan*, 548 U.S. at 627–28 (finding that the Geneva Conventions are incorporated by the U.S. government for purposes of the War on Terror, but leaving open the possibility that the Geneva Conventions are self-enforcing by rejecting the court of appeals' logic that the Geneva Conventions do not create a cause of action).

¹⁶ *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d at 478.

Note will argue that the treatment and detention of asylum seekers from Central America's Drug War violates the Geneva Conventions because these detainees are fleeing a non-international armed conflict (NIAC), and the United States is a co-belligerent in that conflict. Fourth and finally, this Note articulates the enforcement that can be used to bring the United States in compliance with U.S.-ratified Common Article 3.

I. THE UNITED STATES' POLICY OF DETAINING ASYLUM SEEKERS

"Karnes [Immigration Family Detention Center] was quite the visit for me. There's nothing like walking into a prison and the first thing you hear is a crying baby." —Antonio Ginatta, Advocacy Director, U.S. Program, Human Rights Watch¹⁷

After arrival to the United States, refugees identify themselves and any potential asylum claims that they have.¹⁸ This frequently takes place in the form of an interview with Customs and Border Protection (CBP). After they have indicated that they have viable asylum claims, the immigrants are detained in a CBP facility.¹⁹ These short-term facilities are often called "*hieleras*," or "iceboxes," because the conditions are extremely cold.²⁰ Immigrants that are taken to *hieleras* are "held for days in rooms kept at temperatures so low that men, women[,] and children have developed illnesses associated with the cold, [and detainees have also suffered from] lack of sleep, overcrowding, and inadequate food, water[,] and toilet facilities."²¹ This detention is meant to be short, and immigrants typically remain in a CBP facility for up to three days before they are transported to an immigration detention facility.²² Because unlawful presence in the United States is not by itself a federal crime,²³ the nature of an immigrant's detention is civil.²⁴

After an asylum seeker is taken to the detention center, she receives a credible fear interview (CFI) in which the federal government determines if she has a likely claim.²⁵ If an asylum seeker has a viable

¹⁷ LUTHERAN IMMIGRATION & REFUGEE SERV. AND THE WOMEN'S REFUGEE COMM'N, LOCKING UP FAMILY VALUES, AGAIN: THE CONTINUED FAILURE OF IMMIGRATION FAMILY DETENTION 1 (2014) [hereinafter LUTHERAN], http://lirs.org/wp-content/uploads/2014/11/LIRSWRC_LockingUpFamilyValuesAgain_Report_141114.pdf, <<http://perma.cc/M6DX-33FX>>.

¹⁸ *Id.* at 10.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Rachel Bale, *Detained Border Crossers May Find Themselves Sent to 'the Freezers,'* The Center for Investigative Reporting (Nov. 28, 2015), <http://cironline.org/reports/detained-border-crossers-may-find-themselves-sent-to-freezers-5574>, <<http://perma.cc/HPH3-S2UB>>.

²³ *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 171 (D.D.C. Feb. 20, 2015).

²⁴ Farrin R. Anello, *Due Process and Temporal Limits on Mandatory Immigration Detention*, 65 HASTINGS L.J. 363, 363 (2014).

²⁵ See 8 U.S.C. § 1225(b)(1)(A)–(B) (2012); 8 C.F.R. § 208.30(d)–(g) (2015) (proscribing procedure for the credible fear interview).

claim, the next step is to go through immigration proceedings in front of an immigration judge in the form of an asylum hearing.²⁶ If unsuccessful, the immigrant can then appeal to the Board of Immigration Appeals (BIA), which can remand the case for further proceedings.²⁷ If unsuccessful in front of the BIA, an asylum seeker can appeal to the circuit courts, which have jurisdiction to review all agency decisions.²⁸ It is also possible for an asylum seeker to initiate an action in district court in order to challenge her immigration determination under federal law or her confinement.²⁹

Like most litigation, this procedure takes time. Immigration detention is where asylum seekers are interned while they are going through the immigration process.³⁰ Thus, asylum seekers can languish in detention for long periods of time waiting on their determinations—even before receiving their CFIs.³¹ While asylum seekers are theoretically able to apply for a bond to be able to leave the detention center, Immigration and Customs Enforcement's (ICE) policy encourages an exorbitant bond that is so high that detainees cannot afford to pay it.³²

There is reason to be skeptical of the CFI process as a whole. Agents for CBP have undermined the process by dissuading people from requesting asylum, not recording fears of persecution, and not referring asylum seekers to CFIs.³³ Recently, asylum officers have also been told to use “a more rigorous standard that is more akin to the standard applied at merit hearings. The new instructions may prevent many asylum seekers from passing the credible fear stage.”³⁴ Even if the asylum seeker can overcome that obstacle, unreliable or incomplete paperwork from the CFIs have led immigration judges to make unfavorable decisions.³⁵

²⁶ 8 C.F.R. § 208.30(e)(4).

²⁷ See generally U.S. DEP'T OF JUST.: EXECUTIVE OFF. FOR IMMIGRATION REV., BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL CH. 1 – THE BOARD OF IMMIGRATION APPEALS 1, https://www.justice.gov/sites/default/files/pages/attachments/2015/10/30/biapracticemanual_fy2016.pdf#page=11, <<http://perma.cc/X96A-DB46>> (describing the purpose and procedure of the Board of Immigration Appeals in relation to the immigration process).

²⁸ See generally COURT OF APPEALS FOR THE NINTH CIRCUIT, JURISDICTION OVER IMMIGRATION PETITIONS AND STANDARDS OF REVIEW, (Mar. 2015), http://cdn.ca9.uscourts.gov/datastore/uploads/immigration/immig_west/A.pdf, <<http://perma.cc/5TA2-CQVR>> (describing the jurisdiction of the Ninth Circuit Court of Appeals in relation to appeals from immigration proceedings).

²⁹ See Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 459–60 (2006) (indicating that immigrants can utilize habeas corpus as a means of challenging immigration detention under federal law).

³⁰ See LUTHERAN, *supra* note 18, at 3 (stating that the purpose of family detention is to hold immigrants during expedited removal).

³¹ See *id.* (describing the difficulty of leaving immigration detention throughout the duration of immigration proceedings).

³² SARA CAMPOS & JOAN FRIEDLAND, AM. IMMIGRATION COUNCIL, MEXICAN AND CENTRAL AMERICAN ASYLUM AND CREDIBLE FEAR CLAIMS: BACKGROUND AND CONTEXT 7 (2014), http://www.immigrationpolicy.org/sites/default/files/docs/asylum_and_credible_fear_claims_final.pdf, <<http://perma.cc/YX62-U29A>>.

³³ *Id.* at 9.

³⁴ *Id.* at 7.

³⁵ *Id.* at 9.

Additional problems exist in family detention facilities. For one, the lack of childcare forces mothers to conduct their CFIs in front of their children.³⁶ “Those who choose to share more details about the harm they suffered may re-traumatize their children through hearing the parent’s stories or seeing the parent in a vulnerable posture.”³⁷ So, due to the often-graphic nature of the stories, mothers either leave out parts or lie to protect their children. This can lead to accusations of dishonesty when a woman goes before an immigration judge and tells the whole story.³⁸ Such an accusation weakens the chance that the woman would be granted asylum in the United States. Furthermore, a similar phenomenon happens when children are interviewed in front of their parents, leading the children to recount fewer facts pertinent to asylum—even if the child may have a separate and distinct claim from his parent.³⁹ As a result, the methods of CFIs undermine the current legal processes that should be protecting the asylum seekers.

There are several different types of immigration detention facilities, including those that hold exclusively women,⁴⁰ those that hold both men and women,⁴¹ and those that hold mothers with their children (family detention).⁴² Immigration detention centers are secure, prison-like facilities.⁴³ In fact, ICE often contracts private prison companies—such as Corrections Corporation of America and GEO Group—to operate the facilities.⁴⁴ Private prison companies are infamous for creating secure facilities with abysmal conditions, and the appalling conditions extend to the immigration detention centers.⁴⁵

This author has visited an immigration detention facility in Karnes, Texas and can corroborate that the facility looked strikingly like a prison

³⁶ LUTHERAN, *supra* note 18, at 12.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See *T. Don Hutto Residential Center*, CORRECTIONS CORPORATION OF AMERICA, <http://www.cca.com/facilities/t-don-hutto-residential-center>, <<http://perma.cc/F8PL-JVVX>> (noting that population of Hutto is exclusively female).

⁴¹ See *Eloy Detention Center*, CORRECTIONS CORPORATION OF AMERICA, <https://www.cca.com/facilities/eloy-detention-center>, <<http://perma.cc/7UBG-9HGR>> (noting the population of the Eloy Immigration Detention center is both male and female).

⁴² Valencia, *supra* note 10 (describing immigration detention facilities where women are kept with their children, commonly referred to as “family detention”). However, there is recent hope that at least this method of detention is unlawful, with Federal District Judge Dolly Gee of the Central District of California recently issuing an order that would effectively free almost every detainee in family detention centers. *Judge: Immigrant Kids Should Be Freed from Family Detention*, AP (October 23, 2015, 10:10 AM), <http://bigstory.ap.org/article/59b1beed046440acb934a9bacce6d89e/judge-immigrant-kids-should-be-freed-family-detention>, <<http://perma.cc/WPH6-J4BG>>.

⁴³ Raul A. Reyes, *America's Shameful Prison Camps*, CNN (July 23, 2015, 11:00 PM), <http://www.cnn.com/2015/07/23/opinions/reyes-immigration-detention/>, <<http://perma.cc/G9WA-WNDZ>>.

⁴⁴ *Id.*

⁴⁵ Taylor Wofford, *The Operators of America's Largest Immigrant Detention Center Have A History of Inmate Abuse*, NEWSWEEK (Dec. 20, 2014 4:50 PM), <http://www.newsweek.com/operators-americas-largest-immigrant-detention-center-have-history-inmate-293632>, <<http://perma.cc/883R-PZDB>> (describing Corrections Corporation of America's poor record and that the company had recently been contracted to run an immigration detention facility).

facility—from the high cement walls to constant surveillance that the women and children held there were subjected to. This author also recently attended a special meeting in front of the Inter-American Commission on Human Rights Special Rappaport. Immigration attorneys there indicated that the treatment inside the facilities is prison-like, complete with daily body counts where the women and children of the facility were forced to stand outside of their rooms as guards tally them up. At this meeting, one immigration attorney also lamented that the guards bully the children, recounting a story in which a guard took milk out of the hand of a child and poured it onto the ground before forcing the child to return to her room empty handed. This incident only scratches the surface of the ill treatment women faced in the Karnes Family Detention Facility, as the Mexican American Legal Defense and Educational Fund has recently reported that there are also allegations of guards sexually abusing female asylum seekers.⁴⁶

Separate from the poor conditions of internment, the mere act of internment is problematic because immigration detention “causes well-known negative and at times serious . . . psychological consequences.”⁴⁷ Thus, immigration detention magnifies the pain and trauma that asylum seekers are already feeling. For example, immigrants in detention centers were found to suffer from anxiety, depression, post-traumatic stress disorder, self-harm, and suicidal ideation. The time in detention either caused or worsened these psychological conditions in detainees.⁴⁸

Yet, there are alternative methods available, and the deplorable conditions of immigration detention should be contrasted with its possible alternatives. These alternatives would focus on individual assessments of the immigrants.⁴⁹ The Lutheran Immigration and Refugee Service lists several of these alternatives in its report on family detention: releasing on one’s own recognizance; releasing on parole; releasing to a sponsor or family member; requiring periodic check-ins with a detention officer or caseworker; releasing with bond; telephonic monitoring, house arrest, or GPS tracking; and community support programs.⁵⁰ Because these alternatives are based on individualized assessment of the danger the asylum seeker poses to the community, the type of restrictions can be adjusted based on the individual under consideration.⁵¹ Such methods would not be a major deviation from the process that immigrants already go through because at the beginning of the detention the immigrants are

⁴⁶ Guillermo Contreras, *Complaint: Women at Karnes Immigration Facility are Preyed Upon by Guards*, MY SAN ANTONIO (Oct. 3, 2014), <http://www.mysanantonio.com/news/local/article/Complaint-Women-at-Karnes-immigration-facility-5797039.php>, <<http://perma.cc/E39N-R2EU>>.

⁴⁷ U.N. High Comm’r for Refugees, UNHCR Releases New Guidelines on Detention of Asylum Seekers (Sept. 21, 2012), <http://www.unhcr.org/505c461f9.html>, <<http://perma.cc/NSN4-8PXU>>.

⁴⁸ Katy Robjant, Rita Hassan & Cornelius Katona, *Mental Health Implications of Detaining Asylum Seekers: Systematic Review*, 194 BRIT. J. OF PSYCHIATRY 306, 306 (2009).

⁴⁹ LUTHERAN, *supra* note 18, at 20.

⁵⁰ *Id.*

⁵¹ *Id.*

given an individualized bond determination.⁵² The bond determination also requires an individual analysis, such as danger to the community and flight risk.⁵³ Thus, it would not be overly costly to implement the alternatives to immigration detention. In fact, alternatives to immigration detention would be more cost-effective. With less restrictive alternatives that do not rely on maintaining large, secure facilities,⁵⁴ the government would not pay as much for the cost of detention.⁵⁵ Many of the complaints lodged against immigration detention are rooted in its heavily restrictive nature; by using less restrictive alternatives, the immigration process would be more humane, and the United States would bring itself in line with the Geneva Conventions.

II. THE LAW OF WAR, WHAT IS IT GOOD FOR? (A LOT, ACTUALLY.)

“War doesn’t negate decency. It demands it, even more than in times of peace.”—Khaled Hosseini, Goodwill Ambassador for the U.N. High Commissioner for Refugees and author.⁵⁶

International humanitarian law governs conduct in war with the goal of ameliorating human suffering.⁵⁷ This body of law includes the Geneva Conventions, which regulate detention.⁵⁸ The Geneva Conventions acknowledge that the wars waged by politicians displace people’s lives.⁵⁹ Further, they were created to protect civilians, not just enemy combatants, as there is a separate and specific section addressing the protection of civilians.⁶⁰ Thus, the purpose of the Geneva Conventions is a broad effort to force any belligerent nation in a conflict—any nation partly responsible for the human toll—to provide certain humanitarian protections.⁶¹

Considering that many of the asylum seekers in immigration

⁵² See Lornet Turnwell, *Judge: Detained Immigrants Must Get Bond Hearings*, SEATTLE TIMES (Mar. 13, 2014), <http://www.seattletimes.com/seattle-news/judge-detained-immigrants-must-get-bond-hearings/>, <<http://perma.cc/KE24-NFZV>> (indicating that detained immigrants are entitled to a bond hearing).

⁵³ U.S. DEP’T OF JUST., IMMIGRATION JUDGE BENCHBOOK: BOND/CUSTODY 7 (2015), http://www.justice.gov/sites/default/files/eoir/legacy/2014/08/15/Bond_Guide.pdf, <<http://perma.cc/G3P6-FV4R>>.

⁵⁴ LUTHERAN, *supra* note 18, at 20–22.

⁵⁵ *Id.* at 20–22.

⁵⁶ KHALED HOSSEINI, *THE KITE RUNNER* 115 (2003).

⁵⁷ David Weissbrodt & Nathaniel H. Nesbitt, *The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law*, 95 MINN. L. REV. 1339, 1345 (2011) [hereinafter Weissbrodt].

⁵⁸ See generally *id.* (discussing applicability of the Hague Conventions and the Geneva Conventions which regulate conduct and detention).

⁵⁹ Refugees and Displaced Persons, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/en/war-and-law/protected-persons/refugees-displaced-persons>, <<http://perma.cc/QT6U-V9P5>>.

⁶⁰ Weissbrodt, *supra* note 58 at 1373.

⁶¹ See *id.*

detention are refugees, there is a separate sphere of law to protect them, the aptly named international refugee law.⁶² However, recent years have shown that the international humanitarian law and international refugee law have considerable overlap.⁶³ This Note argues that this overlap is a good thing, as it offers asylum seekers, who are typically protected by refugee law, the opportunity to also be protected by international humanitarian law, specifically Common Article 3 of the Geneva Conventions.

At first, it might seem odd to the casual observer that these areas of law are not typically considered together or that many view them as incompatible. After all, international humanitarian law is the law of war, and the inhumanity of war is largely responsible for the flow of refugees.⁶⁴ Yet, in times of war, nations are less willing to follow human rights norms,⁶⁵ such as international refugee law systems. To borrow a colloquial phrase, war brings out the worst in us. Or put less colloquially, this is because war forces a set of strategic considerations due to the adversarial nature of the activity.⁶⁶ Moreover, war is costly.⁶⁷ On the line for nations in times of armed conflict are the national interests of the country and that typically includes the lives of the nation's civilian population.⁶⁸ Thus, we can know that these national interests are fairly strong, considering the heavy costs. In light of these costs, nations are more inclined to find that international human rights law regimes do not apply in times of war because the nations are more focused on other strategic considerations.

Yet, the International Court of Justice consistently has held that human rights law is applicable in times of war.⁶⁹ International refugee law and international humanitarian law are also compatible for several reasons. Both international humanitarian law and international refugee law share a common interest in protecting the dignity of people.⁷⁰ Both

⁶² See generally KATE JASTRAM & MARILYN ACHIRON, U.N. HIGH COMM'R FOR REFUGEES, *REFUGEE PROTECTION: A GUIDE TO INTERNATIONAL REFUGEE* (2001), <http://www.unhcr.org/3d4aba564.html>, <<http://perma.cc/2GLJ-QDUK>> (describing and summarizing refugee law).

⁶³ See Fannie Lafontaine, Joseph Rikhof & Laurel Baig, *Introduction*, 12 J INT'L CRIM. JUST. 901, 902 (2014) (comparing IHL and refugee law).

⁶⁴ *Id.* at 902.

⁶⁵ See Cordula Droegge, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 ISR. L. REV. 310, 314 (2007) ("Still, the Universal Declaration [of Human Rights] was meant for times of peace.").

⁶⁶ See *id.* at 313 ("Humanitarian law, for its part, was primarily based on the reciprocal expectations of two parties at war.").

⁶⁷ See Evan Stephenson, *Does United Nations War Prevention Encourage State-Sponsorship of International Terrorism? An Economic Analysis*, 44 VA. J. INT'L L. 1197, 1219 (2004) (discussing the costs of the United States War on Terror).

⁶⁸ See *id.* (comparing the costs of the War on Terror with the costs of passively being attacked).

⁶⁹ See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116 (ruling on the applicability of IHRL in times of war when IHL applies); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

⁷⁰ *Id.*

share similar concepts, such as international humanitarian law's concept of "civilian" and international refugee law's concept of "civilian character."⁷¹ Finally, both are triggered by exceptional circumstances that share some similarity—the failure of political protection for one set and the onset of the political exercise of war for the other.⁷² Thus, international refugee law and international humanitarian law share the same goals, with the difference being that international humanitarian law takes into account nations' strategic considerations.

But the idea that war comes with separate strategic considerations raises a reason to apply the law of war to the immigration detention context—to neutralize the national security concerns raised by the United States government.⁷³ Unless the government attempts to deter immigrants by sending them to detention facilities, it claims that by allowing people into the United States, it encourages other undocumented immigrants to come to the United States and overwhelm border resources.⁷⁴ The importance of these concerns cannot be overstated; the United States has previously used national security to justify detention and human rights abuses and does so regularly.⁷⁵ However, international humanitarian law, since it is closely tied to war, is meant to balance with national security concerns.⁷⁶ International humanitarian law has twin aims of valuing human dignity and respecting strategic interests, such as national security.⁷⁷ The idea is that international humanitarian law balances the concerns in such a way that when a nation violates international humanitarian law, it is also overbalancing its national security concerns over the human dignity aspect.⁷⁸ Because international humanitarian law takes national security concerns into account, applying it in the context of immigration detention neutralizes the national security concerns claimed by the United States government.

Also, because international humanitarian law was designed for times when nations were less likely to follow international human rights law, international humanitarian law symbolizes a lower level of

⁷¹ *Id.* at 935.

⁷² *Id.*

⁷³ See *R.I.L.-R.*, 80 F. Supp. 3d at 175 (recognizing that the governments justification is that the woman and children in Karnes pose a "national security" threat).

⁷⁴ *Id.*

⁷⁵ See Derek P. Jinks, *The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India*, 22 MICH. J. INT'L L. 311, 370 n.21 (2001) (After all, "[n]ational security is the Achilles' heel of international law."); Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549, 1629 (2009) (lamenting that the typical constitutional protections become riddled with exceptions when the government is concerned with national security).

⁷⁶ NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 11 (2009), <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>, <<http://perma.cc/K3FD-6N9F>>.

⁷⁷ *Id.*

⁷⁸ See *id.* (arguing that international humanitarian law forces nations to adopt a balance).

compliance that nations must meet.⁷⁹ The fact that international humanitarian law is a lower level favors analyzing the United States' stance in relation to this bare minimum because it shows the extent to which the United States is non-compliant with requirements under international law. Exposing that the United States is unable to meet even a low level of compliance will have a stronger corrosive effect on U.S. legitimacy. Because legitimacy, both domestic and international, has a substantial effect on encouraging enforcement, it will benefit an attempt to end this detention practice.⁸⁰

Another blow to U.S. legitimacy is that detainees are from regions where the United States has allies in combating drug gangs.⁸¹ International humanitarian law has long recognized the importance of protecting civilians.⁸² One reason to be concerned about the treatment of civilians is that proper treatment of allied nations' civilians in times of war creates better relationships between the nations.⁸³ Since international humanitarian law has strategic considerations in mind, applying the Geneva Conventions to uphold the dignity of Latin American citizens fleeing the violence will signify the United States' attempt to closely align with Central American nations in order to combat drug gangs. This is pertinent because better communication between the United States and Central American nations will improve the chances of defeating the drug gangs.⁸⁴

Applying international humanitarian law in this context would benefit a larger group of detainees than those who can currently receive protection under international refugee law. The standards by which one can receive refugee status in the United States are rather high.⁸⁵ Because of these high standards, it can be extremely difficult for many Central American detainees to receive legal protections under international law even if they can show that they were fleeing violence in a war-torn

⁷⁹ See Droege, *supra* note 66, at 314 (discussing why international humanitarian law norms are lower than international human rights law norms).

⁸⁰ Jonathan H. Marks, *Toward a Unified Theory of Professional Ethics and Human Rights*, 33 MICH. J. INT'L L. 215, 226 (2012) ("The more widespread and systematic a state's failure to comply with human rights obligations, the less legitimate that state will be.")

⁸¹ *Immigrants' Rights and Detention*, ACLU, <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention>, <<http://perma.cc/3T6Q-28SS>> (indicating the many detainees are from nations in the Central American region); see *infra* introduction (discussing the U.S. alliance with Mexico, a power in the Central American region).

⁸² MELZER, *supra* note 77, at 10.

⁸³ See Ron Moreau & Sami Yousafzai, *U.S. Soldier Murders Afghan Civilians, in Latest Blow to Afghan-American Relations*, DAILY BEAST (Mar. 11, 2012, 2:30 PM), <http://www.thedailybeast.com/articles/2012/03/11/us-soldier-murders-afghan-civilians-in-latest-blow-to-afghan-american-relations.html>, <<http://perma.cc/8BTH-ELQJ>> (noting that in Afghanistan, Afghani civilian deaths have decreased trust in the United States as an allied power).

⁸⁴ See Gina Harkins, *Marines Train Central American Allies to Battle Ruthless Cartels*, MARINE CORPS TIMES, (Jan. 9, 2015, 11:05 AM), <http://www.marinecorpstimes.com/story/military/pentagon/2015/01/09/marines-central-america-drug-cartels/21419813/>, <<http://perma.cc/8DFB-4J9T>> (describing improvements in the Central American fighting forces because of training from the United States' Marines).

⁸⁵ BEATRIZ MANZ, REFUGEES OF A HIDDEN WAR: THE AFTERMATH OF COUNTERINSURGENCY IN GUATEMALA 176 (1988).

nation.⁸⁶ But, refugees can much more easily seek the protections of the Geneva Conventions. Provided that the United States is a co-belligerent in a NIAC,⁸⁷ the asylum seeker need only show that she is a citizen of one of the nations involved in the conflict and that she is a civilian instead of a combatant.⁸⁸ Accordingly, applying the Geneva Conventions would also serve as a means of protecting a larger number of asylum seekers than relying purely on international refugee law.

III. THE PRACTICE OF FAMILY DETENTION VIOLATES THE GENEVA CONVENTIONS.

“I know an American internment camp when I see one.”—
Satsuki Ina, Professor at California State University, who was
born in a Japanese internment camp, describing an
immigration detention center.⁸⁹

The Geneva Conventions are part of international humanitarian law and place restrictions on detention procedures.⁹⁰ For the text of the Conventions to apply, there must be an armed conflict.⁹¹ This Note builds on scholarship that argues that the ongoing international drug conflict in Mexico and Central America triggers the application of the law of war.⁹² Since this is a NIAC, the United States is bound by the terms of Common Article 3 because the United States has signed and ratified that part of the Conventions. This author uses the term “Central American Drug Conflict” to indicate the ongoing conflict between Central American and Mexican governments and the gangs that profit from drug crime. This author also indicates that the United States is a co-belligerent in the conflict.⁹³

⁸⁶ See *Groups Ask Federal Court to Block Deportation Hearings for Children Without Legal Representation*, ACLU (Aug. 1, 2014), <https://www.aclu.org/news/groups-ask-federal-court-block-deportation-hearings-children-without-legal-representation>, <<http://perma.cc/AC9R-LA6R>> (discussing difficulty of attaining representation in children's deportation cases, even when children have compelling asylum cases); Sarah Mehta, *Immigrants Have No Access to Justice*, ACLU (Apr. 2, 2014, 5:08 PM), <https://www.aclu.org/blog/immigrants-have-no-access-justice>, <<http://perma.cc/LGX9-2T5Q>> (discussing issues of access to justice in immigration proceedings).

⁸⁷ See *infra* III (arguing that the United States is a co-belligerent in a NIAC).

⁸⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3.

⁸⁹ Satsuki Ina, *I Know an American 'Internment' Camp When I See One*, ACLU (May 27, 2015, 10:45 AM), <https://www.aclu.org/blog/speak-freely/i-know-american-internment-camp-when-i-see-one>, <<http://perma.cc/5AME-HC6P>>.

⁹⁰ FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR* 16 (4th ed. 2011).

⁹¹ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁹² See generally Carina Bergal, *The Mexican Drug War: The Case for Non-International Armed Conflict Classification*, 34 *FORDHAM INT'L L.J.* 1042 (2011) (arguing that the Mexican Drug War should be recognized as a NIAC).

⁹³ See *infra* III (indicating why the United States is a co-belligerent in the conflict).

For the purposes of invoking the Geneva Conventions, the asylum seekers fleeing Central America to escape violence can show that they are fleeing a NIAC. Typically, for a conflict to be recognized as a NIAC, the conflict must reach a certain threshold of hostilities.⁹⁴ There are sections of the Geneva Conventions that explicitly discuss their applicability and sections that do not.⁹⁵ Common Article 3 does not contain such a provision, so by analogy, the standard of Protocol II is applied.⁹⁶ That standard is defined in the negative.⁹⁷ It states: “this Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”⁹⁸ This has been interpreted to mean that there are two major requirements. First, there must be “a minimum level of organization, [and] demonstration of a responsible command and capacity to meet minimum humanitarian requirements.”⁹⁹ Second, there must be “hostilities that are collective and coordinated in nature, reaching such intensity that the government is compelled to respond with military forces rather than law enforcement.”¹⁰⁰

The Central American Drug Conflict meets each of these requirements. First, the Central American Drug Conflict has a minimum level of organization. Narco-trafficking organizations that operate throughout Central America are organized with a centralized command structure.¹⁰¹ Large-scale drug production requires a large amount of land.¹⁰² This land is needed both for cultivation¹⁰³ and access to trade routes.¹⁰⁴ The consequence is that the drug trade has organized itself into organizations that can provide tactical and logistical support.¹⁰⁵ The

⁹⁴ See William A. Schabas, *Punishment of Non-State Actors in Non-International Armed Conflict*, 26 *FORDHAM INT’L L.J.* 907, 915 (2003) (indicating a standard requirement that the hostilities between the powers are protracted to define the conflict as a NIAC).

⁹⁵ See Elizabeth Holland, *The Qualification Framework of International Humanitarian Law: Too Rigid to Accommodate Contemporary Conflicts?*, 34 *SUFFOLK TRANSNAT’L L. REV.* 145, 156 (2011) (nothing that protocol II contains such a provision, and common article three does not).

⁹⁶ *Id.*

⁹⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, 1125 U.N.T.S. 609.

⁹⁸ *Id.*

⁹⁹ Holland, *supra* note 96, at 156.

¹⁰⁰ *Id.*

¹⁰¹ See PETER CHALK, RAND CORP., *THE LATIN AMERICAN DRUG TRADE: SCOPE, DIMENSIONS, IMPACT, AND RESPONSE* 25–26 (2011), http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG1076.pdf, <<http://perma.cc/4RP9-S5N7>> (describing the command structure and make up of major drug cartels).

¹⁰² See U.N. OFFICE ON DRUGS AND CRIME, *TRANSNATIONAL ORGANIZED CRIME IN CENTRAL AMERICA AND THE CARIBBEAN: A THREAT ASSESSMENT* 11–13 (2012), http://www.unodc.org/documents/data-and-analysis/Studies/TOC_Central_America_and_the_Caribbean_english.pdf, <<http://perma.cc/E87P-J6GC>> (discussing the use of land by crime syndicates and families).

¹⁰³ *Id.* at 17.

¹⁰⁴ *Id.* at 11–13.

¹⁰⁵ See John P. Sullivan & Adam Ekelus, *Tactics and Operations in the Mexican Drug War*, in *INFANTRY* 20, 20–23 (2011) (discussing the tactics employed by drug cartels).

cartels create sections of their organizations whose jobs are to battle other drug traffickers and the government for territory. The need for manpower has created a corporation-like structure within drug cartels.¹⁰⁶ These organizations contain command structures as well.¹⁰⁷ For example, the Arellano Félix family runs the Tijuana Cartel, and the Carrillo Fuentes family controls the Juarez Cartel.¹⁰⁸ In contrast, the Sinaloa Cartel is made up of small federation-like factions that are allied with one another.¹⁰⁹ The Zetas are known for having a military structure, since many of its members come from the Mexican military.¹¹⁰

Local gangs also partner with larger multi-national cartels.¹¹¹ In Guatemala, crime families, such as the Mendoza family, control territories and allow narco-traffickers to use the land as drug routes.¹¹² In El Salvador the Mara Salvatrucha is involved with narco-traffickers.¹¹³ These organizations protect trade routes for narco-traffickers and help transport the goods across borders—such as across the Guatemala–Mexico border for drugs en route to the United States.¹¹⁴ Looking at the structure of these narco-trafficking organizations, it is clear that the level of organization is higher than the “minimum” level necessary for invoking the Geneva Conventions.

Second, the Central American Drug Conflict has a high enough intensity to be characterized as a NIAC. In Mexico there have been over 60,000 deaths associated with drug crime.¹¹⁵ In 2009 alone, in the small nation of Guatemala, there were 6,500 violent deaths, and 41% were related to the drug trade.¹¹⁶ In El Salvador, there were sixteen murders *per day* in March 2015 with most related to drug and gang activity.¹¹⁷ To accomplish this level of killing, drug cartels in the Central American region have acquired military grade technology.¹¹⁸ The Central American

¹⁰⁶ KAMALA D. HARRIS, CAL. DEP'T OF JUST.: OFFICE OF ATTORNEY GEN., CALIFORNIA AND THE FIGHT AGAINST TRANSNATIONAL ORGANIZED CRIME 2 (2014), https://oag.ca.gov/sites/all/files/agweb/pdfs/toc/report_2014.pdf, <<http://perma.cc/6N6S-ZGTP>>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 3.

¹¹⁰ MAX G. MANWARING, GANGS, PSEUDO MERCENARIES AND OTHER MODERN MERCENARIES, 134–135 (2014).

¹¹¹ U.N. OFFICE ON DRUGS AND CRIME, *supra* note 103, at 11 (“*Transportistas*, in contrast, prefer to fly under the radar, simply moving contraband from place to place, paying tribute to territorial groups when necessary.”).

¹¹² See *id.* at 11, 23 (describing land controllers, and the Mendoza family, a land controlling group associated with the cartels).

¹¹³ *Id.* at 26.

¹¹⁴ BRUCE BAGLEY, WOODROW WILSON INT’L CTR. FOR SCHOLARS, DRUG TRAFFICKING AND ORGANIZED CRIME IN THE AMERICAS: MAJOR TRENDS IN THE TWENTY-FIRST CENTURY 7 (2012), <http://www.wilsoncenter.org/sites/default/files/BB%20Final.pdf>, <<http://perma.cc/B3CA-TTPU>>.

¹¹⁵ HUMAN RIGHTS WATCH, *supra* note 3, at 1.

¹¹⁶ Arthur Brice, *Gangs, Drugs Fuel Violence in Guatemala*, CNN (September 9, 2011 8:50 PM), <http://www.cnn.com/2011/WORLD/americas/09/09/guatemala.violence/>, <<http://perma.cc/DLN2-WFSR>>.

¹¹⁷ David Stout, *16 People Were Murdered Every Day in El Salvador in March*, TIME (Apr. 7, 2015), <http://time.com/3773443/el-salvador-murder-gang-violence/>, <<http://perma.cc/8MDL-AN8B>>.

¹¹⁸ Ken Ellingwood & Tracy Wilkinson, *Drug Cartels' New Weaponry Means War*, L.A. TIMES

drug gangs have also begun assassinating government officials.¹¹⁹ The militaries of Central America have reacted to this intensity; Mexico has dispatched its military because the police and judicial apparatus are incapable of overcoming the drug gangs.¹²⁰ The U.S. Marines are currently training the militaries of the United States' Central American allies to respond to and to battle the illegal drug trading organizations.¹²¹ Considering this level of intensity, the Central American Drug Conflict should be recognized as a NIAC.

Finally, the United States can be recognized as a party to the Central American Drug Conflict as a co-belligerent. A "co-belligerent" means any state or armed force joining and directly engaged with a nation that is party to the hostilities, or one directly supporting hostilities against a common enemy.¹²² The United States is currently training members of the Mexican military, as well as the militaries of other Central American nations.¹²³ The United States has also undertaken the "Mérida Initiative," a regional security agreement between Mexico and the United States to combat drug violence.¹²⁴ Funding for Mexico's attempt to combat drug violence in Central America is the United States' largest aid initiative, at \$830 million.¹²⁵ The United States has also engaged in a policy of interdiction, breaking up drug trade lines by seizing drugs at the U.S. border or while the drugs are en route through Central America.¹²⁶ In addition, the United States has used police and military forces in order to eliminate crops before they can be harvested.¹²⁷ Of course, one reason the United States has gotten involved is because of the serious national security threat that Central American drug gangs pose to the United States' southern border.¹²⁸ Furthermore, the United States has also waged a "War on Drugs"¹²⁹ and battles within U.S. cities against the same drug gangs that Central America battles,

(Mar. 15, 2009), <http://www.latimes.com/world/la-fg-mexico-arms-race15-2009mar15-story.html#page=1>, <<http://perma.cc/ZA4M-C49H>>.

¹¹⁹ Harkins, *supra* note 85.

¹²⁰ Tony Payan, James A. Baker III Inst. for Pub. Pol'y, *Why Mexico's Military is Fighting the Country's Drug War*, HOUSTON CHRON. (Jun. 6, 2013 at 8:18 AM), <http://blog.chron.com/bakerblog/2013/06/why-mexicos-military-is-fighting-the-countrys-drug-war/>, <<http://perma.cc/55Q2-E8MC>>.

¹²¹ Harkins, *supra* note 85.

¹²² See *Practice Relating to Rule 3. Definition of Combatants*, INT'L COMM. OF THE RED CROSS, (2015), https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule3, <<http://perma.cc/CZ4Y-CWD3>> (defining co-belligerent in relation to the United States).

¹²³ Harkins, *supra* note 85.

¹²⁴ Suzanna Reiss, *Beyond Supply and Demand: Obama's Drug Wars in Latin America*, N. AM. CONG. ON LATIN AM., <https://nacla.org/news/beyond-supply-and-demand-obama%E2%80%99s-drug-wars-latin-america>, <<http://perma.cc/SA9G-Q5ZW>>.

¹²⁵ *Id.*

¹²⁶ DRUG POLICY ALLIANCE, THE DRUG WAR ACROSS BORDERS: US DRUG POLICY AND LATIN AMERICA, http://www.drugpolicy.org/docUploads/fact_sheet_borders.pdf, <<http://perma.cc/4F4C-PBBD>>.

¹²⁷ *Id.*

¹²⁸ Kelly, *supra* note 5.

¹²⁹ Seth Harp, *Globalization of the U.S. Black Market: Prohibition, the War on Drugs, and the Case of Mexico*, 85 N.Y.U. L. REV. 1661, 1663–64 (2010).

such as the Mara Salvatrucha in Los Angeles.¹³⁰

It is also fair to say that the United States is responsible for the hostilities and strength of Central American drug gangs. Demand for illegal drugs in the United States is a contributor to the success of drug gangs.¹³¹ For example, “[n]inety percent of the cocaine that enters the U.S. transits through Mexico.”¹³² Also, a large supply of marijuana and methamphetamines come from Mexico and Central America.¹³³ In addition, a large amount of the guns used by drug gangs come from the United States as a result of loose gun laws.¹³⁴ “Nearly 70% of guns recovered from Mexican criminal activity from 2007 to 2011, and traced by the U.S. government, originated from sales in the United States.”¹³⁵ United States involvement may be based partially on the national security threat of drug gangs and partially on a shared feeling of responsibility for the hostilities. Thus, by looking to how the United States has directly and indirectly contributed to the Central American Drug Conflict, it becomes apparent that the United States is a co-belligerent.

It is important to indicate that this Note claims the Central American Drug Conflict is the conflict that triggers the application of the Geneva Conventions, and this Note does not focus on a specific nation. It may be easier for advocates to argue that one nation falls under this moniker than to characterize the conflict in broad swath. In fact, this author would encourage litigants to explore that option, and this Note does not attempt to foreclose that possibility. However, immigration detention focuses broadly on detaining people from Central America,¹³⁶ and this Note seeks to analyze that process under that same mode of thinking. Also, by showing that the Central American Drug Conflict as a whole should be characterized as a NIAC, it demonstrates that there should be a wide breadth of detainees who are subject to the protections of the Geneva Conventions.

However, one of the arguments against recognizing the Central

¹³⁰ See Margot Kniffin, *Balancing National Security and International Responsibility: The Immigration System's Legal Duty to Asylees Fleeing Gang Violence in Central America*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 314, 315 (2011) (indicating the presence of the Maras, aka MS-13, in the United States).

¹³¹ Reiss, *supra* note 125.

¹³² CNN Library, *Mexico Drug War Fast Facts*, CNN (last updated Sept. 23, 2015, 4:41 PM ET), <http://www.cnn.com/2013/09/02/world/americas/mexico-drug-war-fast-facts>, <<http://perma.cc/FX6T-TD39>>.

¹³³ *Id.*

¹³⁴ Chris McGreal, *How Mexico's Drug Cartels Profit from Flow of Guns Across the Border*, GUARDIAN (Dec. 8, 2011), <http://www.theguardian.com/world/2011/dec/08/us-guns-mexico-drug-cartels>, <<http://perma.cc/Q72L-XJ3Z>>.

¹³⁵ Terry Frieden, *Data show most firearms recovered at Mexican crime scenes originated in U.S.*, CNN (Apr. 26, 2012), <http://www.cnn.com/2012/04/26/us/mexico-crime-guns/>, <<http://perma.cc/94PC-6NX2>>.

¹³⁶ See Wil S. Hylton, *A Federal Judge and a Hunger Strike Take on the Government's Immigration Detention Facilities*, N.Y. TIMES MAG. (Apr. 10, 2015), <http://www.nytimes.com/2015/04/06/magazine/a-federal-judge-and-a-hunger-strike-take-on-the-governments-immigrant-detention-facilities.html>, <<http://perma.cc/7YQL-YXCY>>.

American Drug Conflict as a NIAC is that NIACs were created to respond to instances of internal struggles. Opponents would argue that the Central American Drug Conflict spans multiple nations.¹³⁷ As a result, the term “non-international” itself implies that the types of conflict recognized by Common Article 3 of the Geneva Conventions are not international in character—which the Central American Drug Conflict surely is. In fact, it would almost seem contradictory that there exists an “international non-international armed conflict.”¹³⁸ However, under the interpretation of NIACs expounded by the United States Supreme Court, that argument would surely fail.

The United States Supreme Court has ruled on what qualifies as a NIAC.¹³⁹ In *Hamdan v. Rumsfeld*, the United States Supreme Court was called on to determine if the military commissions of Guantanamo detainees were in compliance with the Geneva Conventions.¹⁴⁰ The Government advanced the argument that the Geneva Conventions did not apply because the war with Al-Qaeda was not a NIAC.¹⁴¹ The Government argued that the war with Al-Qaeda was an international conflict, and thus, did not fall under the term *non-international*.¹⁴² The Supreme Court rejected that claim.¹⁴³

The Court held that Common Article 3 of the Geneva Conventions—the common article triggered by NIACs—applied to the United States’ war with Al-Qaeda.¹⁴⁴ The Court articulated that “[t]he term ‘conflict not of an international character’ is used here in contradistinction to a conflict between nations.”¹⁴⁵ The Supreme Court contrasted this with Common Article 2, which applies to international armed conflicts, and indicated that the protections of Common Article 3 apply to all conflicts that do not arise between two parties—albeit affording a lower level of protection than Common Article 2.¹⁴⁶

This holding is significant for two reasons. First, it shows that the threshold for recognizing a NIAC under U.S. law is actually rather low. So, in analyzing the fighting between government groups and drug gangs, a logical conclusion based on the U.S. Supreme Court’s interpretation is that the drug conflict is a NIAC in the same way that the conflict between Al-Qaeda and the United States is a NIAC. Second, this

¹³⁷ *The Drug War Hits Central America: Organised Crime Is Moving South from Mexico into a Bunch of Small Countries Far Too Weak to Deal with It*, THE ECONOMIST (Apr. 14, 2011), <http://www.economist.com/node/18560287>, <<http://perma.cc/F5R7-DXZM>>.

¹³⁸ See generally Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U. L. REV. 145 (1983) (observing cases of internationalized NIACs).

¹³⁹ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630 (2006) (holding that the war on Al-Qaeda qualifies as a NIAC).

¹⁴⁰ *Id.* at 627.

¹⁴¹ See *id.* at 628.

¹⁴² *Id.* at 630.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 630–31.

holding shows that a NIAC can take place across several nations.¹⁴⁷ Thus, the Central American Drug Conflict, which has its roots in nations across Central America, is not disqualified because of its international nature.

The nature of the conflict demonstrates the nexus between the conflict and the detention of immigrants. The United States government claims that the detention of asylum seekers is animated by national security concerns.¹⁴⁸ Specifically, the government claims that mass migration, such as the kind reported at the border in summer of 2014, would overwhelm the immigration apparatus.¹⁴⁹ One of the purposes of the immigration apparatus is to protect the United States from admitting dangerous people.¹⁵⁰ In relation to Central American immigration, one large concern of some is that a compromised immigration apparatus will allow an inflow of drug cartel members or narco-traffickers.¹⁵¹ To protect the immigration system and the nation from the violence of the drug conflict, the United States has implemented policies that detain refugees.¹⁵² Therefore, there is a close nexus between the justifications for the detention and the conflict driving the influx of refugees.

A. The Protections Afforded to Women and Children Under Common Article 3 of the Geneva Conventions

The United States' current immigration detention practices violate Common Article 3 of the Geneva Conventions. The relevant provisions read:

[There is a prohibition on] [(1)](a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . . [(1)](c) outrages upon personal dignity, in particular humiliating and degrading treatment; . . . [and] (2)

¹⁴⁷ Under the interpretation by the Supreme Court, one could say that the term “Non-International” Armed Conflict is a bit of a misnomer, but saying “Only-One-Signatory-Party-as-a-Participant” Armed Conflict is a bit of a mouthful.

¹⁴⁸ *R.I.L.-R. v. Johnson*, 80 F. Supp. 3d 164, 175 (D.D.C. 2015). See MICHAEL TAN, AM. IMMIGRATION POLICY COUNCIL, LOCKED UP WITHOUT END: INDEFINITE DETENTION OF IMMIGRANTS WILL NOT MAKE AMERICA SAFER 9 (2011), http://www.immigrationpolicy.org/sites/default/files/docs/Tan_-_Locked_Up_Without_End_100611.pdf, <<http://perma.cc/55HD-9HBJ>> (describing the national security justification for immigration detention).

¹⁴⁹ *R.I.L.-R.*, 80 F. Supp. 3d at 189.

¹⁵⁰ See Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1681 (2011) (noting immigration law contains provisions that deport or limit the entry of people with a criminal background).

¹⁵¹ See Frank Diez & Bill Vourvoulias, *Cartels Exploit Immigration Crisis To Smuggle More Drugs Across Border*, FOX NEWS LATINO (July 03, 2014), <http://latino.foxnews.com/latino/news/2014/07/03/cartels-exploit-immigration-crisis-to-smuggle-more-drugs-across-border/>, <<http://perma.cc/C48Y-9S55>> (arguing that drug cartels are utilizing the immigration crisis in order to gain access to the United States).

¹⁵² See *R.I.L.-R.*, 80 F. Supp. 3d at 184 (calling the no release on bond policy a “blanket” policy).

The wounded and sick shall be collected and cared for.¹⁵³

In applying facts to these scenarios, this author does not intend to provide an exhaustive list of causes of action, but instead provide examples of violations that litigants may use to model their own claims.

1. Current Immigration Detention Conditions Qualify as “Cruel Treatment and Torture.”

The United National Committee against Torture recently weighed in on the United States’ immigration detention practice and indicated that the process itself raises concerns of torture.¹⁵⁴ The Committee was concerned about taking immigrants with viable asylum claims who are trying to flee violence and placing them in secure “prison-like” facilities.¹⁵⁵ The Committee also indicated that the poor conditions cause unnecessary suffering to the immigrants detained in the secure facility.¹⁵⁶ This includes sexual abuse of female asylum seekers and the psychological impacts from the use of solitary confinement.¹⁵⁷ Further, these problems are exacerbated for the children held in the facilities.¹⁵⁸

What is true under the United Nations Convention against Torture (CAT) should also be recognized as true under the Geneva Conventions. One reason for this is because the International Committee of the Red Cross¹⁵⁹ broadly adopts the United Nations’ definition of torture when defining torture under the Geneva Conventions.¹⁶⁰ In fact, the only difference between the U.N. definition and the international humanitarian law definition is that the international humanitarian law definition does “not requir[e] the involvement of a person acting in an official capacity.”¹⁶¹ At their core, the purpose of the CAT and the purpose behind section (1)(a) of Common Article 3 of the Geneva Conventions are the same—to prevent cruel treatment of people.¹⁶² Immigration

¹⁵³ Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 92.

¹⁵⁴ See UNITED NATIONS COMM. AGAINST TORTURE, CONCLUDING OBSERVATIONS ON THE THIRD TO FIFTH PERIODIC REPORTS OF UNITED STATES OF AMERICA 9 (2014), <https://www.justsecurity.org/wp-content/uploads/2014/11/UN-Committee-Against-Torture-Concluding-Observations-United-States.pdf>, <<http://perma.cc/JXY3-F53G>> (discussing the policy of immigration detention in a periodic review of U.S. policy for concerns regarding torture).

¹⁵⁵ *Id.* at 8–9.

¹⁵⁶ *Id.* at 9.

¹⁵⁷ *Id.* at 9.

¹⁵⁸ See *id.* at 10 (describing increased incidence of sexual violence faced by children held in detention facilities).

¹⁵⁹ The International Committee of the Red Cross is the international organization that seeks to promulgate the standards of international humanitarian law across the world. *Humanitarian Diplomacy*, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/en/what-we-do/humanitarian-diplomacy-and-communication>, <<http://perma.cc/BXZ3-UB9U>>.

¹⁶⁰ *What Is the Definition of Torture and Ill Treatment?*, INT’L COMM. OF THE RED CROSS, <https://www.icrc.org/eng/resources/documents/misc/69mjxc.htm>, <<http://perma.cc/L7UA-JMQU>>.

¹⁶¹ *Id.*

¹⁶² See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

detention should be recognized as torture under the Geneva Conventions for the same reasons that are recognized as torture by the Committee against Torture.

Even if the Committee had never weighed in, a litigant could prove that immigration detention is torture because it causes needless suffering. While a litigant could provide similar reasons to CAT—such as that asylum seekers are kept in cages—a litigant could argue that the poor conditions of the immigration detention centers amounts to torture. One point is that poor provision of medical care coupled with the inability to seek medical attention elsewhere exacerbates the pain that detainees are forced to endure when ill.¹⁶³ Even when medical care is provided, it is often provided poorly.¹⁶⁴ For example, recently 250 children were accidentally administered an adult dose of the Hepatitis A vaccine, causing potentially debilitating illness.¹⁶⁵

Accordingly, there are many ways an individual could bring such a claim—this Note only provides a brief list. Advocates who wish to bring causes of action should investigate the facilities in search of needless suffering. In this author's experience, it will not be hard to find.

2. *The Current Practice of Immigration Detention Creates Outrages upon Personal Dignity.*

The Geneva Conventions prevent conditions that are “outrages upon personal dignity.”¹⁶⁶ This means that nations cannot “[s]ubject[] victims to treatment designed to subvert their self-regard.”¹⁶⁷ The equivalent under international human rights law is “degrading treatment,”¹⁶⁸ and the Common Article 3 makes direct reference to this term.¹⁶⁹

Punishment, Dec. 10, 1984, 14765 U.N.T.S. 85 (presenting U.N. provisions designed to prevent cruel treatment).

¹⁶³ See Press Release, Am. Immigration Council, *Deplorable Medical Treatment at Family Detention Centers* (July 20, 2015), <http://www.americanimmigrationcouncil.org/newsroom/release/deplorable-medical-treatment-family-detention-centers>, <<http://perma.cc/5VEU-ZDK4>> (describing the pain that poor provision of medical care forces detainees to endure while being detained).

¹⁶⁴ *Id.*

¹⁶⁵ Kerry Flynn, *Overdose of Hepatitis A Vaccine Given to 250 Immigrant Children Detained in Texas: Report*, INT'L BUS. TIMES (July 5, 2015, 2:53 PM), <http://www.ibtimes.com/overdose-hepatitis-vaccine-given-250-immigrant-children-detained-texas-report-1996169>, <<http://perma.cc/4QJH-8RXJ>>.

¹⁶⁶ Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 92.

¹⁶⁷ Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 285 (Jan. 27, 2000).

¹⁶⁸ See generally David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1 (1999) (discussing the principle of degrading treatment under international human rights law).

¹⁶⁹ Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 92.

The issues of degrading treatment and torture are closely related and are often treated together.¹⁷⁰ For the same reasons that detention is torture, it is also degrading treatment. Those reasons include the caging of asylum seekers, poor conditions of confinement, and causing mental illness.¹⁷¹

One example of a facility with conditions that subvert the self-regard of the detainees is the Eloy Facility in Arizona, which is operated by the Corrections Corporation of America and has recently been plagued by a string of suicides.¹⁷² It has been called “the deadliest immigration detention center in the nation.”¹⁷³ Some of the problems that have contributed to the infamous title are the harsh conditions of confinement, including a lack of “adequate medical care, effective suicide monitoring[,] and staffing levels.”¹⁷⁴

One specific issue that is typically treated under Common Article 3 section (1)(c) exclusively is sexual abuse, which is rampant in immigration detention facilities.¹⁷⁵ In 2011 the ACLU National Prison Project filed an open records request with the federal government requesting documents relating to allegations of sexual abuse at immigration detention facilities.¹⁷⁶ What the ACLU discovered is frightening. There were sixteen allegations of sexual abuse in Arizona, seventeen in California, and fifty-six in Texas.¹⁷⁷ There were an additional sixty-five allegations from states that have less robust immigration detention complexes.¹⁷⁸ In total “immigrants held in U.S. immigration detention facilities filed more than 170 allegations of sexual abuse over the last four years, mostly against guards and other staff at the centers.”¹⁷⁹ No evidence was found that the majority of the complaints had been resolved or even investigated.¹⁸⁰ Furthermore, one former employee indicates that “officials attempted to cover up complaints of sexual abuse.”¹⁸¹ Current conditions in confinement continue to put

¹⁷⁰ See *Ali v. Rumsfeld*, 649 F.3d 762, 782 (D.C. Cir. 2011) (treating Obama’s executive order ending “outrages upon personal dignity” as an end to state sanctioned “torture” under the Bush Administration).

¹⁷¹ See *infra* III(A)(i) (noting that immigration detention is torture due to mental anguish).

¹⁷² Megan Jula & Daniel González, *Eloy Detention Center: Why So Many Suicides?*, THE ARIZ. REPUBLIC (July 29, 2015, 10:33 AM), <http://www.azcentral.com/story/news/arizona/investigations/2015/07/28/eloy-detention-center-immigrant-suicides/30760545/>, <<http://perma.cc/Z7FM-3FMA>>.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT’L L. 288, 327 (2003).

¹⁷⁶ *Sexual Abuse in Immigration Detention Facilities*, ACLU, <https://www.aclu.org/map/sexual-abuse-immigration-detention-facilities>, <<http://perma.cc/MVT7-Z5TG>>.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ Catherine Rentz, *How Much Sexual Abuse Gets “Lost in Detention”?*, PBS (Oct. 19, 2011, 2:03 PM), <http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/how-much-sexual-abuse-gets-lost-in-detention/>, <<http://perma.cc/98F5-A29L>>.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

asylum seekers at risk of sexual abuse.¹⁸² In addition, there is consistent under-reporting of sexual assault and abuse.¹⁸³ This suggests sexual abuse in facilities is even more widespread than these numbers indicate. Therefore, the conditions in immigration detention facilities violate prohibitions on outrages against personal dignity.

3. *The Wounded and Sick Are Not Cared for in Immigration Detention.*

Common Article 3 of the Geneva Conventions contains a provision that makes failure to care for the sick and wounded a violation of the Conventions.¹⁸⁴ This is likely because international humanitarian law developed around attempts to care for the sick and wounded in combat. Unfortunately, immigration detention facilities in the United States do not comply with this requirement.¹⁸⁵ For example, at least one detention center does not have a full-time doctor, and children in detention are either not given medical attention or are given inadequate medical attention.¹⁸⁶ One habeas petition outlines how a little boy with allergies was denied adequate medical treatment for the entirety of his detention at the Karnes facility.¹⁸⁷ Another child who was vomiting blood was told to drink more water and was not given any additional care or a referral to an external medical care unit for several days.¹⁸⁸

Because many of the immigrants are fleeing violence, cases of psychological trauma, such as post-traumatic stress disorder (PTSD), are rampant.¹⁸⁹ For example, the same habeas petition as the boy who could not receive allergy treatment also indicates that his mother suffered from

¹⁸² HUMAN RIGHTS WATCH, *DETAINED AND AT RISK: SEXUAL ABUSE AND HARASSMENT IN UNITED STATES IMMIGRATION DETENTION 19* (2010), <https://www.hrw.org/sites/default/files/reports/us0810webwcover.pdf>, <<http://perma.cc/X72E-5JVA>>.

¹⁸³ U. S. GOV'T ACCOUNTABILITY OFFICE, *IMMIGRATION DETENTION: ADDITIONAL ACTIONS COULD STRENGTHEN DHS EFFORTS TO ADDRESS SEXUAL ABUSE 18-19* (2013), <http://www.gao.gov/assets/660/659145.pdf>, <<http://perma.cc/RJD2-NNV9>>.

¹⁸⁴ Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 92.

¹⁸⁵ *See US: Immigration Detention Neglects Health: Two Studies – On Women and Systemic Abuses – Document Shortcomings and Lack of Accountability*, HUMAN RIGHTS WATCH (Mar. 17, 2009), <https://www.hrw.org/news/2009/03/17/us-immigration-detention-neglects-health>, <<http://perma.cc/V4N3-4Q3R>> (describing a variety of ways in which current medical treatment received by detainees is below community standards).

¹⁸⁶ Letter from Trisha Trigilio, Fellow, Univ. of Tex. Sch. of Law Civil Rights Clinic, Ranjana Natarajan, Dir., Univ. of Tex. Sch. of Law Civil Rights Clinic & Kelly Haragan, Dir., Univ. of Tex. Sch. of Law Envtl. Law Clinic to Teresa R. Pohlman, Dir., Sustainability and Envtl. Programs, Dept. of Homeland Sec. & Susan Bromm, Dir., Office of Fed. Activities (Oct. 30, 2014), http://www.immigrantjustice.org/sites/immigrantjustice.org/files/UT_EnvironmentalImpactofDilley_2014_10_30.pdf, <<http://perma.cc/5SSL-4GUJ>>.

¹⁸⁷ Petition for Habeas Corpus, *Castillo v. Thompson*, 5:14-CV-01023 (W.D. Tex. Nov. 18, 2014).

¹⁸⁸ Press Release, Am. Immigration Council, *supra* note 164.

¹⁸⁹ *US: Trauma in Family Immigration Detention: Release Asylum-Seeking Mothers, Children*, HUMAN RIGHTS WATCH (May 15, 2015), <https://www.hrw.org/news/2015/05/15/us-trauma-family-immigration-detention-0>, <<http://perma.cc/8F6Y-68E6>>.

anxiety and depression related to her trauma.¹⁹⁰ This arose from multiple death threats from gangs, directed at her and her family, including attempts on her life and the murder of her uncle.¹⁹¹ Her daughter—who had also experienced numerous death threats from gang members—had such a serious case of PTSD that it left her physically weak and made her prone to fainting.¹⁹² Yet, the facility did not provide treatment.¹⁹³ In fact, psychiatric care provided by these detention centers has been found to be lacking across the board.¹⁹⁴

Facilities also fail to provide adequate medical care for pregnant women.¹⁹⁵ “According to ICE statistics for just six detention facilities, at least 559 of the women detained between 2012 and 2014 were pregnant.”¹⁹⁶ One woman held in the Eloy Detention facility describes her experience as follows:

Despite my pregnancy, I and others like me were treated the same as any other detainee. I felt constantly humiliated. Beds were hard, and stools had no backs. We weren’t allowed sufficient rest, because at 5am each morning, officials would enter our cells and yell at us to get up. The food was inedible – everything was pasta and rice, or rotting vegetables and sometimes undercooked chicken. There was nothing I could do but eat it.

ICE insists that we get excellent pre-natal care. Yet during my monthly checkups, my nurse would always dismissively wave her hand and say “you are fine, no problem, go back to the pod,” though I was dehydrated, depressed and tired, losing weight, and always feeling sick and worried. I believe that at least two women suffered miscarriages while I was detained. The stress of constantly fearing that I would lose my baby, too, was almost too much to bear.¹⁹⁷

Since immigration detention facilities do not provide the proper care to asylum seekers that are detained, the current practice violates the requirement that the sick be cared for under Common Article 3 of the

¹⁹⁰ Petition for Habeas Corpus, *supra* note 188.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ TRAVIS PACKER, IMMIGRATION POLICY CTR., NON-CITIZENS WITH MENTAL DISABILITIES: THE NEED FOR BETTER CARE IN DETENTION AND IN COURT 5 (2010), http://www.immigrationpolicy.org/sites/default/files/docs/Non-Citizens_with_Mental_Disabilities_112310.pdf, <<http://perma.cc/FHS6-5GK9>>.

¹⁹⁵ See Yamileth Garcia, *Immigration Detention Is Inhumane. But for Pregnant Women, It's Trauma*, GUARDIAN (July 27, 2015), <http://www.theguardian.com/commentisfree/2015/jul/27/immigration-detention-pregnant-women-conditions>, <<http://perma.cc/KDF9-8YTW>> (personal account describing the inhuman treatment she suffered during detention).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

Geneva Conventions.

IV. ENFORCEMENT OF THE GENEVA CONVENTIONS

“Where there is a will there is a lawsuit.” - Addison Mizner,
American Architect

Litigatory war should be declared on these facilities under the Geneva Conventions. With the application of the Geneva Conventions comes a set of enforcement mechanisms that can be used to force an improvement in the conditions of immigration detention. As part of the laws of the United States, immigrants in immigration detention can bring suit under Common Article 3 because the Geneva Conventions are likely self-executing.¹⁹⁸

In the D.C. District Court where the litigation surrounding detention in Guantanamo Bay was filed, plaintiffs have already successfully argued that the Geneva Conventions are self-executing.¹⁹⁹ In *Hamdan*, the District Court, drawing on prior precedent,²⁰⁰ indicated that to determine if a treaty is self-executing “a court interpreting a treaty . . . look[s] to the intent of the signatory parties as manifested by the language of the treaty and, if the language is uncertain, then . . . to the circumstances surrounding execution of the treaty.”²⁰¹ Based on this test, a court finds a cause of action “whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined.”²⁰² The court went on to provide four reasons why the Geneva Conventions are self-executing:

[(1)] Because the Geneva Conventions were written to protect individuals, [(2)] because the Executive Branch of our government has implemented the Geneva Conventions for fifty years without questioning the absence of implementing legislation, [(3)] because Congress clearly understood that the Conventions did not require implementing legislation except in a few specific areas, and [(4)] because nothing in the Third Geneva Convention itself manifests the contracting parties’

¹⁹⁸ See *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 478–79 (D.D.C. 2005), *vacated sub nom.* Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 553 U.S. 723 (2008), and *vacated*, 282 F. App'x 844 (D.C. Cir. 2008), and *vacated sub nom.* Al Odah v. United States, 282 F. App'x 844 (D.C. Cir. 2008), and *vacated*, 559 F.3d 539 (D.C. Cir. 2009) (finding that the Geneva Conventions create an independent cause of action).

¹⁹⁹ See *id.* (finding that the Geneva Conventions are self-executing); *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 165 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd and remanded*, 548 U.S. 557 (2006) (holding that the Geneva Conventions are self-executing).

²⁰⁰ See *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976) (establishing a test for determining self-executing treaties).

²⁰¹ *Hamdan*, 344 F. Supp. 2d at 164 (citing *Diggs v. Richardson*, 555 F. 2d 848, 851 (D.C. Cir. 1976))

²⁰² *Id.* (quoting *In re Head Money Cases*, 112 U.S. 580, 598 (1884)).

intention that it not become effective as domestic law without the enactment of implementing legislation²⁰³

In *In re Guantanamo Detainees*, to reach the same conclusion that the Geneva Conventions are self-executing, the same District Court cited the same four reasons.²⁰⁴

The Supreme Court has also left open the possibility that the provisions of the Geneva Conventions are self-executing and expressly disavowed analysis that found the opposite.²⁰⁵ After the District Court in *Hamdan* found that the Geneva Conventions were self-executing, the D.C. Circuit Court reversed that decision.²⁰⁶ The Circuit Court believed prior precedent already foreclosed the question.²⁰⁷ The Supreme Court reversed, and expressly disavowed the logic that the D.C. Circuit Court used to find that there was not a private right of action.²⁰⁸ In doing so, the Supreme Court left open the possibility that the Geneva Conventions are self-executing—making way for future district court opinions similar to *In re Guantanamo Detainees*. It also counteracted one of the strongest government arguments against finding that the Geneva Conventions are self-executing, which is that prior precedent forecloses the possibility. Thus, those who oppose the current practice of immigration detention in the United States can sue using claims similar to those advanced by Guantanamo Bay detainees.

Additionally, the standards of the Geneva Conventions are enforceable through criminal law because the United States incorporated the Geneva Conventions into its criminal law with the passage of the War Crimes Act of 1996.²⁰⁹ In order to be criminally punishable, a defendant must commit a “grave breach” of the Geneva Conventions.²¹⁰ A “grave breach” is also defined by statute.²¹¹ Therefore, advocates can also file complaints with the Department of Justice on behalf of the detainees to encourage the prosecution of those that violate the Geneva Conventions.²¹² Doing so would put pressure on the administration to abandon the practice of immigration detention.

²⁰³ *Id.* at 165.

²⁰⁴ *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 479 (D.D.C. 2005).

²⁰⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557, 627–29 (2006).

²⁰⁶ *Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005), *rev'd and remanded*, 548 U.S. 557 (2006).

²⁰⁷ *Id.*

²⁰⁸ *See Hamdan*, 548 U.S. at 627–28.

²⁰⁹ War Crimes Act of 1996, 18 U.S.C. § 2441 (1996).

²¹⁰ *Id.* § 2441(c)(1).

²¹¹ *Id.* § 2441(d)(1).

²¹² *Crime Victims' Rights Ombudsman – Filing a Complaint*, U.S. DEP'T OF JUST. (Dec. 9, 2014), <http://www.justice.gov/usao/resources/crime-victims-rights-ombudsman/filing-complaint>, <<http://perma.cc/X2YP-7Q7H>>.

V. CONCLUSION

The Drug Conflict in Central America is a war. Men, women, and children have responded by fleeing their homes to save their lives. Once here, however, the United States has implemented policies that create additional barriers and force people to endure additional pain. The United States has already agreed to a set of protections to provide these asylum seekers under the Geneva Conventions. The United States should follow through on its agreement.

The chaos of war has driven these asylum seekers here. The laws of war should protect them. This author hopes that advocates use this research to help the men, women, and children trapped immigration detention. At its core, international humanitarian law seeks to protect human dignity. The pain these immigrants have suffered shows that they are the key candidates for the protection of international humanitarian law.