

ARTICLE

Spillover: Evolving Threats and Converging Legal Authorities in the Fight Against Mexican Drug Cartels

Christopher J. Curran *

* Major, Judge Advocate, United States Army. Associate Professor, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. Previous assignments include 160th Special Operations Aviation Regiment (Airborne), United States Army Forces Command, Joint Task Force – Iraq, and United States Army Trial Defense Service. The author would like to express his sincere thanks to Lieutenant Colonel John Cherry, United States Marine Corps, for the significant insight and assistance he provided on this Article. *Semper Fidelis*. The views expressed in this Article are those of the author and do not reflect the official policy or position of the United States Army, the Department of Defense, or the U.S. Government.

Table of Contents

Introduction	346
I. Understanding the Threat	349
<i>A. Background</i>	349
<i>B. Characterizing the Cartel Threat</i>	354
1. An Organized Crime Model.....	355
2. An Insurgency Model	356
3. A Terrorism Model	362
<i>C. Addressing the Hybrid Threat</i>	364
II. Legal Mechanisms to Address the Hybrid Threat	366
<i>A. Title 18 Terrorism</i>	368
<i>B. Designation as Foreign Terrorist Organizations</i>	370
<i>C. Counterterrorism Operations</i>	374
Conclusion	380

*[W]e have to recognize that the threat has shifted and evolved from the one that came to our shores on 9/11. With a decade of experience now to draw from, this is the moment to ask ourselves hard questions—about the nature of today's threats and how we should confront them.*¹

Introduction

The border separating the United States from Mexico stretches for nearly two thousand miles across the American Southwest, through the states of California, Arizona, New Mexico, and Texas. It is the busiest border in the world, a gateway for the roughly one million people who travel between the United States and Mexico each day, and the transit point for billions of dollars worth of goods and services that are vital to the U.S. economy.² In addition to being a neighbor and a leading trading partner,³ Mexico is also one of the United States' most important strategic security partners.⁴ As a result of their shared border, the relationship between the United States and Mexican governments plays a crucial role in protecting U.S. national security interests, particularly with regard to homeland security and hemispheric defense issues.⁵ Unfortunately, the security situation throughout Mexico has steadily deteriorated over the last decade, with attendant consequences in the southwestern United States. Throughout that time, both countries have struggled to gain the upper hand in a bloody and rapidly expanding conflict against sophisticated and well-organized Mexican drug cartels.⁶

The fight against the cartels has claimed thousands of lives in Mexico over the past several years, bringing growing instability to that country and the United States' southwestern border.⁷ For years now, the U.S. government has

¹ President Barack Obama, *Remarks by the President at the National Defense University* (May 23, 2013), <http://perma.cc/Z7BL-BLPH>.

² *Quick Facts About the U.S.-Mexico Border*, THE GEORGE W. BUSH WHITEHOUSE ARCHIVES, <http://perma.cc/3CPQ-RX68>; *U.S. Relations With Mexico*, U.S. DEP'T OF STATE, BUREAU OF W. HEMISPHERE AFFAIRS (Sept. 10, 2014), <http://perma.cc/EPS9-JUHB>.

³ *Top Trading Partners – November 2013*, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU (Nov. 2013), <http://perma.cc/LS9A-4URV> (Mexico is the United States' third largest trading partner).

⁴ EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY STRATEGY 42 (2010) [hereinafter NATIONAL SECURITY STRATEGY OF 2010], <http://perma.cc/HG7C-PECN>.

⁵ *See id.*; U.S. DEP'T OF DEFENSE, WESTERN HEMISPHERE DEFENSE POLICY STATEMENT (Oct. 2012), <http://perma.cc/WZ7K-KRCQ>.

⁶ *See* JUNE S. BIETTEL, CONG. RESEARCH SERV., MEXICO'S DRUG TRAFFICKING ORGANIZATIONS: SOURCE AND SCOPE OF THE VIOLENCE (2013).

⁷ The precise number of drug-related casualties is unknown, but some sources estimate that as many as 150,000 people have been killed since 2006. Molly Molloy, *Pena Nieto's First Year: Iraq on Our Southern Border*, SMALL WARS J. (Jan. 6, 2014), <http://perma.cc/EBR2-7TJ3>.

recognized that the deteriorating security situation in Mexico poses a direct threat to U.S. national security.⁸ In addition to worries about the violence taking place within Mexico and the corresponding political instability that it causes, there is also significant concern among U.S. lawmakers that the conflict could begin to “spillover” into the United States.⁹ Indeed, instances of cartel violence within the United States are increasingly prevalent and elements of every major Mexican cartel are now known to operate within U.S. borders.¹⁰ However, the violent disposition and organizational complexity of modern Mexican cartels pose, perhaps, the area of greatest concern for the United States.¹¹ These organizations have evolved over the past decade into entities far more sophisticated and dangerous than traditional criminal smugglers.¹² Employing cadres of military-trained personnel equipped with sophisticated weaponry, today’s cartels can carry out exceptionally complex operations and apply a degree of force capable of overwhelming the response

Part of the challenge in reaching a conclusive number is the inherent difficulty in categorizing the available data to determine which homicides in Mexico are attributable to organized crime or cartel-related activities. Another challenge is that a genuine dispute remains regarding the accuracy of the data reported by the Mexican government. In recent years, several media outlets, including *Milenio* and the Mexico City-based newspaper *Reforma*, have independently tracked and reported drug-related casualties. See CORY MOLZAHN, OCTAVIO RODRIGUEZ FERREIRA, & DAVID A. SHIRK, DRUG VIOLENCE IN MEXICO: DATA AND ANALYSIS THROUGH 2012, UNIV. OF SAN DIEGO, TRANS-BORDER INST., at 6–10 (2013) [hereinafter DRUG VIOLENCE IN MEXICO 2012], <http://perma.cc/K6VA-Y83U> (providing a thorough analysis of the data as well as the inherent methodological challenges in collecting, reporting, and interpreting such data).

⁸ See BIETTEL, *supra* note 6; NATIONAL SECURITY STRATEGY OF 2010, *supra* note 4.

⁹ KRISTIN M. FINKLEA, CONG. RESEARCH SERV., SOUTHWEST BORDER VIOLENCE: ISSUES IN IDENTIFYING AND MEASURING SPILLOVER VIOLENCE (2013), Summary, <https://www.fas.org/sgp/crs/homsec/R41075.pdf> (“When assessing the potential implication of the increased violence in Mexico, one of the central concerns for Congress is the potential for what has been termed ‘spillover’ violence—an increase in drug trafficking-related violence in the United States.”); BIETTEL, *supra* note 6, at 6 (“The growing security crisis in Mexico including the March 13, 2010, killing of three individuals connected to the U.S. consulate in Ciudad Juárez, Mexico, (two of the victims were U.S. citizens) has drawn the attention of the U.S. Congress and has raised concerns about the stability of a strategic partner and neighbor. Congress is also concerned about the possibility of ‘spillover’ violence along the U.S. border and further inland. The 111th Congress held more than 20 hearings dealing with the violence in Mexico, U.S. foreign assistance, and border security issues.”).

¹⁰ See, e.g., U.S. DEP’T OF JUSTICE, NAT’L DRUG INTELLIGENCE CTR., NATIONAL DRUG THREAT ASSESSMENT (2011) [hereinafter NATIONAL DRUG THREAT ASSESSMENT 2011], at 8, <http://perma.cc/76EN-YBWE> (Mexican cartels are now known to operate in over one thousand U.S. cities); FINKLEA, *supra* note 9, at 11 (discussing the spree of drug cartel-related kidnappings in Phoenix, Arizona between 2007 and 2009).

¹¹ See Christopher Sherman, *Mexican Cartels Use Corporate Business Model to Exert Control, Protect Revenue and Ensure Succession*, HUFFINGTON POST (Sept. 30, 2012), <http://perma.cc/X7FZ-FDMF>.

¹² *Id.*; see also Rodrigo Canales, *Ted Talk: The Deadly Genius of Drug Cartels*, TED.COM (2013), <http://perma.cc/GQ2F-D54F> (analyzing cartels as business organizations and discussing the use of corporate-style branding by major Mexican drug trafficking organizations).

capacity of civilian law enforcement agencies on either side of the border.¹³ Perhaps most worrisome, Mexican cartels routinely engage in acts of terrorism and have ties with U.S. street and prison gangs, other known terrorist organizations, and U.S. adversaries from across the globe.¹⁴

How to respond to the threat posed by these organizations is one of the most significant national security questions confronting the United States today. In 2010, the President's National Security Strategy noted that "[t]ransnational criminal threats and illicit trafficking networks continue to expand dramatically in size, scope, and influence—posing significant national security challenges for the United States and our partner countries."¹⁵ The following year, the Strategy to Combat Transnational Organized Crime called for the use of all elements of national power to counter this threat.¹⁶

Over the last several decades, the United States' approach to handling national security threats has changed significantly, particularly with regard to counterterrorism operations in the years since September 11, 2001.¹⁷ At the same time, both traditional criminal networks and terrorist organizations have expanded their reach and diversified their activities, blurring the line between profit seeking criminal enterprises and ideologically motivated terrorist organizations.¹⁸ Perhaps nowhere is this convergence more pronounced than with Mexican drug cartels. While the national security threat posed by Mexican drug cartels has evolved dramatically in recent years, the United

¹³ See Antonio Sampaio, *Los Zetas' Way of Combat*, KINGS OF WAR (July 19, 2013), <http://perma.cc/6A34-UW8D> (discussing the military origins of the Los Zetas cartel and their systematic employment of terror-like tactics); Robert Bunker et. al., *Mexican Cartel Tactical Notes 1-18*, SMALL WARS J., <http://perma.cc/TS7T-6KZJ>.

¹⁴ EXEC. OFFICE OF THE PRESIDENT, STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME: ADDRESSING CONVERGING THREATS TO NATIONAL SECURITY 6 (2011) [hereinafter STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME OF 2011], <https://perma.cc/J9Q2-3U42> (discussing the "Crime-Terror-Insurgency Nexus" and the convergence of previously distinct threats); see also Douglas Farah, *Transnational Organized Crime, Terrorism, and Criminalized States in Latin America: An Emerging Tier-One National Security Priority*, STRATEGIC STUDIES INST. (Apr. 2012), <http://www.strategicstudiesinstitute.army.mil/pdf/files/PUB1117.pdf>; Robert Killebrew, *Iran's Cartel Strategy*, WAR ON THE ROCKS (Aug. 14, 2013), <http://perma.cc/SR8A-23CG>; Michael Lohmuller, *Zetas Training U.S. Gang Members in Mexico: Witness*, INSIGHT CRIME (Feb. 5, 2014), <http://perma.cc/PU2T-RR6T>; MARK P. SULLIVAN AND JUNE S. BIETTEL, CONG. RESEARCH SERV., *LATIN AMERICA: TERRORISM ISSUES* (2014).

¹⁵ NATIONAL SECURITY STRATEGY OF 2010, *supra* note 4, at 49.

¹⁶ STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME OF 2011, *supra* note 14, at 4.

¹⁷ See generally EXEC. OFFICE OF THE PRESIDENT, NATIONAL STRATEGY FOR COUNTERTERRORISM (2011) [hereinafter NATIONAL COUNTERTERRORISM STRATEGY OF 2011], <https://perma.cc/PU2Z-6GXU>; NATIONAL COMMISSION ON THE TERRORIST ATTACKS UPON THE UNITED STATES, STAFF STATEMENT NO. 9, LAW ENFORCEMENT, COUNTERTERRORISM, AND INTELLIGENCE COLLECTION IN THE UNITED STATES PRIOR TO 9/11, <http://perma.cc/L5K3-M5XG>.

¹⁸ STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME OF 2011, *supra* note 14, at 5–6.

States' legal approach to countering this threat has not kept pace with that evolution. In addition to the illegal enterprises that they run, the major cartels operating throughout Mexico and in the United States today are also engaging in terrorism and should be legally recognized as terrorist organizations. By more effectively utilizing existing counterterrorism laws and practices and fully integrating them into its overall counterdrug strategy, the United States can make significant progress in the fight against the Mexican drug cartel threat.

The first part of this Article provides background on the threat, examining the nature of Mexican drug cartels and the conflict that continues across Mexico and along its border with the United States. The Article then discusses how the hybrid threat posed by the cartels is characterized in the press and academia, specifically focusing on debates among experts from various fields of security studies. The second part of this Article argues that existing counterterrorism legal authorities can, and should, be more frequently utilized to better address aspects of the complex threats posed by today's drug cartels. This part specifically considers the prosecution of cartel members for terrorism, the designation of the most violent Mexican cartels as foreign terrorist organizations, and the use of military counterterrorism forces to address the most serious national security threats presented by the cartels. Finally, this Article concludes by arguing not only that the use of counterterrorism authorities is consistent with current U.S. law and policy, but also that it would provide greater flexibility to those responsible for developing effective responses to the threats posed by Mexican cartels.

I. Understanding the Threat

*[D]efining what sort of organized violence is happening has deep and far reaching implications for policymakers who design strategies that eventually must be implemented by those who face the effects of the ongoing violence on a daily basis. Terms like insurgency and terrorism create policy options and strategic choices that are different from those that would be responses to criminality.*¹⁹

A. Background

Whereas the illegal smuggling of drugs into the United States is not a new phenomenon, the scope of the problem has grown exponentially in recent years.²⁰ This is particularly true along the U.S.-Mexico border, where the

¹⁹ PAUL REXTON KAN, CARTELS AT WAR 6–7 (1st ed. 2013).

²⁰ See generally DRUG ENFORCEMENT ADMINISTRATION, DEA HISTORY IN DEPTH [hereinafter DEA HISTORY], <http://www.dea.gov/about/history.shtml> (last visited Mar. 30, 2015) (detailing the history of federal law enforcement efforts against international drug trafficking organizations and the growth of international drug trade over the last several decades).

dramatic expansion of drug trafficking activities in that region has made it the single largest point-of-entry for illegal drugs moving into the United States each year.²¹ Several factors have contributed to this growth and to the concentration of drug trafficking activity along the southwestern border.²² First, in 1994, the North American Free Trade Agreement (NAFTA) went into effect, creating the world's largest free trade area.²³ In addition to facilitating the free flow of commercial goods across the U.S.-Mexico border and throughout North America, NAFTA also facilitated rapid growth in the illicit drug trafficking market.²⁴ By substantially increasing the total number of shipments of goods crossing the border each year, NAFTA provided increased opportunities for Mexican cartels to surreptitiously move their illicit products into the United States. The increased flow of goods also provided for more efficient and cost-effective methods of delivering large quantities of narcotics to U.S. markets,²⁵ and provided new competitive advantages to the organizations that controlled overland smuggling routes across the relatively open land borders of the United States.²⁶

Contemporaneous to the passage of NAFTA, the United States started growing increasingly successful in its maritime interdiction efforts against drug shipments in the Caribbean, in particular, shipments of cocaine originating from Colombia.²⁷ The diminished effectiveness of these sea routes also set the conditions for a dramatic expansion of the effective and long-established overland smuggling routes through Mexico. In large part, this was simply a matter of geography; "Mexican D[rug] T[rafficking] O[rganization]s are situated between the world's largest producer of cocaine (Colombia) and the world's largest consumer of cocaine (United States), leading Mexico to be a natural drug transshipment route between the two countries."²⁸ The Mexican cartels that controlled these trafficking corridors (*plazas*) were now in a position to reap the benefits of having nearly exclusive access to the most lucrative drug market in the world.²⁹

²¹ *Id.*; NATIONAL DRUG THREAT ASSESSMENT 2011, *supra* note 10, at 13 ("[T]he volume [of drugs] moved across the U.S.-Mexico border significantly exceeds that moved through all other routes combined.").

²² *See id.*

²³ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

²⁴ KAN, *supra* note 19, at 3.

²⁵ *Id.* at 3-5.

²⁶ *Id.* at 14.

²⁷ BIETTEL, *supra* note 6, at 8.

²⁸ FINKLEA, *supra* note 9, at 6.

²⁹ BIETTEL, *supra* note 6, at 5 ("[A]n important transition in the role of Mexico in the international drug trade took place during the 1980s and early 1990s. As Colombian DTOs [drug trafficking organizations] were forcibly broken up, the highly profitable traffic of cocaine into the United States was gradually taken over by Mexican traffickers. The traditional trafficking route used by the Colombians through the Caribbean was shut down by intense enforcement efforts of the U.S. government. As Colombian DTOs lost this route they

These conditions, along with the growing demand for illegal drugs in the United States, led to increased competition among the cartels. This eventually resulted in a series of early drug wars in the 1990s, as cartels in Mexico began waging violent campaigns against one another for control of the most lucrative *plazas*.³⁰ This struggle continued over the course of the following decade, with the level of violence growing each year as competing factions fought to consolidate their positions and control over key territory.³¹ Eventually the more powerful cartels began to rise above the competition, growing more brutal and aggressive in the process:

[b]y 2006, drug traffickers coalesced into seven major cartels that now control 90 percent of the illicit narcotics imports into the United States. These major players are the actors largely responsible for inflicting the ongoing and bloody violence upon Mexican society, defying many familiar terms and concepts associated with large-scale death at the hands of armed groups operating in the shadow of the state.³²

With major cartels emerging as the dominant criminal traffickers within specific regions, the conditions were set for the dramatic expansion of the conflict that continues to the present day.³³

One additional factor that played a major role in the escalation of violence was a shift in the political landscape in Mexico, characterized by the diminishing political power of the once dominant *Partido Revolucionario Institucional* (PRI) during the last part of the twentieth century.³⁴ The PRI was the political party that wielded power throughout Mexico for over seventy-one years, quietly tolerating, and to a large extent moderating, drug trafficking-related activity.³⁵ The historical role of the government in the Mexican drug trade is rather complex:

Drug traffickers in Mexico historically required the permission of governors along with the collusion of the military and police to operate. For the majority of the twentieth century, the PRI

increasingly subcontracted the trafficking of cocaine produced in the Andean region to the Mexican DTOs who they paid in cocaine rather than cash. These already strong organizations gradually took over the cocaine trafficking business, evolving from being mere couriers for the Colombians to being the wholesalers they are today.”)

³⁰ *Id.*; KAN, *supra* note 19, at 4.

³¹ BIETTEL, *supra* note 6, at 5; KAN, *supra* note 19, at 4.

³² KAN, *supra* note 19, at 6.

³³ *Id.*

³⁴ Hal Brands, *Mexico's Narco-Insurgency and U.S. Counterdrug Policy*, STRATEGIC STUDIES INST. 6 (May 2009), <http://perma.cc/S86W-9CHN>.

³⁵ *Id.*

acted as a referee and market enforcer among various drug smuggling groups that lent relative stability to the trade in illicit narcotics. . . . During the late 1980s and into the 1990s, however, these traditional arrangements began to break down as the PRI became weaker while new opportunities for trafficking cocaine and meth rose for Mexican drug trafficking organizations . . . resulting in a violent free-for-all as criminal organizations seized new opportunities, attempted to establish territorial dominance over the plazas and competed for a greater share of illicit markets.³⁶

The loss of the Mexican government as a regulator of the illicit drug market occurred as the major cartels moved aggressively to consolidate their power. This contributed to the initial outbreak of drug violence in Mexico in the 1990s—violence that only continued to worsen over the course of the following decade.³⁷ “The definitive disintegration of the political-criminal nexus occurred when the PRI lost the presidency in both 2000 and 2006 to the right-leaning *Partido Accion Nacional* (PAN). . . . [a party that] took a more confrontational stance toward Mexican drug trafficking organizations.”³⁸ This set the stage for the conflict that continues today.

In 2006, Mexican President Felipe Calderón responded to the growing crisis in his country by launching an aggressive offensive campaign against the cartels, deploying the Mexican Army and Marines across the country in an effort to regain control of a rapidly deteriorating security situation.³⁹ Since that

³⁶ KAN, *supra* note 19, at 4. Since the breakdown of the system of political patronage provided by the PRI, the use of the term “cartel” is somewhat inaccurate when used to describe modern Mexican drug trafficking organizations and is also the subject of some controversy and dispute. *See, e.g.*, BIETTEL, *supra* note 6, at 1 (“In an earlier era, when some [Mexican] government officials helped to organize the business through explicit and implicit arrangements demarking drug syndicate territories and plazas as well as rules of game [sic], this economic term may have made more sense. Today in a period of unprecedented competition between the DTOs, where collusive behavior appears to last only temporarily and to rapidly evaporate, the term ‘cartel’ is less accurate. Today’s Mexican DTOs are not necessarily engaged in price-fixing and other forms of collusive economic activity ascribed to cartels.”). However, the term “drug trafficking organization” also provides an incomplete description as these organizations have significantly diversified their operations in recent years, expanding well beyond the drug trade and entering into a variety of other illicit ventures. *See* Evelyn Krache Morris, *Think Again: Mexican Drug Cartels – They Aren’t Just About Mexico or Drugs Anymore*, FOREIGN POL’Y (Dec. 3, 2013), <http://perma.cc/ASQ2-AHCS>. For purposes of this Article, the terms “cartel,” “drug trafficking organization,” and “transnational criminal organization” are used synonymously, albeit somewhat imprecisely in each instance.

³⁷ Brands, *supra* note 34, at 7.

³⁸ KAN, *supra* note 19, at 5.

³⁹ President Calderón was not the first Mexican president to deploy the armed forces to combat drug traffickers. President Vicente Fox, Calderón’s predecessor, deployed an average of 19,293 troops per year during his administration from 2000-2006. George W. Grayson, *The*

time, the conflict has spun out of control; casualties have skyrocketed and daily acts of horrific violence have become the norm across many parts of Mexico.⁴⁰ Thousands of Mexican citizens have been killed in bloody battles fought between the cartels and Mexican government forces, as well as in battles among rival cartels seeking to monopolize access to the most lucrative *plazas*.⁴¹ Today, the major cartels are more powerful than ever, controlling large amounts of Mexico's territory and operating with practical impunity.⁴² They kill, maim, torture and mutilate thousands of people each year, employing car bombs, political assassinations, kidnappings, and other terror-like tactics. They target not just rival cartel members, but also government officials, members of the armed forces, police officers, journalists, students, and ordinary citizens.⁴³ Simply put, Mexico is, quite literally, at war.⁴⁴

Impact of President Felipe Calderon's War on Drugs on the Armed Forces: The Prospects for Mexico's "Militarization" and Bilateral Relations, STRATEGIC STUDIES INST. 3 (Jan. 2013) ("This figure soared 133 percent to 45,000 during the Calderon *sexenio*. In 2009 alone, the Army assigned 48,750 men to combating narcotics syndicates—with approximately one-quarter of these cadres involved in joint operations with the Navy, the Federal Police, the U.S. Drug Enforcement Administration, the U.S. Homeland Security Department, and other agencies."), <http://www.strategicstudiesinstitute.army.mil/pdffiles/pub1137.pdf>; see also BIETTEL, *supra* note 6, at 18–20. The use of the military to combat the cartels has also continued since the re-emergence of the PRI, under the administration of President Enrique Peña Nieto, Calderón's successor. Though his administration has proposed "pull[ing] significant numbers of soldiers back from the cities and rely[ing] more on police forces to enforce the rule of law," this effort has stalled and significant numbers of soldiers remain deployed across the country today. Sylvia Longmire, *Disappointment Is the Hallmark of EPN's First Year in Office*, SMALL WARS J. (Jan. 12, 2014), <http://perma.cc/3V7G-HQHE>.

⁴⁰ See generally BIETTEL, *supra* note 6; Briana Lee, *Mexico's Drug War*, COUNCIL ON FOREIGN REL. (Mar. 5, 2014), <http://perma.cc/ZWA9-6CCX>.

⁴¹ DRUG VIOLENCE IN MEXICO 2012, *supra* note 7, at 6–10.

⁴² The major Mexican cartels are the Sinaloa Cartel, Los Zetas, the Gulf Cartel, the Juarez Cartel, the Beltran-Leyva Organization (BLO), La Familia Michoacana (LFM), and the Tijuana Cartel. NATIONAL DRUG THREAT ASSESSMENT 2011, *supra* note 10, at 7. However, it is important to note that because of the fierce competition among the cartels, shifting alliances, the ongoing battle with the Mexican government, and for a variety of other reasons, it is difficult to state with certainty which particular organization controls a specific territory or is the most dominant cartel at any given time. More recent reporting has shown a relative decline of LFM in the state of Michoacan, and the rise of the Knights Templar cartel and the Cartel de Jalisco Nuevo Generacion. Additionally, arrests and inter-cartel fighting has led to a significant decline in the relative power of the Tijuana cartel, with much of its territory now controlled by the Sinaloa Federation. See *Mexico's Major Drug Cartels*, THE TELEGRAPH (Jan. 15, 2014),

<http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/mexico/1057513/5/Mexicos-major-drug-cartels.html>; KAN, *supra* note 19, at 36–48 (discussing in depth the major cartels and the areas in which they generally operate).

⁴³ Labeling cartel violence as terrorism is the subject of significant intellectual debate. See *infra* at Part I.B.3. Regardless of the merits of that debate, there is little dispute that many of the tactics employed by the Mexican cartels are identical to tactics employed by known and formally recognized terror groups. See generally Malcolm Beith, *Are Mexico's Drug Cartels Terrorist Groups?*, SLATE (Apr. 15, 2010), <http://perma.cc/SXK6-WEAS>.

⁴⁴ While the phrase "war on drugs" has been used in a colloquial sense for several decades by commentators and policymakers, many observers have asserted that the situation in Mexico

B. Characterizing the Cartel Threat

Defining the nature of modern Mexican cartels and the threat they pose is a necessary starting point in understanding the current conflict in Mexico and the threat that conflict poses to the United States. It is also an essential first step in attempting to define the contours of a legal framework that will assist in analyzing and effectively responding to those threats. In many respects, the process of simply characterizing and categorizing the cartel threat presents significant challenges and has led to a considerable amount of confusion, contention, and debate.⁴⁵ These debates revolve primarily around determining whether the situation in Mexico is simply an expansion of the organized criminal threat that has existed in that country for decades, or instead, whether the conflict has so fundamentally changed over the last decade that it now constitutes something categorically different, such as an insurgency or terrorism.⁴⁶

Few experts argue that the situation in Mexico today depicts a pure form of organized crime, insurgency, or terrorism. Rather, most scholars consider the threat posed by Mexico's drug cartels as some form of hybrid threat that blends elements from each of these fields of security studies.⁴⁷

now constitutes an actual armed conflict, recognizable under international law. *See, e.g.*, Maj. Nagesh Chelluri, *A New War on America's Old Frontier: Mexico's Drug Cartel Insurgency*, 210 MIL. L. REV. 52 (2011).

⁴⁵ *See generally* Michael L. Burgoyne, *Breaking Illicit Rice Bowls: A Framework for Analyzing Criminal National Security Threats*, SMALL WARS J. (Dec. 17, 2012) (proposing a methodology for analyzing threats that combine aspects of crime, terrorism, and insurgency); Robert J. Bunker, *The Mexican Cartel Debate: As Viewed Through Five Divergent Fields of Security Studies*, SMALL WARS J. (Feb. 11, 2011) (noting that the debate about the situation in Mexico has led to significant, and often contentious, disagreement by experts from various fields of security studies).

⁴⁶ Separate from the debate among scholars over how to properly characterize the violence in Mexico, another source of contention seems to be that discussions of issues surrounding Mexican cartel violence often touch on a number of other political and social issues that are highly polarizing. These issues include topics such as U.S. immigration policy, border security, gun control, foreign assistance spending, domestic drug use, drug legalization, and drug policy. These issues are relevant, but not critical, to the questions presented in this Article and are not addressed extensively herein.

⁴⁷ *See, e.g.*, *The Mexican Cartel Debate*, *supra* note 45, at 8 ("What is clear is that complex post-modern threats – such as those posed by the Mexican cartels and, for that matter, Al Qaeda and its affiliate network – do not fit into neat categories and well-defined security fields."). This view is also expressed in official U.S. policy. *See* EXEC. OFFICE OF THE PRESIDENT, STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME: ADDRESSING CONVERGING THREATS TO NATIONAL SECURITY (July 2011), <https://perma.cc/L6WZ-UBDG> ("Not only are criminal networks expanding, but they also are diversifying their activities, resulting in the convergence of threats that were once distinct and today have explosive and destabilizing effects.").

While no single school of thought provides a perfect description, the main elements of each are examined and discussed below.

1. An Organized Crime Model

The traditional and long standing view of drug cartels is that their activities are inherently criminal in nature and, thus, that they are most appropriately understood and analyzed in terms of organized crime.⁴⁸ Responsibility for addressing criminal drug trafficking and the violence that accompanies it is seen as a law enforcement concern, best handled by police and prosecutors rather than by a state's military forces.⁴⁹ Rather than viewing a cartel's actions as a direct challenge to the state, proponents of the organized crime model tend to focus on the underlying economic motivations that drive the cartel's criminal actions:

The basic assumption of this field is that organized crime entities seek to establish a parasitic (and symbiotic) relationship with their host state(s) and simply obtain freedom of action for their illicit activities. Such criminal entities are viewed as solely money making endeavors, are not politicized, and have no intention of creating their own shadow political structures or taking over the reins of governance.⁵⁰

Violence perpetrated by cartels is thus viewed not as irrational or senseless action, but rather as a deliberate and calculated method by which players in the illicit market can provide some form of order and market regulation.⁵¹ Focusing on profit motives, this view seeks to counter the actions of Mexican cartels by addressing what it considers to be the root causes of the problem: “[B]ecause an organized crime group is a profit-seeking entity at its core, governments that have focused a long-term campaign directed at a cartel's finances have often caused it to disintegrate.”⁵²

Recognizing that the level of violence perpetuated by Mexican cartels during the last decade has exceeded that committed by a typical criminal organization, this field of study has since expanded and some of its adherents

⁴⁸ See generally DEA HISTORY, *supra* note 20.

⁴⁹ *Id.*

⁵⁰ *The Mexican Cartel Debate*, *supra* note 45, at 2.

⁵¹ See BIETTEL, *supra* note 6, at 2 (“Violence is an intrinsic feature of the trade in illicit drugs. As in other criminal endeavors, violence is used by traffickers to settle disputes, and a credible threat of violence maintains employee discipline and a semblance of order with suppliers, creditors, and buyers.”).

⁵² KAN, *supra* note 19, at 9.

now describe the situation in Mexico as “high-intensity crime.”⁵³ While seeking to explain the atypical levels of criminal violence in Mexico, this approach still remains focused on the underlying profit motives that drive the cartels to engage in such violence.⁵⁴ These motivations tend to receive greater consideration than the specific tactics that the cartels choose to employ, the capabilities that they possess, or the overall level of violence that they perpetuate in furtherance of those motivations.⁵⁵

2. An Insurgency Model

While the current threat posed by Mexican drug trafficking organizations continues to resemble crime in several important respects, many aspects of the cartel fight now more closely resemble an armed insurgency. This is particularly true of the fight since 2006.⁵⁶ After winning the Mexican presidency by a narrow margin that year, Felipe Calderón took office and ten days later initiated a new campaign against the cartels, deploying large elements of the Mexican Armed Forces across the country in an effort to regain control of cities that had fallen to the drug traffickers.⁵⁷ This move was met with fierce resistance by the cartels and not only sparked a violent backlash against the government, but also triggered violent power struggles within and among the cartels as rivals sought to take advantage of their competitors’ setbacks.⁵⁸ To some observers, the large-scale deployment of the military marked the beginning of a new and fundamentally different kind of conflict in Mexico.⁵⁹

Since the deployment of the Armed Forces, the scope of the conflict in Mexico has only continued to grow, as has the intensity of the fighting and the level of violence perpetuated by the cartels.⁶⁰ To date, tens of thousands of

⁵³ *Id.* at 10 (“The proponents of the narco-insurgency/narco-terrorism school are equating low-intensity conflict with what might be better labeled as ‘high-intensity crime’”); *The Mexican Cartel Debate*, *supra* note 45, at 2.

⁵⁴ KAN, *supra* note 19, at 10. (“Instead of being warring groups that are turning to criminal activities as a means to keep their struggle alive, criminal groups in Mexico are turning to warlike activities to keep themselves in business.”).

⁵⁵ *The Mexican Cartel Debate*, *supra* note 45, at 2.

⁵⁶ Brands, *supra* note 34, at 4.

⁵⁷ KAN, *supra* note 19, at 5.

⁵⁸ *Id.*; BIETTEL, *supra* note 6, at 2. This is not to say that the use of the Mexican military has necessarily been ineffective. Brands, *supra* note 34, at 14 (“These efforts have not been without effect. Under Calderon, the government has detained more than 14,000 suspects (including a number of high-profile targets) and seized large quantities of heroin, cocaine, marijuana, and methamphetamines. Massive police and troop deployments have temporarily tamped down violence in certain areas, and have somewhat weakened the cartels. . . . Unfortunately, the positive effects of the government offensive have been transitory at best.”).

⁵⁹ See, e.g., KAN, *supra* note 1, at 5.

⁶⁰ BIETTEL, *supra* note 6, at 3 (“Despite government efforts, President Calderon’s strategy has been criticized for not reducing the violence . . . Drug-trafficking related homicides doubled

people have been killed as a result of fighting among these organizations, and in battles between the cartels and Mexican government forces.⁶¹ In that time, the means and methods of warfare employed by the cartels have also changed,⁶² tactics have begun to more closely resemble those used in armed conflict, and the level of violence has escalated to a point where the cartels now appear to present a fundamentally different kind of threat.⁶³ General (Retired) Barry R. McCaffrey, former commander of the U.S. Southern Command (SOUTHCOM) and later, Director of the Office of National Drug Control Policy (ONDCP), described the security situation in Mexico as follows:

The internal threat to Mexican institutions approximates the conditions of general warfare as these armed criminal gangs compete with the state for power. To date, 53,000 Mexicans have been murdered. Cartel gangs employ .50-caliber anti-aircraft guns, rocket-propelled grenades, military hand grenades, armored vehicles, helicopters, submarines, signals intelligence intercept equipment, information warfare, and automatic weapons by the thousands to completely dominate local police, and corrupt and intimidate state and federal police. The cartels will also engage in direct and open warfare against Mexican marines and the army. This battle for control of Mexico's future is not confined to the toxic U.S.-Mexico border states. Half the states of Mexico are now in contention.⁶⁴

The militarization of both the conflict and the weaponry employed is rapidly becoming apparent. Aside from the fact that the Mexican Armed Forces were called into action and are now actively involved in the fight on behalf of the government, there has also been a significant increase in the number of military trained personnel fighting on the side of the drug cartels.⁶⁵

between 2007 and 2008 and continued to [increase] through 2010.”); *see also* DRUG VIOLENCE IN MEXICO 2012, *supra* note 7, at 13 (showing a rise in both the overall number of homicides in Mexico as well as in organized-crime related killings every year between 2007 and 2013). However, it should be noted that there is evidence that in the last year, there may have been a slight decline in drug related murders in Mexico, though the level of violence remains very high. KIMBERLY HEINLE ET AL., DRUG VIOLENCE IN MEXICO: DATA AND ANALYSIS THROUGH 2013 (Apr. 2014) [hereinafter DRUG VIOLENCE IN MEXICO 2013], <http://perma.cc/A8K9-EUXT>.

⁶¹ DRUG VIOLENCE IN MEXICO 2012, *supra* note 7, at 13.

⁶² See generally a series of twenty-three blog posts regarding Mexican cartels, *Mexican Cartel Tactical Notes #1–23*, SMALL WARS J. BLOG (Apr. 20, 2015), <http://perma.cc/PCA9-55L5>.

⁶³ *Id.*

⁶⁴ Barry R. McCaffrey, *Foreword* to PAUL REXTON KAN, *CARTELS AT WAR*, at vii (1st ed. 2013).

⁶⁵ The Commentaries to the 1949 Geneva Conventions list a number of non-binding factors that are used to determine whether a given internal conflict has risen to the level of non-international armed conflict within the meaning of Common Article 3 of the Conventions. One

Los Zetas, one of the largest and most dangerous cartels operating in Mexico, was originally created by a group of military officers who deserted from the Mexican military's Special Air Mobile Force Group (*Grupos Aeromoviles de Fuerzas Especiales*) to work as enforcers for the Gulf cartel before later breaking away to form their own independent organization.⁶⁶ *Los Zetas* continue to recruit former military members, corrupt police officers, security professionals, and others trained in combat and small unit tactics to fill their ranks.⁶⁷ Mexican drug cartels have also recruited heavily from the *Kaibiles*, the Guatemalan Special Forces, and even in some instances from the U.S. military.⁶⁸ The presence of professionally-trained personnel familiar with weapons and tactics enables these organizations to carry out far more sophisticated and complex operations, presenting a much greater security challenge for Mexico.

Mexican drug trafficking organizations also have access to military grade weaponry, a large percentage of which is smuggled into Mexico from the United States.⁶⁹ This supply is not limited to personal small arms. Cartel members are known to frequently employ high caliber sniper rifles, particularly against the Mexican military or police.⁷⁰ They have also acquired advanced weapon systems such as anti-aircraft guns, as well as developed and employed relatively sophisticated homemade armored vehicles against rival

factor is whether the group in revolt against the government has an organized military force. Another is whether the legal government of the state has resorted to the use of its regular armed forces to address that threat. COMMENTARY ON THE GENEVA CONVENTION I, at 49 (Jean S. Pictet, ed., 1952).

⁶⁶ COLEEN W. COOK, CONG. RESEARCH SERV., MEXICO'S DRUG CARTELS 7–9 (2007).

⁶⁷ *Id.* at 7–8; KAN, *supra* note 19, at 46–48.

⁶⁸ COOK, *supra* note 66, at 7–9; Joseph J. Kolb, *Mexican Cartels Hiring US Soldiers as Hit Men*, FOX NEWS (Aug. 1, 2013), <http://perma.cc/YD34-42BJ> (quoting Fred Burton: “We have seen examples over the past few years where American servicemen are becoming involved in this type of activity . . . It is quite worrisome to have individuals with specialized military training and combat experience being associated with the cartels”); see also U.S. DEP'T OF JUSTICE, NAT'L GANG INTELLIGENCE CTR., NATIONAL GANG THREAT ASSESSMENT: EMERGING TRENDS 35–38 (2011), <http://perma.cc/6TW4-ALGN>.

⁶⁹ KAN, *supra* note 19, at 35 (“Of the 29,284 firearms recovered in Mexico in 2009 and 2010 and submitted to the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) National Tracing Center, 20,504 were from the United States.”).

⁷⁰ Robert Bunker & Jacob Westerberg, *Mexican Cartel Tactical Note #19: Sniper Rifle Use in Mexico*, SMALL WARS J. BLOG (July 16, 2013), <http://perma.cc/2NTJ-ZNDQ> (“What is clear is that sniper rifles have been used both offensively for assassinations (targeted killings) and as part of integrated combined arms tactics to support the movements of cartel enforcement units and defensively to cover the withdrawal of forces in urban combat, to protect safe houses, and to cover avenues of approach into cartel territories.”). This report documents several instances of Mexican drug trafficking organizations employing .50 caliber sniper rifles in an anti-armor or anti-helicopter role against Mexican military and police forces. *Id.*

drug cartels and Mexican government forces, albeit with varying degrees of success in the latter case.⁷¹

It is this increased capacity and willingness to directly challenge the Mexican state for control on a military level that leads some scholars to argue that the conflict between the cartels and the state is best viewed in terms of an insurgency or a low-intensity armed conflict.⁷² The U.S. Department of Defense defines insurgency as “[t]he organized use of subversion and violence to seize, nullify, or challenge political control of a region.”⁷³ Low-intensity conflict is a related concept that attempts to describe the level of force or violence used in a conflict, and is defined as a “[p]olitical-military confrontation between contending states or groups below conventional war and above the routine, peaceful competition among states.”⁷⁴ Insurgency

⁷¹ Robert Bunker & Jacob Westerberg, *Mexican Cartel Tactical Note #14*, SMALL WARS J. BLOG (Sept. 22, 2012), <http://perma.cc/PK26-WHNU>; Robert J. Bunker & Byron Ramirez, *Editors’ Note*, in *NARCO ARMOR: IMPROVISED ARMORED FIGHTING VEHICLES IN MEXICO* 4, 5 (Robert J. Bunker & Byron Ramirez eds., 2013), <http://perma.cc/6MPQ-99AF> (The authors note that there has been an “apparent cessation of the fielding of narco armor since early 2012 . . . with more emphasis once again placed by the cartels on fielding more stealth-masked armored vehicles, such as armored SUVs, that better blend in with civilian cars and trucks so as to eluded [sic] identification and targeting by Mexican federal forces.”); *see also* Patrick Corcoran, *Mexico’s ‘Narco-Tanks’ Not a Game Changer*, in *NARCO ARMOR: IMPROVISED ARMORED FIGHTING VEHICLES IN MEXICO* 16, 16 (Robert J. Bunker & Byron Ramirez eds., 2013) (“There are no reports of the tanks allowing the gangs to attack and overwhelm convoys of soldiers.”).

⁷² *See* Brands, *supra* note 34, at 4–5 (“Over the past several years, and especially since 2006, Mexico has experienced an accelerating increase in drug-related violence and a corresponding deterioration of internal security. As part of what might be described as a multi-sided narco-insurgency, well-financed cartels are doing battle with the government and one another for control of the drug corridors into the United States.”); *but cf.* KAN, *supra* note 19, at 8 (“[A] critical question is whether tactical qualities of the cartels equal an insurgent or terrorist threat to the Mexican state. The narco-insurgency/narco-terrorism school argues that they do because of the cartels sophisticated weaponry and the proficiency of their violence often match or outstrip the police and military. But equipment and tactics do not exist in isolation. Improved tactics, skills, and weaponry of cartels are not a substitute for a strategic political objective that tactics are intended to serve. Having better weapons does not compensate for a cause. It would be as if J. Edgar Hoover declared Al Capone and his gang to be insurgents because they had tommy guns while local police merely had pistols.”).

⁷³ JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 119 (Nov. 8, 2010) [hereinafter DOD DICTIONARY OF MILITARY TERMS].

⁷⁴ U.S. DEP’T OF DEF., DEP’T OF DEFENSE DIRECTIVE 5111.10 (Mar. 22, 1995), <http://perma.cc/C6VC-FHLY>. The definition goes on to state that low-intensity conflict (LIC) “involves protracted struggles of competing principles and ideologies. LIC ranges from subversion to the use of armed force. It is waged by a combination of means employing political, economic, informational, and military instruments. LIC conflicts are often localized, generally in the Third World, but contain regional and global security implications. LIC activities include, but are not limited to counterterrorism, foreign internal defense, counterinsurgency, support to insurgency, contingency operations, counternarcotics, and peacekeeping.” *Id.* at 11. For purposes of this Article, references to “low-intensity conflict”

studies typically focus “on political change and revolution, that is, how groups out of power in a country seize control of a government by indirect and irregular means.”⁷⁵ In the context of a criminal insurgency, this can include efforts aimed at corrupting the government in order to establish a “parallel shadow government” that is controlled by the insurgent group or, at a minimum, tolerates its illicit activities.⁷⁶

Proponents of the insurgency view in the context of the Mexican drug cartels argue that these organizations are essentially competing with the Mexican government for control over the key smuggling routes and corridors, or at least for the ability to exercise a degree of autonomy in these geographic regions without interference from the Mexican state.⁷⁷ In many towns and regions, the cartels are, in fact, operating a type of parallel government. As one commentator noted, “[t]hese criminal groups have morphed from being strictly drug cartels into a kind of alternative society and economy. . . . They are the dominant forces of coercion, tax the population . . . and are the ultimate decision-makers in the territories they control.”⁷⁸

The struggle in Mexico does, in fact, have many characteristics of an insurgency. Major drug trafficking organizations now exercise near complete control over some parts of Mexican territory, and even take on roles traditionally performed exclusively by the government, such as providing protection to citizens, assisting with disaster relief efforts, and controlling utility services.⁷⁹ Yet, characterizing the situation in Mexico as a pure insurgency also has some conceptual weaknesses. Most significantly, this view tends to minimize the fact that drug trafficking organizations are inherently entrepreneurial enterprises, driven by profit rather than political ideology, a fact that better supports an organized crime conception of the cartel violence in Mexico.⁸⁰ In reality, cartel violence is applied not in furtherance of ideology or political ambition, but instead as a way to directly regulate the illegal markets in which they operate.⁸¹ Put more plainly, “[a]s with other black markets, drug

generally refer to a level of violence and conflict below conventional war and above typical or routine law enforcement operations.

⁷⁵ *The Mexican Cartel Debate*, *supra* note 45, at 3.

⁷⁶ *Id.* at 6.

⁷⁷ See Brands, *supra* note 34, at 4–7.

⁷⁸ Alfredo Corchado, *Drug Cartels Taking Over Government Roles in Parts of Mexico*, DALLAS MORNING NEWS (Apr. 30, 2011), <http://perma.cc/NMN9-6YAT>.

⁷⁹ *Id.*; Dudley Althaus, *Mexico Drug Cartels Helping With Storm Relief*, LOS ANGELES DAILY NEWS (Sept. 24, 2013), <http://perma.cc/XHD3-JNMP>.

⁸⁰ See KAN, *supra* note 19, at 9–10 (“When it comes to financial gain for terrorist or insurgent groups, money is an investment in violence; for organized crime, money is an investment in making more money.”).

⁸¹ FINKLEA, *supra* note 9, at 6; KAN, *supra* note 19, at 27 (“[A] cartel uses violence to enforce a deal or as a way to discipline the cartel’s workforce of employees, suppliers, and clients. But a cartel also uses force for a number of other strategic and operational reasons. It will use violence for issues of internal security; its members will engage in violence against each other

markets are necessarily governed by the threat of violence, which may lead to actual violence.”⁸² This notion is supported by the fact that “the vast majority of violence [is] happening between and within cartels themselves” as a way to secure and advance their business interests, and is not directed exclusively against the Mexican state or its military and police forces.⁸³ Thus, it appears that the cartels’ willingness to engage in conflict with the government is only to the extent that doing so is necessary to protect or further their financial interests.

Defining the cartel situation in Mexico in terms of an insurgency or armed conflict rather than in terms of crime could also have significant legal ramifications. For instance, if the current situation is characterized as a “non-international armed conflict” under international law, it would trigger Common Article 3 of the 1949 Geneva Conventions, as well as the customary international law provisions of Additional Protocol II of 1977.⁸⁴ While such a legal determination does not turn on the mere fact that the conflict is labeled an insurgency, legal recognition of the cartel fight as an armed conflict would have profound implications for the Mexican government, requiring compliance with the law of armed conflict in its fight against drug traffickers inside its own territory.⁸⁵ There are also significant political consequences to consider:

[s]tates do not wish to have the appearance of lack of control for political and economic reasons. States may not want to have political ties with a faltering government for the sake of their standing with a possible successor government. Foreign business may not want to invest in an area seen as unstable and damaging to their enterprise. Application of Common Article 3 by a State is a tacit admission of loss of control, and therefore rarely ever applied.⁸⁶

to move up in the organization; and the cartel will resort to force to compete for market share against other cartels. A cartel will also use violence to enhance its reputation.”).

⁸² FINKLEA, *supra* note 9, at 12.

⁸³ See KAN, *supra* note 19, at 8.

⁸⁴ See Chelluri, *supra* note 44, at 56–58 (arguing that the situation in Mexico is an insurgency as defined by U.S. counterinsurgency doctrine, and that it is of such intensity that it has risen to the level of non-international armed conflict under international law, thus triggering Common Article 3 of the 1949 Geneva Conventions and the customary international law provisions of Additional Protocol II.).

⁸⁵ *Id.* at 86–95; Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁸⁶ Chelluri, *supra* note 44, at 86. The political sensitivity surrounding the labeling of the conflict in Mexico as an insurgency or armed conflict was highlighted in 2010 when then U.S. Secretary of State Clinton made remarks to the Council on Foreign Relations suggesting that the situation in Mexico had risen to the level of insurgency: “[W]e face an increasing threat from a well-organized network drug trafficking threat that is, in some cases, morphing into or making common cause with what we would consider an insurgency, in Mexico and in Central

3. A Terrorism Model

The terms “terrorist” or “narco-terrorist” are also invoked when discussing modern Mexican drug cartels, and for good reason.⁸⁷ The U.S. Department of Defense defines terrorism as “[t]he unlawful use of violence or threat of violence, often motivated by religious, political, or other ideological beliefs, to instill fear and coerce governments or societies in pursuit of goals that are usually political.”⁸⁸ The fact that the cartels systematically employ violence for the express purpose of intimidating or coercing particular segments of the Mexican population provides strong evidence that these organizations are, in fact, engaging in terrorism.⁸⁹ Indeed, there are numerous instances where a cartel has used violence specifically to threaten or coerce the Mexican government or society at large as part of a widespread and systematic campaign of terror and intimidation.⁹⁰ For example, the frequent use of decapitation and subsequent public display of the victim’s severed head is but one of several recurring actions falling into the category of terroristic behavior.⁹¹ Moreover, the use of *narcomantas* (public banners displaying messages for the community, rivals, and the government) by the cartels is

America.” Hillary Rodham Clinton, Remarks on United States Foreign Policy to the Council on Foreign Relations (Sept. 8, 2010), <http://perma.cc/299A-FA2G>. The Secretary’s characterization of the violence in Mexico as an insurgency was immediately disputed by the Mexican government and the following day President Obama also rejected Secretary Clinton’s characterization of Mexico’s fight against the cartels. *See, e.g.*, Tom A. Peter, *Mexico Denies Hillary Clinton’s ‘Insurgency’ Comparison*, THE CHRISTIAN SCI. MONITOR (Sept. 9, 2010), <http://perma.cc/4B83-9WBA>; Frank James, *Obama Rejects Hillary Clinton Mexico-Colombia Comparison*, NPR (Sept. 9, 2010), <http://www.npr.org/blogs/thetwo-way/2010/09/09/129760276/obama-rejects-hillary-clinton-mexico-colombia-comparison>.

⁸⁷ *See* Michael J. Coote, *A Rose by Any Other Name*, SMALL WARS J. (Jan. 9, 2012), <http://perma.cc/EDR3-B9VP>.

⁸⁸ DOD DICTIONARY OF MILITARY TERMS, *supra* note 73, at 247.

⁸⁹ Howard Campbell, *Extreme Violence and Terrorism in Mexico: A Dialogue Between Howard Campbell and Tobin Hansen*, SMALL WARS J. (Aug. 14, 2012), <http://perma.cc/2DET-SV8U>. The deliberate use of the media or publicity to highlight the brutality of the cartels further illustrates this point.

[W]hen you talk about massacres involving more than 100 people or bodies that are carved up, disfigured, people tortured and it’s filmed and put on Youtube meant for public display, that is in fact a war-like tactic and a tactic of terror because it’s designed to terrorize enemies of a drug cartel, be they members of another cartel or enemies that are members of police or military forces. It’s also designed to terrorize members of the civilian population because they allow these drug cartels, as they are called, to control a region. That’s clearly a tactic of warfare that involves terrorism and propaganda.

Id.

⁹⁰ Brands, *supra* note 34, at 10–11.

⁹¹ *Id.* at 11.

another way in which they attempt to intimidate and threaten Mexican society.⁹² As one commentator wrote:

Cartel attacks are thus not meant solely to batter the police and the military, but also to sow fear and demonstrate that the cartels—not the government—are dominant in Mexico. Many drug-related killings are spectacularly violent, aimed at achieving the maximum psychological impact. In one instance, the Zetas stuffed four Nuevo Laredo police officers inside barrels of diesel fuel and burned them to death. Decapitations such as those occurring in Acapulco serve the same purpose. Cartel enforcers have begun to publish lists of officials to be targeted for assassination, post execution videos on YouTube, and coerce newspapers into providing graphic coverage of their deeds. “They are openly defying the Mexican state,” says one analyst. “They are showing that they can kill anybody at any time.”⁹³

Proponents of the terrorism view also emphasize the motivations behind the cartels’ widespread use of these violent tactics:

The basic assumption is that terrorists, both politically and religiously motivated, engage in destructive attacks that generate “terror” (a form of disruptive societal targeting) in order to change governmental policies. Further, terrorism is considered a technique that, when utilized in a revolutionary or insurgent setting, can help to create a shadow government and/or overthrow a government in power. Narco-terrorism would be considered a subfield of terrorism studies—though utilizing terror to promote criminal objectives.⁹⁴

Of particular importance is the recognition that the terrorism view of the cartels is not necessarily inconsistent with either the organized crime/law enforcement view, or the insurgency/military response view.⁹⁵ While this can be said of both the organized crime and insurgency models as well, it is particularly significant in the case of terrorism. Terrorism is recognized not just as ideologically-driven violence, but also as a tactic that can be used by both criminals and insurgents in order to achieve their goals.⁹⁶

C. Addressing the Hybrid Threat

⁹² KAN, *supra* note 19, at 32.

⁹³ Brands, *supra* note 34, at 10–11 (internal citations omitted).

⁹⁴ *The Mexican Cartel Debate*, *supra* note 45, at 2–3.

⁹⁵ *Id.*

⁹⁶ *Id.*

In analyzing the complex nature of the fight against the cartels in Mexico and along the southwestern border, it becomes clear that these organizations pose a hybrid threat, combining characteristics of organized crime, insurgency, and terrorism;⁹⁷ no single model fits perfectly, but rather, elements of each can be seen in the ongoing battle in Mexico. The hybrid nature of the threat is seen in the variety of tactics employed by the cartels, their overarching goals and objective, and by the magnitude and spectacular nature of violence being perpetuated by these organizations. The expansion and diversification of the cartels' illicit business into new ventures beyond the drug trade provides even further evidence.⁹⁸ As articulated in the U.S. Department of Defense Counternarcotics & Global Threats Strategy:

The illegal drug issue that we are chartered to address is one manifestation of the overall problem of illicit trafficking. The

⁹⁷ Many commentators have referred to the type of threat posed by modern Mexican drug cartels in terms of a “hybrid threat.” See, e.g., *Farah, supra* note 14, at 1–2 (“This emerging combination of threats comprises a hybrid of criminal-terrorist, and state and nonstate franchises, combining multiple nations acting in concert, and traditional TOCs and terrorist groups acting as proxies for the nation-states that sponsor them.”). Others use similar labels to describe the conflict in Mexico. Professor Paul Rexton Kan of the United States Army War College uses the term “mosaic cartel war” to describe “a multidimensional, multiparty, multilocation conflict fought over criminal goals[.]” KAN, *supra* note 19, at xii. Regardless of the particular label, the terms are generally used as a method to describe a situation or an organization that combines aspects of multiple traditional threats, thereby presenting unique challenges to security.

⁹⁸ Official U.S. policy also recognizes the “hybrid” nature of Mexican cartels, though it defines this type of modern threat in terms of Transnational Organized Crime. STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME OF 2011, *supra* note 14, at 9.

Transnational organized crime refers to those self-perpetuating associations of individuals who operate transnationally for the purpose of obtaining power, influence, monetary and/or commercial gains, wholly or in part by illegal means, while protecting their activities through a pattern of corruption and/or violence, or while protecting their illegal activities through a transnational organizational structure and the exploitation of transnational commerce or communication mechanisms. There is no single structure under which transnational organized criminals operate; they vary from hierarchies to clans, networks, and cells, and may evolve to other structures. The crimes they commit also vary. Transnational organized criminals act conspiratorially in their criminal activities and possess certain characteristics which may include, but are not limited to:

- In at least part of their activities they commit violence or other acts which are likely to intimidate, or make actual or implicit threats to do so;
- They exploit differences between countries to further their objectives, enriching their organization, expanding its power, and/or avoiding detection/apprehension;
- They attempt to gain influence in government, politics, and commerce through corrupt as well as legitimate means;
- They have economic gain as their primary goal, not only from patently illegal activities but also from investment in legitimate businesses; and
- They attempt to insulate both their leadership and membership from detection, sanction, and/or prosecution through their organizational structure.

Id. at cover page.

overarching threat to our national security, of which illegal drugs are one *part*, is a continuum of illicit commodities and traffickers. Over the past decade, due at least in part to successful campaigns by the U.S. government and its partner nations to counter the flow of drugs, T[ransnational] C[riminal] O[rganization]s [TCOs] have diversified their portfolios and adapted their approaches. TCOs have expanded to other illicit commodities such as small arms and explosives (including improvised explosive devices), precursor chemicals, people, and illicitly-gained and laundered money. The exchange of these illegal commodities—*illicit trafficking*—presents us with a common thread that points to an adversary exhibiting all the hallmarks of a threat to U.S. national security.⁹⁹

While the drug trade continues to make up the largest percentage of the cartels' businesses and represents a significant amount of the revenue they earn, the organizations carrying out mass violence in Mexico have diversified far beyond simply supplying drugs.¹⁰⁰ As one commentator explains, the cartels' primary expertise is really their ability to successfully operate illegal distribution networks and markets, irrespective of the type of products sold in those markets.¹⁰¹ "What the DTOs are really selling is logistics. . . . Logistics . . . are the DTOs' main source of revenue, and illegal drugs are but one of the products they offer."¹⁰² Thus, continuing to approach the challenges posed by these organizations simply in terms of drug trafficking fails to recognize the hybrid threat that they pose.

⁹⁹ U.S. DEP'T OF DEF., DEPUTY ASSISTANT SEC'Y OF DEF. FOR COUNTERNARCOTICS & GLOBAL THREATS, DEPARTMENT OF DEFENSE COUNTERNARCOTICS & GLOBAL THREATS STRATEGY 4 (2011) [hereinafter DoD COUNTERNARCOTICS & GLOBAL THREATS STRATEGY], <https://perma.cc/B6GG-RKY2?type=pdf>.

¹⁰⁰ KAN, *supra* note 19, at 25–26. The precise dollar amounts that cartels earn from particular products or activities are unknown, but general estimates are available:

By far, the biggest moneymaker for the cartels is marijuana, which generates an estimated \$8.4 billion in annual sales. This is followed by cocaine at \$3.9 billion, methamphetamine at \$1 billion, and heroin at \$400 million. The cartels not only meet the demand for drugs in the United States, but they also meet the demand of many Mexicans who seek to enter the United States illegally. Before 1995, independent human smugglers, or "coyotes," would arrange for Mexicans to be clandestinely moved into the United States; cartels and gangs would merely "tax" them for using their routes. However, since then, cartels have increasingly moved in to this lucrative territory themselves to the tune of roughly \$2 billion a year.

Id. (internal citations omitted).

¹⁰¹ Morris, *supra* note 36.

¹⁰² *Id.*

A related aspect of cartel operations that contributes to the hybrid nature of the threat is the cartels' exploitation of what the National Security Strategy refers to as the "crime-terror nexus," whereby "terrorists use criminal networks for logistical support and funding."¹⁰³ As part of the diversification of their business and expansion into new revenue streams, cartels have formed alliances or business arrangements with an array of other criminal entities, terrorist organizations and U.S. adversaries.¹⁰⁴ Protecting the United States against the hybrid threat posed by Mexican cartels will require the United States to update its perception of the cartels and the conflict in Mexico in order to understand that the threat has become something much larger than an organized crime or drug trafficking problem. It will require not just the collective efforts of all elements of national power, but also flexible legal mechanisms through which a comprehensive strategy addressing the hybrid nature of the threat can be implemented.

II. Legal Mechanisms to Address the Hybrid Threat

*[T]he risk of an ever-expanding mosaic cartel war that more completely draws in the United States requires the thoughtful consideration of scenarios that may become a reality. Any analysis and assessment of options to prevent or counter the worst features of the potential outcomes must be sober as well as bold. The uniqueness of a mosaic cartel war demands nothing less.*¹⁰⁵

International drug trafficking and the accompanying drug cartels have long been recognized as a threat to the national security interests of the United States. For many years, the U.S. response to this threat has focused predominantly on a law enforcement model, with domestic and international policing efforts leading the fight against drug abuse at home and drug traffickers around the world.¹⁰⁶ However, experts and policy makers have

¹⁰³ NATIONAL SECURITY STRATEGY OF 2010, *supra* note 4, at 49.

¹⁰⁴ See U.S. HOUSE COMM. ON HOMELAND SEC. SUBCOMM. ON OVERSIGHT, INVESTIGATIONS AND MANAGEMENT, A LINE IN THE SAND: COUNTERING CRIME, VIOLENCE AND TERROR AT THE SOUTHWEST BORDER (2d Sess. 2012), <http://perma.cc/GX3Q-HSBQ>; Farah, *supra* note 14; Robert Killebrew, *Iran's Cartel Strategy*, WAR ON THE ROCKS (Aug. 14, 2013), <http://perma.cc/7HE8-AH7M>. But see Greg Sargent, *Tom Cotton: Terrorists Collaborating with Mexican Drug Cartels to Infiltrate Arkansas*, WASH. POST (Oct. 7, 2014), <http://perma.cc/AT9F-LSV8> (discussing the partisan political rhetoric that often accompanies discussion of border issues).

¹⁰⁵ KAN, *supra* note 19, at 128.

¹⁰⁶ President Richard M. Nixon declared drug abuse a serious national threat in 1968 and first used the term "war on drugs" in 1971. In 1973, he signed Executive Order 11721 creating the U.S. Drug Enforcement Administration within the U.S. Department of Justice to coordinate the law enforcement activities of the federal government related to the enforcement of drug laws. DEA HISTORY, *supra* note 20. See also *Timeline: America's War on Drugs*, NPR (Apr. 2, 2007), <http://www.npr.org/templates/story/story.php?storyId=9252490>.

come to recognize the ever-expanding relationships between terrorism and illicit trafficking activities in recent years.¹⁰⁷ As the Mexican cartel threat continues to evolve and the complex nature of those organizations becomes apparent, new legal tools and approaches will be needed.

The debate among security experts and policy makers about whether modern Mexican cartels, from a strategy perspective, should be studied and addressed as criminal organizations, insurgent movements, or terrorist organizations, is an important one.¹⁰⁸ Indeed, there is ample room for continued debate on this issue, particularly as the situation in Mexico continues to evolve. However, from a legal perspective, many aspects of that debate miss an important point: the law provides tools that can be used and applied in support of a number of different strategies, irrespective of how the threat is articulated or strategically defined. In addition to the vast array of criminal drug laws that are routinely used to counter the threats posed by Mexican cartels, federal law also provides a number of terrorism-related provisions that could be utilized to more effectively counter these organizations.¹⁰⁹ For example, the cartels routinely engage in acts that could be prosecuted under the terrorism provisions of the U.S. criminal code.¹¹⁰ These organizations also satisfy the statutory requirements for designation as foreign terrorist organizations (FTOs), which offers a number of benefits.¹¹¹ Additionally, the U.S. military has the legal authority to conduct direct military action in defense of the nation and could, in extraordinary circumstances, be lawfully called upon to bring those capabilities to the fight against the cartels. Serious consideration should be given to incorporating these options into a comprehensive strategy that recognizes the unique characteristics of the threat, and makes use of the most effective elements of our law enforcement, counterinsurgency, and counterterrorism legal authorities. Importantly, choosing to utilize these tools, on a case-by-case basis, need not redefine our understanding of the conflict or limit our ability to continue to use traditional tools and approaches to address the cartel threat.

A. Title 18 Terrorism

The *Federal Criminal Code* provides a number of mechanisms that the United States can use to address threats to national security posed by Mexican cartels. One such method is through the criminal prosecution of international

¹⁰⁷ See NATIONAL SECURITY STRATEGY OF 2010, *supra* note 4, at 49; STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME OF 2011, *supra* note 14, at 3.

¹⁰⁸ See *supra* Part I.B.

¹⁰⁹ The Controlled Substances Act is the primary source of federal drug laws. Controlled Substances Act, 21 U.S.C. §§ 801-904 (2010).

¹¹⁰ 18 U.S.C. §§ 2331-2332 (2001).

¹¹¹ 8 U.S.C. §1189(a)(1) (2004). See *infra* Part II.B.

or domestic terrorists under Title 18 of the United States Code.¹¹² Title 18 defines “international terrorism” as activities that:

- (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
- (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum.¹¹³

Title 18 goes on to define “domestic terrorism” as activities that:

- (A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;
- (B) appear to be intended—
 - (i) to intimidate or coerce a civilian population;
 - (ii) to influence the policy of a government by intimidation or coercion; or
 - (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
- (C) occur primarily within the territorial jurisdiction of the United States.¹¹⁴

As is the case with applying the doctrinal definition of terrorism to the Mexican cartels, a compelling argument can be made that the cartels engage in international terrorism, as that term is defined within the *Federal Criminal Code*.¹¹⁵ Additionally, these acts of terrorism would likely constitute acts of domestic terrorism if committed “primarily within the territorial jurisdiction of the United States.”¹¹⁶

¹¹² 18 U.S.C. §§ 2331-2332 (2001).

¹¹³ *Id.* at § 2331(1).

¹¹⁴ *Id.* at § 2331(5).

¹¹⁵ There are numerous examples of acts committed by Mexican drug cartels that could fall within the statutory definition of international terrorism. *See generally* BIETTEL, *supra* note 6.

¹¹⁶ 18 U.S.C. § 2331(5) (2001).

One frequently-cited reason why Mexican drug cartels should not be categorized as terrorists is that the cartels are primarily motivated by economic interests rather than by ideology, politics, or religion.¹¹⁷ However, it is important to draw a distinction between the doctrinal definitions of terrorism, which are used by policymakers and national security professionals to craft national security strategies, and the statutory definitions contained within the *Federal Criminal Code*. The statutory definitions of international and domestic terrorism in Title 18 focus on the intent with which a specific act of violence is committed, and not on whether the act also happens to satisfy some larger economic motivation or overarching financial goal of the organization.¹¹⁸ The fact that Mexican cartels perpetuate violence designed to intimidate or coerce governments and civilian populations because their ultimate goal is financial, rather than religious, political or ideological, is legally irrelevant for purposes of a criminal prosecution under 18 U.S.C. § 2331.¹¹⁹ While such motives and financial goals may still be extremely relevant in terms of crafting overarching national security policies and strategies for responding to the threats posed by these organizations, this does not change the fact that the employment of terrorism as a way to attain those ultimate goals still violates the terrorism provisions of the *Federal Criminal Code*.

While not appropriate for most drug trafficking crimes, criminal prosecutions for terrorism could provide a valuable tool for law enforcement and prosecutors when it comes to addressing certain kinds of “spillover crime,” a term frequently used by commentators and policy makers when referring to the threat of Mexican cartel violence occurring within the United States.¹²⁰ Currently, there is no formal legal definition of spillover crime or spillover violence.¹²¹ However, the interagency community¹²² has attempted to provide a definition that distinguishes between incidents that it considers to be ordinary drug trafficking crimes and those that more accurately reflect extreme violence from the Mexican cartel war spilling over into the United States. To this end, it defines spillover violence as “deliberate, planned attacks by the cartels on U.S. assets, including civilian, military, or law enforcement

¹¹⁷ See, e.g., Robert Valencia, *Mexico's Drug Cartels Are Not Terrorists*, WORLD POLICY BLOG (Oct. 26, 2011) <http://perma.cc/WL5F-MSQT>; KAN, *supra* note 19, at 6–13; see also U.S. DEP'T OF STATE, BUREAU OF COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2013, Chapter 2 (Apr. 2014), <http://perma.cc/6L87-4C42>.

¹¹⁸ But see Beith, *supra* note 43.

¹¹⁹ 18 U.S.C. § 2331 contains no reference to religion, politics, or ideology.

¹²⁰ See FINKLEA, *supra* note 9 (discussing the use of the term “spillover”).

¹²¹ *Id.* at 13.

¹²² The Department of Defense defines “interagency” as “[o]f or pertaining to United States Government agencies and departments, including the Department of Defense.” DOD DICTIONARY OF MILITARY TERMS, *supra* note 73.

officials, innocent U.S. citizens, or physical institutions such as government buildings, consulates, or businesses.”¹²³

Using the interagency definition, terrorism prosecutions could serve as an appropriate and helpful tool for law enforcement officials to address the issue of spillover crime. By limiting the definition to include only extreme acts of violence perpetrated against innocent civilians or government officials and institutions, the interagency definition articulates the threat in language very similar to that already found within the statutory definitions of terrorism from 18 U.S.C. § 2331.¹²⁴ Importantly, the interagency definition specifically excludes “trafficker on trafficker violence, whether perpetrated in Mexico or in the U.S.,”¹²⁵ a category of criminal behavior already adequately addressed through other criminal statutes. As a significant portion of the events that the interagency community would categorize as a spillover of cartel violence are, in fact, severe criminal offenses, fundamentally distinct from mere drug trafficking, and can also be properly characterized as acts of domestic terrorism, they should be prosecuted as such.¹²⁶ This would provide law enforcement and prosecutors an existing statutory mechanism that distinguishes cartel violence that poses a direct threat to national security from the more routine types of drug trafficking-related offenses that are commonly charged under other statutes.¹²⁷

B. Designation as Foreign Terrorist Organizations

Another legal mechanism through which the United States can more effectively respond to the threat posed by Mexican drug cartels is the designation of these organizations as foreign terrorist organizations.¹²⁸ The Immigration and Nationality Act grants the authority to designate foreign terrorist organizations to the U.S. Secretary of State.¹²⁹ The statute provides:

¹²³ FINKLEA, *supra* note 9, at 13 (quoting VIOLENCE ALONG THE SOUTHWEST BORDER: HEARING BEFORE THE SUBCOMM. ON COMMERCE, JUSTICE, SCIENCE AND RELATED AGENCIES OF THE H. COMM. ON APPROPRIATIONS, 111th Cong. (2009) (Statement of Joseph M. Arabit, Special Agent in Charge, United States Drug Enforcement Administration, El Paso Division)).

¹²⁴ FINKLEA, *supra* note 9, at 14.

¹²⁵ *Id.* at 13.

¹²⁶ *Id.*; 18 U.S.C. § 2331(5) (2001).

¹²⁷ A single criminal act may, and very frequently does, violate multiple criminal statutes. Generally, the decision on whether to charge a particular crime is a matter of discretion exercised by prosecutors. *See* U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL §§ 9-2.136-9-2.137 (1999), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrim.htm (discussing federal prosecutor discretion for bringing charges involving international or domestic terrorism and the requirements for consultation with other agencies).

¹²⁸ *See* H.R. 1270, 112th Cong. (2011); 8 U.S.C. § 1189(a)(1) (2004).

¹²⁹ 8 U.S.C. § 1189 (2004). The statute also provides the procedures for designation to include congressional notification, as well as a process by which organizations may seek review of the Secretary’s determination. 8 U.S.C. § 1189(a)(2)-(8).

The Secretary is authorized to designate an organization as a foreign terrorist organization in accordance with this subsection if the Secretary finds that—

- (A) the organization is a foreign organization;
- (B) the organization engages in terrorist activity (as defined in section 1182 (a)(3)(B) of this title or terrorism (as defined in section 2656f (d)(2) of title 22), or retains the capability and intent to engage in terrorist activity or terrorism); and
- (C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.¹³⁰

Applying the statute to the major Mexican cartels, these organizations meet the requirements for designation.¹³¹ First, the cartels are foreign

¹³⁰ 8 U.S.C. § 1189(a)(1) (2004). For purposes of element B, “Terrorist activity” under section 1182 of title 8 is defined as:

any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

- (I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
- (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
- (III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18) or upon the liberty of such a person.
- (IV) An assassination.
- (V) The use of any—
 - (a) biological agent, chemical agent, or nuclear weapon or device, or
 - (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
- (VI) A threat, attempt, or conspiracy to do any of the foregoing.

8 U.S.C. § 1182(a)(3)(B)(iii)(2013). Under Section 2656(f) of title 22, “Terrorism” is defined as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” 22 U.S.C. § 2656f(d)(2) (2004).

¹³¹ For purposes of this Article, the major cartels are discussed collectively, something that obviously could not and should not be done if making specific legal determinations based on facts. Whether a particular cartel should be designated as a Foreign Terrorist Organization is a fact specific question that can only be addressed on a case-by-case basis. Indeed, as there are significant differences among the major cartels in terms of organizational structure and the tactics that they employ, there could very likely be different outcomes for different cartels. The cartels are not discussed collectively here to suggest that all Mexican drug trafficking

organizations, composed primarily of foreign individuals that carry out the majority of their operations in Mexico.¹³² They also engage in terrorist activity, routinely assassinating Mexican government officials, detonating explosive devices, and kidnapping, threatening, and murdering individuals—all acts that could fall within the statute’s definition of “terrorist activity.”¹³³ When considering whether an organization should be listed as an FTO, the U.S. Department of State “looks not only at the actual terrorist attacks that a group has carried out, but also at whether the group has engaged in planning and preparations for possible future acts of terrorism or retains the capability and intent to carry out such acts.”¹³⁴ Finally, the activity of the Mexican cartels threatens the security of U.S. nationals and the security of the United States. Indeed, there have been several instances of U.S. nationals being killed or injured as a result of cartel violence, both within the United States and in Mexico.¹³⁵ Official U.S. policies have also expressed that the cartels pose an ongoing threat to the security of the United States.¹³⁶ Importantly, the statute does not require the Secretary of State to find that the cartels have actually killed or injured U.S. nationals or damaged national security. Rather, the statute merely requires that “the terrorist activity or terrorism of the organization *threatens* the security of United States nationals or the national security of the United States.”¹³⁷

One argument frequently raised by those who oppose characterizing the cartels as terrorists is that some of the major cartels are already subject to the provisions of the Foreign Narcotics Kingpin Designation Act (the Kingpin Act).¹³⁸ While it is correct that both statutes provide similar legal options, they are not identical, and nothing prohibits the inclusion of an organization on

organizations are the same, but rather for simplicity and to provide a generalized, albeit somewhat imprecise, understanding of the Mexican cartel threat.

¹³² See generally BIETTEL, *supra* note 6; Robert Chesney, *Should Mexican Cartels be Designated as Terrorist Organizations?*, LAWFARE (Mar. 31, 2011), <http://perma.cc/E52V-DAXV>.

¹³³ 8 U.S.C. § 1182 (2013); see generally Robert J. Bunker & John P. Sullivan, *Cartel Car Bombings in Mexico*, STRATEGIC STUDIES INST. (Aug. 2013), <http://perma.cc/P28Q-GHUR>; Brands, *supra* note 34; BIETTEL, *supra* note 6.

¹³⁴ *Foreign Terrorist Organizations*, U.S. DEP’T OF STATE, BUREAU OF COUNTERTERRORISM [hereinafter *Foreign Terrorist Organizations*], <http://perma.cc/4MX5-XJ66>.

¹³⁵ See FINKLEA, *supra* note 9, at 15–16.

¹³⁶ STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME OF 2011, *supra* note 14, at 5–9; DOD COUNTERNARCOTICS & GLOBAL THREATS STRATEGY, *supra* note 99, at 3–9.

¹³⁷ 8 U.S.C. § 1189(a)(1)(C) (2004) (emphasis added). In 2011, Representative Michael McCaul of Texas introduced legislation that would have required the U.S. Department of State to designate six major Mexican drug cartels as FTOs. H.R. 1270, *supra* note 128. Though it never was enacted into law, the bill proposed designating the Arellano Felix Organization, Los Zetas, La Familia Michoacana, the Beltran Leyva Organization, the Sinaloa Cartel, the Juárez Cartel and the Gulf Cartel as FTOs. *Id.*; see also Julian Aguilar, *Bill Seeks To Designate Drug Cartels as Terrorists*, N.Y. TIMES (Apr. 21, 2011), <http://perma.cc/FBL4-ZPDG>.

¹³⁸ *Valencia*, *supra* note 117; The Kingpin Act, 21 U.S.C. §§ 1901-1908 (1999); 8 U.S.C. § 1182 (2013).

both lists. Indeed, the *Fuerzas Armadas Revolucionarias de Colombia* (FARC) is currently designated as both an FTO and a significant foreign narcotics trafficker under the Kingpin Act.¹³⁹ As the Mexican cartels continue to expand and diversify their operations into other illicit activities beyond the narcotics trade and build increasingly complex and decentralized business structures, it will become more important to enable law enforcement, particularly at the federal level, to utilize tools that are not exclusively tied to the narcotics trafficking aspects of the cartels' operations.

Foreign terrorist organization designation is a manner through which the United States can begin to provide such tools. Designation carries with it a number of legal and practical benefits.¹⁴⁰ First, it enables the criminal prosecution of any person who assists or facilitates Mexican drug cartel activities for providing material support to a terrorist organization pursuant to 18 U.S.C. § 2339A.¹⁴¹ Second, designation would permit members of Mexican cartels to be denied entry into the United States and allow for the deportation of any foreign members of those organizations, even if their presence in the United States is otherwise lawful.¹⁴² Finally, and perhaps most importantly, designation permits U.S. financial institutions to freeze any assets in which an FTO or its agents have an interest, a critical tool when attempting to combat a group that is “a profit-seeking entity at its core.”¹⁴³

In addition to providing additional legal options that the U.S. government can use to pursue the cartels and their assets, there are non-legal benefits to foreign terrorist organization designation as well.¹⁴⁴ Designation itself produces a certain degree of stigma, heightens public awareness, and signals to other governments the United States' concerns about an

¹³⁹ See *Foreign Terrorist Organizations*, *supra* note 134; *Designations Pursuant to the Foreign Narcotics Kingpin Designation Act*, U.S. DEP'T OF TREASURY, OFFICE OF FOREIGN ASSET CONTROL, <http://perma.cc/CQ6N-9QB9> (last updated Jan. 14, 2014).

¹⁴⁰ See *Foreign Terrorist Organizations*, *supra* note 134.

¹⁴¹ 18 U.S.C. § 2339A (2009). This statute defines material support or resources as:

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

Id. at § 2339A(b)(1). The maximum penalty for providing material support to a foreign terrorist organization is fifteen years imprisonment, or if the support provided results in the death of an individual, then life imprisonment. 18 U.S.C. § 2339B (2009).

¹⁴² 8 U.S.C. § 1182 (a)(3)(B)(i)(IV)-(V) (2013); 8 U.S.C. § 1227 (a)(1)(A) (2008).

¹⁴³ *Foreign Terrorist Organizations*, *supra* note 134; *Kan*, *supra* note 19 at 9.

¹⁴⁴ *Foreign Terrorist Organizations*, *supra* note 134.

organization.¹⁴⁵ “FTO designations play a critical role in our fight against terrorism and are an effective means of curtailing support for terrorist activities and pressuring groups to get out of the terrorism business.”¹⁴⁶ It is true that Mexican cartels may be criminal organizations and insurgent movements in addition to being terrorists. However, that should not dissuade the United States from applying a statute that will put more pressure on the cartels and provide additional tools to the parts of the federal government engaged in the day-to-day fight against the cartels.

C. Counterterrorism Operations

In addition to expanding the application of federal statutory provisions related to terrorism to assist law enforcement in countering the Mexican cartel threat, the United States should also consider the proper role for military counterterrorism forces in the fight against these organizations.¹⁴⁷ The U.S. military has long played an important role in counterdrug operations, and continues to conduct counterdrug missions on a routine basis.¹⁴⁸ However, while the military currently has a prominent role in maritime monitoring and drug shipment interdiction efforts, and provides extensive logistical and intelligence support to other federal agencies and foreign partners in the counterdrug fight, direct military counterterrorism operations against cartels is not typically a part of this support.¹⁴⁹

With the evolution of the threat posed by the cartels in recent years, it is time to consider whether there are scenarios where employment of military counterterrorism forces would be appropriate, particularly as it relates to the potential for spillover violence, as that term has been previously defined. As

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ The Department of Defense defines counterterrorism as “[a]ctivities and operations taken to neutralize terrorists and their organizations and networks in order to render them incapable of using violence to instill fear and coerce governments or societies to achieve their goals.” DOD DICTIONARY OF MILITARY TERMS, *supra* note 73.

¹⁴⁸ The Department of Defense defines counterdrug as “[t]hose measures taken to detect, interdict, disrupt or curtail any activity that is reasonably related to illicit drug trafficking.” DOD DICTIONARY OF MILITARY TERMS, *supra* note 73. In the 1990s, Congress expanded the role of the Department of Defense in counterdrug operations and over the decades that followed, DoD continued to shoulder more and more responsibility with regard to this mission. *See* 10 U.S.C. § 124 (1990) and § 1004, National Defense Authorization Act for Fiscal Year 1991 (as amended), “Additional Support for Counter-Drug Activities”; JOINT CHIEFS OF STAFF, JOINT PUB. 3-07.4, COUNTERDRUG OPERATIONS, Chapter I (Aug. 14, 2013).

¹⁴⁹ *See id.*; CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION 3717.01B DOD COUNTERDRUG SUPPORT (June 12, 2014). This is not to suggest that counterterrorism forces have been *uninvolved* in this fight, but rather that their role has been limited compared with their role in other mission sets. *See* MARK BOWDEN, KILLING PABLO: THE HUNT FOR THE WORLD’S GREATEST OUTLAW, (1st ed. 2001); Dana Priest, *Covert Action in Columbia*, WASH. POST (Dec. 21, 2013), <http://perma.cc/HT4S-22HW>.

one commentator noted when discussing the escalating drug cartel violence in American cities:

[w]hile undesirable, such situations are manageable by existing Law Enforcement Agencies. However, if significant escalation occurs and/or the advent of terrorist attacks in which the actors strike multiple targets with the intent on holding buildings or other facilities, then it may be necessary to consider employing [military special operations] elements domestically. Posse Comitatus Act, acknowledged, it would be better to contemplate these options now rather than being called in after the event has unfolded. It is the expansion of the drug cartels that could easily force such a scenario.¹⁵⁰

As the cartel threat continues to evolve, understanding the legal authority under which military counterterrorism forces can be employed becomes increasingly important.

The role of the Armed Forces in defending the United States against threats to our national security is significant.¹⁵¹ The President, as the Chief Executive and Commander-in-Chief of the Armed Forces, has the inherent authority and responsibility to protect the United States from armed attack.¹⁵² This includes not only attack from traditional threats such as invasion by a foreign army, but also against attack from unconventional threats as well.¹⁵³ This right and responsibility exists not only in our domestic law, but is also embodied in both the customary international law right of self-defense, as well as in Article 51 of the United Nations Charter.¹⁵⁴ In carrying out this responsibility, the President has the discretion to call upon the capabilities of various elements of national power, including the Department of Defense when necessary and appropriate.

¹⁵⁰ John B. Alexander, *Convergence: Special Operations Forces and Civilian Law Enforcement*, JOINT SPECIAL OPERATIONS UNIVERSITY REPORT 10–6 (July 2010), <http://perma.cc/VSP4-A32P>.

¹⁵¹ See, e.g., JOINT CHIEFS OF STAFF, JOINT PUB. 3-27, HOMELAND DEFENSE, at I-2 (July 29, 2013) [hereinafter HOMELAND DEFENSE]. “The mission of DOD is to provide the military forces needed to deter war and to protect the security of the US. The US employs all instruments of national power to continuously defeat threats to the homeland. DOD executes the homeland defense (HD) mission by detecting, deterring, preventing, and defeating against threats from actors of concern as far forward from the homeland as possible.” *Id.* at I-1.

¹⁵² U.S. CONST. art. II, § 2.

¹⁵³ See *id.*; President Barack Obama, *Remarks by the President at the National Defense University*, *supra* note 1.

¹⁵⁴ U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”).

An important initial matter when considering whether military counterterrorism forces are the appropriate element of national power is whether the proposed operation is to be conducted domestically or in the territory of another state. Before such an operation may be carried out in another state, issues of state sovereignty must be considered.¹⁵⁵ Generally, counterterrorism actions against non-state actors conducted in the territory of another state may be carried out only with the consent of that state's government.¹⁵⁶ Alternatively, if the President determines that a particular situation poses an imminent threat to the United States and that the sovereign state where that threat is located is either unwilling or unable to sufficiently address that threat, then the United States may take action to defend itself from attack.¹⁵⁷

Counterterrorism operations may also be carried out within the United States. Such operations are normally the responsibility of civilian law enforcement agencies operating under the Department of Justice or the Department of Homeland Security.¹⁵⁸ However, Department of Defense forces may be called upon, from time to time, to provide support to those agencies as they respond to terrorism.¹⁵⁹ In such situations, military forces operate only in a supporting role, with law enforcement agencies in the lead and the actions of military personnel limited by the restrictions contained within the Posse Comitatus Act and other Department of Defense regulations.¹⁶⁰

¹⁵⁵ See U.N. Charter art. 2, para. 4. ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

¹⁵⁶ See generally *Remarks by the President at the National Defense University*, *supra* note 1; Attorney General Eric Holder, *Remarks as prepared for delivery by Attorney General Eric Holder at Northwestern University School of Law* (Mar. 5, 2012), <http://perma.cc/3497-L7X7>; JOINT CHIEFS OF STAFF, JOINT PUB. 3-26, COUNTERTERRORISM, at V-12 (Nov. 13, 2009) [hereinafter COUNTERTERRORISM]. Action could also be taken pursuant to a United Nations Security Council Resolution under Chapter VII of the United Nations Charter. See U.N. Charter, Art. 39–50.

¹⁵⁷ See generally *Remarks by the President at the National Defense University*, *supra* note 1; *Remarks as prepared for delivery by Attorney General Eric Holder at Northwestern University School of Law*, *supra* note 156.

¹⁵⁸ See HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR HOMELAND SECURITY (Oct. 2007), <http://perma.cc/8MEY-EPCW>.

¹⁵⁹ See JOINT CHIEFS OF STAFF, JOINT PUB. 3-28, DEFENSE SUPPORT TO CIVIL AUTHORITIES (July 31, 2013) [hereinafter DEFENSE SUPPORT TO CIVIL AUTHORITIES]; U.S. DEP'T OF DEF., INSTR. 3025.21, DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES (Feb. 27, 2013) [hereinafter DoDI 3025.21].

¹⁶⁰ See DEFENSE SUPPORT TO CIVIL AUTHORITIES, *supra* note 159; DEFENSE SUPPORT OF CIVILIAN LAW ENFORCEMENT AGENCIES, *supra* note 159; The Posse Comitatus Act, 18 U.S.C. § 1835 (2000) ("Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.").

It is also possible, in extreme cases, for a domestic terrorism situation to become sufficiently severe that it warrants a direct military response to the threat.¹⁶¹ A determination must be made that the threat posed is beyond a mere violation of the laws, and that it essentially amounts to an armed attack on the United States. In such a situation, “[t]he President has the authority to direct the use of the military against terrorist groups and individuals in the United States for other than law enforcement actions (i.e., national defense, emergency protection of life and property, and to restore order).”¹⁶² Military personnel operating in response to such a threat operate within a Homeland Defense paradigm, under a military chain of command, and with Department of Defense forces in the lead, executing a military mission rather than providing support to a law enforcement operation.¹⁶³

There are a number of possible situations that could arise in which cartels pose such a serious threat to the United States that employing the U.S. military is an appropriate response to counter that threat. This is particularly true if a situation were to arise where cartels began employing the military tactics and weaponry seen across Mexico over the last decade within the United States, such as employment of armored vehicles or rocket propelled grenades against U.S. government personnel or facilities. Such capabilities have the potential to overwhelm the response capacity of many civilian law enforcement agencies. However, military forces are generally trained and equipped to respond to forces possessing this type of capability and weaponry. Military counterterrorism forces could also be effectively employed in situations where, because of the numbers of cartel members involved or because of the tactics and weaponry used, the threat could be properly categorized as an armed attack against the United States.

This is not to say that military counterterrorism forces should engage in direct action against the cartels in most situations. Indeed, there are very good policy considerations that dictate that law enforcement should be the primary effort in this fight and that military force be used only as a last resort, and most importantly, under the right legal framework. While our armed forces have conducted continuous counterterrorism operations since shortly after September 11, 2001, it is important to note that the legal basis for the vast majority of those operations would not necessarily apply to an action taken in response to a threat posed by a modern Mexican cartel. One must carefully distinguish between counterterrorism operations conducted based on the authority derived from the law of armed conflict, and operations based on an

¹⁶¹ COUNTERTERRORISM, *supra* note 156, at Ch. IV; JOINT CHIEFS OF STAFF, JOINT PUB. 3-27, HOMELAND DEFENSE at I-2 (July 29, 2013) [hereinafter HOMELAND DEFENSE].

¹⁶² COUNTERTERRORISM, *supra* note 156, at Ch. V-13-14.

¹⁶³ *Id.* at Ch. IV (“If a [counterterrorism] situation should formally transcend into a matter of homeland defense (HD), then DOD is the lead for action and interagency coordination for HD.”); HOMELAND DEFENSE, *supra* note 161, at I-2.

exercise of the inherent right of national self-defense.¹⁶⁴ Since September 11th, the President of the United States has asserted that the United States is engaged in an armed conflict with al Qaeda, the Taliban, and associated forces.¹⁶⁵ Indeed, Congress explicitly endorsed this view when it passed the Authorization for the Use of Military Force (AUMF), which has subsequently been upheld by the courts.¹⁶⁶ Individuals targeted by U.S. military counterterrorism forces under this rubric have been killed or captured based upon their status as combatants engaged in armed conflict against the United States.¹⁶⁷ While a compelling argument can be made that Mexico is engaged in an armed conflict against the cartels, it is difficult, at this time, to claim that the United States is engaged in that conflict. As such, military forces cannot attack cartel members based on their status as members of a particular organization. Importantly, it must be recognized that designation of a cartel as a foreign terrorist organization discussed in Part II.B does not factor into this analysis. Declaring a cartel as a foreign terrorist organization in accordance with 8 U.S.C. §1189 is not the same as declaring that the United States is engaged in an armed conflict with that organization and, therefore, has no bearing on whether cartel members are, or are not, status based targets.

Targeting of individuals outside of an armed conflict model requires a completely different analysis.¹⁶⁸ Based on an exercise of national self-defense, this type of counterterrorism targeting requires an assessment of the imminence of the threat, and whether lesser means of force are available to counter that threat.¹⁶⁹ In short, individuals or groups may only be lawfully

¹⁶⁴ See generally Geoffrey S. Corn, *Debate (Round 1): The Military Component of Counter-Terror Operations*, JUST SEC. (Sept. 30, 2013), <http://perma.cc/YUD4-PY2V>.

¹⁶⁵ See *id.*; *Remarks by the President at the National Defense University*, *supra* note 1.

¹⁶⁶ Authorization for the Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹⁶⁷ See *Remarks by the President at the National Defense University*, *supra* note 1; Authorization for the Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001).

¹⁶⁸ Corn, *supra* note 164; *Remarks by the President at the National Defense University*, *supra* note 1.

¹⁶⁹ See Corn, *supra* note 164. Professor Corn discusses the challenge of distinguishing between counterterrorism operations based upon a law of armed conflict construct and operations based on a traditional self-defense or law enforcement type of construct.

Certainly, the question of where, if at all, to draw the proverbial legal line between war and peace—and the accordant line between law enforcement and armed conflict—is complex, evolving, and critical. For at its heart, this line drawing exercise defines the scope of “attack” authority that U.S. armed forces may permissibly exercise. Once the nation crosses this proverbial borderline, international law justifies the use of deadly force as a measure of first resort against individuals based not on an individualized assessment of actual imminent threat, but solely on a reasonable determination of status as a member of the opposing belligerent force. This Law of Armed Conflict (LOAC) construct thus stands in fundamental juxtaposition with accepted law enforcement/human rights based use of force authorities. This

targeted based on a true self-defense analysis, not based on their status as a member of a particular group engaged in armed conflict with the United States.¹⁷⁰

In recent years, this distinction has become blurred as United States counterterrorism forces have conducted operations combining aspects of both legal constructs.¹⁷¹ While maintaining that the legal basis for targeting is grounded in an armed conflict model, U.S. military counterterrorism forces have also carried out operations that appear to be law enforcement-type operations, capturing individuals that present a threat to the United States with a view toward prosecution in Article III courts.¹⁷² In addition, many military counterterrorism operations are conducted with direct support from federal law enforcement personnel, even in cases where the legal authority for such an operation is based on the law of armed conflict.¹⁷³ This “convergence” of military and law enforcement roles makes it difficult, at times, to articulate the proper legal framework for a given counterterrorism operation. However, it provides the potential to leverage the unique capabilities and expertise of both law enforcement and military counterterrorism forces and, therefore, is a model that policymakers should consider applying in the context of the Mexican cartel threat.

While military counterterrorism operations are another tool that can be leveraged to address the threat posed by Mexican drug cartels, they should be used only in the event that these organizations begin to pose a severe and imminent threat to U.S. national security. This could include defending the United States against many of the types of armed terrorist attacks that have unfolded across Mexico during the last decade. Such an operation would need to be legally based on the existence of an imminent threat and not on an individual’s status as a member of the particular cartel, even if that cartel were

juxtaposition then extends to both deprivation of liberty and criminal sanction, allowing use of status based preventive detention and trial by military tribunal for the captured enemy belligerent, neither of which would be tolerable in peacetime.

Id.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* The cases of Ahmed Abdulkadir Warsame and Abu Anas al Libi are the most prominent examples. In both instances, military counterterrorism forces captured individuals during counterterrorism operations conducted based on the law of armed conflict. In both cases, the detainees were subsequently transferred to an Article III court for prosecution in the United States. See Rick Pildes, *Warsame: An Emerging New Model for Terrorism Cases?*, LAWFARE (July 5, 2011), <http://perma.cc/8AB8-QE7Y>; Wells Bennett, *On al-Liby and the Transition from Military Detention to Criminal Prosecution*, LAWFARE (Oct. 8, 2013), <https://perma.cc/L8JD-G5JV?type=source>.

¹⁷³ See Adam Goldman & Julie Tate, *Inside the FBI’s secret relationship with the military’s special operations*, WASH. POST (April 10, 2014), <http://perma.cc/S4KY-D3Q3>.

to be designated as a foreign terrorist organization. That designation offers additional tools for U.S. officials to apply to counter the cartel threat, yet does not change the analysis for conducting military counterterrorism operations as the United States is not currently at war against the cartels.

Conclusion

*Washington policymakers, who overwhelmingly concentrate on Asia and the Mideast, would be well advised to focus on the acute dangers that lie principally south of the Rio Grande, but whose deadly avatars are spilling into our nation.*¹⁷⁴

The national security threat posed by Mexican drug cartels has seen a dramatic evolution in recent years. Enterprises that could once be understood and addressed solely as criminal smuggling organizations now possess characteristics and capabilities that will require the United States to respond in a concerted manner, utilizing all elements of national power. While the fundamental nature of the threat has changed, our legal approach to addressing that threat has not. In an effort to more effectively manage the modern cartel threat, the United States should look to our laws that provide tools and authorities for responding to terrorism. Recognizing that modern Mexican cartels combine elements of criminal and terrorist organizations and insurgent movements, the United States must incorporate every available legal mechanism and authority to more aggressively and effectively respond to this hybrid threat.

The major cartels operating throughout Mexico and in the United States today are engaging in acts of terrorism. Indeed, this threat may be far more dangerous than we have realized thus far and warrants immediate thought and attention. As stated by the commander of the United States Southern Command, General John Kelly, “in comparison to other global threats, the near collapse of societies in the hemisphere with the associated drug and [undocumented immigrant] flow are frequently viewed to be of low importance. Many argue these threats are not existential and do not challenge our national security. I disagree.”¹⁷⁵ The situation created by Mexican drug cartels has deteriorated to the point where new approaches are needed. Criminal prosecution of cartel members for terrorism provides an effective tool for law enforcement and prosecutors to utilize in the fight against these organizations. It also provides an effective mechanism for differentiating

¹⁷⁴ George W. Grayson, *The Evolution of Los Zetas in Mexico and Central America: Sadism as an Instrument of Cartel Warfare*, STRATEGIC STUDIES INST. xii (Apr. 2014), <http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB1195.pdf>.

¹⁷⁵ Molly O’Toole, *Top General Says Mexico Border Security Now “Existential” Threat to U.S.*, DEFENSE ONE (July 5, 2014), <http://perma.cc/GQ5Y-4534>.

between ordinary drug trafficking crime and conduct that is more representative of warlike acts spilling over into the United States.

The cartels also meet the statutory definition of foreign terrorist organizations and should be legally recognized as such. Official recognition provides a number of benefits that can be immediately implemented to attack the cartels' finances and to go after individuals who provide weapons and material support to these organizations. Unlike the Kingpin Act, foreign terrorist organization designation also articulates the threat posed by cartels in terms unrelated to the narcotics trade, an issue that will continue to be important as these violent organizations expand into new illicit ventures that are not necessarily related to the drug enterprise, such as human trafficking, money laundering, and extortion.

The United States must also consider the appropriate role of the military in countering this threat, particularly with regard to conducting military counterterrorism operations. While the Department of Defense has long been involved in counterdrug operations, its counterterrorism operations have largely remained contained to the fight against al Qaeda, its associated forces, and more recently, the Islamic State in Iraq and Syria. Understanding the authority of the United States military to conduct counterterrorism operations against Mexican cartels is important, particularly because the legal framework for such operations cannot, at this time, be lawfully based upon an armed conflict construct. As such, military counterterrorism operations against the cartels should only be considered in the event that they pose an imminent threat to U.S. national security where law enforcement is incapable of adequately addressing the situation. This is not to suggest that the military should be the main effort in the fight to counter the highly complex threat that Mexican cartels pose. However, it is an option that should remain on the table—one that policymakers and senior government leaders can call upon to respond to the most imminent and severe threats posed by these organizations.

Taken together, these approaches provide options for policy makers and for those involved in the day-to-day battle against the cartels. Utilizing these tools in no way means that the United States government has to choose to adopt a purely counterterrorism approach to the Mexican cartel threat. Much of the resistance to utilizing these tools seems to be an assumption that calling the situation in Mexico terrorism, designating the cartels foreign terrorist organizations, or prosecuting a cartel member for international terrorism necessarily indicates that the United States has chosen to pursue a strategy similar to the military-centric approach taken in the fight against al Qaeda and its associated forces.¹⁷⁶ This is not the case—it is an argument that confuses legal authorities with national strategies.

¹⁷⁶ See Morris, *supra* note 36; Valencia, *supra* note 117.

The modern cartel threat is complex. It also presents challenges to the traditional ways in which the United States has protected its national security interests for generations. However, many of the tools that we need to meet the security challenges that these organizations present are within our reach. We simply need to have the ability to call upon them in the fight against the Mexican drug cartels.