DESIGNATING MEXICAN CARTELS AS TERRORIST ORGANIZATIONS

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Designating Mexican Cartels as Terrorist Organizations

Joshua Treviño

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Executive Summary

Over the last decade, the Mexican drug cartels have unleashed a degree of violence and attained a degree of political influence in Mexico sufficient to compel policymakers in the U.S. to consider new and more aggressive strategies to combat them (CBS News, 2022b; Nuño, 2022; Wood et al., 2022; CFR.org Editors, 2021). A particularly brutal manifestation of this violence took place in La Mora, a community in northern Mexico, where cartel members ambushed and massacred three women and six children, all dual Mexican and American citizens, in November 2019 (Stevenson, 2019). Texas Gov. Abbott referred to this incident, among others, in a 2021 letter to President Biden calling on him to "designat[e] the Mexican drug cartels as foreign terrorist organizations" in order to "bolster much-needed tools to secure the border and protect innocent lives" (Abbott, 2021, p. 1). President Trump, for his part, also publicly expressed a desire to designate the cartels as terrorist organizations before abandoning the idea (Donati & de Córdoba, 2019; Vazquez, 2019; Rummler, 2019).

In what follows, we will consider the case for designating the Mexican cartels as terrorist organizations. To this end, we will (1) define terrorism and terrorist activity under U.S. law, (2) examine the legal case for designating the Mexican cartels as terrorist organizations, (3) explore the potential issues with doing so, and (4) give a brief account of the different policies by means of which the U.S. can designate the cartels as terrorist organizations.

Key Points

- The U.S. should designate Mexican cartels as foreign terrorist organizations.
- The Mexican cartels meet the legal definition of terrorism according to the Immigration and Nationality Act.
- Whether it is prudent or desirable for the U.S. to designate the Mexican cartels as terrorist organizations is not merely a legal question: It is primarily a political question and must be addressed at that level.
- U.S. law defines both terrorism and terrorist activity, thereby providing a standard that policymakers can use in determining whether to designate an organization as a terrorist organization.
- Fears that an FTO designation for Mexican cartels would result in a flood of asylum claimants and admittees will likely be unrealized.

What Is Terrorism or Terrorist Activity Under U.S. Law?

Everyone can recognize what they believe to be a terrorist act when they see one reported on the news. But what, in a strictly legal sense, is terrorist activity or terrorism? Section 802 of the Patriot Act defines "domestic terrorism" as "acts dangerous to human life that are a violation of the criminal laws of the United States or of any State" that "occur primarily within the territorial jurisdiction of the United States," and that "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" (115 Stat. 376). It stands to reason that, *mutatis mutandis*, the same set of principles, would describe *international* terrorism under U.S. law.

But we need not rely solely on the preceding inference to arrive at the definition of terrorism under U.S. law. The Patriot Act itself refers to provisions in U.S. law that define terrorism and terrorist activity (115 Stat. 345–346). Specifically, Section 411 of the Patriot Act (115 Stat. 348) refers to Sections 219 and 212 of the Immigration and Nationality Act, also called the INA (8 U.S.C. 1189 & 8 U.S.C. 1182). Section 219 itself refers to Section 212 (see also

U.S. Citizenship and Immigration Services, n.d.), and Section 212 defines "terrorist activity" as any activity which, in addition to being "unlawful under the laws of the place where it is committed," involves:

1. The highjacking [*sic*] or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

2. 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.

3. A violent attack upon an internationally protected person … or upon the liberty of such a person.

4. An assassination.

5. 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.

6. A threat, attempt, or conspiracy to do any of the foregoing. (8 U.S.C. 1182)

Section 219 of the INA also refers to "terrorism." More specifically, it refers to Section 2656f of Title 22 of the U.S. Code—the "Foreign Relations Authorization Act"—which defines "terrorism" (22 U.S.C. 2656f). Section 2656f charges the U.S. State Department with submitting to the speaker of the House of Representatives and the Senate Foreign Relations Committee an annual report that, among other things, contains "detailed assessments" of the foreign countries in which significant acts of terrorism have occurred. Pursuant to this charge, Section 2656f defines "terrorism" as "premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents" (22 U.S.C. 2656f).

In summary, Section 219 of the INA stipulates that both Section 212 of the INA (which is also Section 1182 of Title 8 of the U.S. Code) and Section 2656f of the Foreign Relations Authorization Act provide the secretary of state with the authoritative legal standards by which he must determine whether a foreign organization qualifies as a terrorist organization under U.S. law. The relevant portion of Section 219 reads as follows: "the Secretary is authorized to designate an organization as a foreign terrorist organization … if the Secretary finds that … 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)" (8 U.S.C. 1189). This legal standard, moreover, is supported by both the U.S. State Department and the U.S. Government Accountability Office in its report, "Foreign Terrorist Organization Designation Process and U.S. Agency Enforcement Actions" (U.S. Department of State, n.d.-b; U.S. Government Accountability Office, 2015, p. 3).

Should Mexican Cartels Be Designated as Terrorist Organizations? The Legal Perspective

In light of the preceding, we must raise the question of whether Mexican cartels qualify as terrorist organizations under Section 219 of the INA.[1]

A review of Mexican cartel activities, combined with their intersection with Mexican-state actors, provides a strong case that they qualify as terrorist organizations. They have hijacked vehicles, predominantly in Mexican states connected to highways that serve critical drug trafficking routes, such as Guanajuato, Puebla, Querétaro, the State of Mexico, and Jalisco (Bleszynska, 2021). They have taken hostages on numerous occasions, going as far as kidnapping Mexican soldiers and their families (Meza, 2021; Fry, 2020; Carpenter, 2019; "Mexico Cartel Holds Two," 2018; Diaz, 2008). They have engaged in torture and have "disappeared" upward of 50,000 Mexicans caught in the war between rival gangs (Wilson, 2020). They have engaged in arson and used drone-guided bombs against rival gangs (Hudson, 2011; Hambling, 2021). They have used improvised explosive devices (IEDs) to attack the Mexican army and law enforcement (Associated Press, 2022; Korpar, 2022). Some cartel members are also suspected of cultivating a relationship with Hezbollah, which is designated as a Foreign Terrorist Organization (FTO) by the U.S. State Department (U.S. Department of State, n.d.-b). One report argues that "Hezbollah has training bases and sleeper cells

1 According to the Drug Enforcement Administration, the Mexican drug cartels with "the greatest drug trafficking impact on the United States" are the "Sinaloa Cartel, CJNG, Beltran-Leyva Organization, Cartel del Noreste and Los Zetas, Guerreros Unidos, Gulf Cartel, Juarez Cartel and La Linea, La Familia Michoacána, and Los Rojos" (U.S. Drug Enforcement Administration, 2021, p. 66).

in Mexico" and that they have dug tunnels along the U.S.–Mexico border and provided training to cartel members in bomb-making (Rosenthal, 2013).

The cartels have also reportedly engaged in numerous targeted assassinations over the last decade, murdering a leading candidate for the governorship of Tamaulipas (Tuckman, 2010) and, more recently, the mayor of a town in Michoacán (CBS News, 2022a). For the big picture of cartel assassinations in Mexico, one need only turn to the Justice in Mexico Project. In the 2021 edition of its Organized Crime and Violence in Mexico report, the Justice in Mexico Project estimates that, in 2020, "current, former, and aspiring mayors in Mexico were over four times more likely to be murdered than the general population" (Ahrens-Víquez at al., 2021, p. 31) and "police officers more than five times more likely to be murdered … than the regular citizen" (p. 34). Cartels have, in addition, both murdered and attempted to murder ICE agents (U.S. Immigration and Customs Enforcement, 2017).

One episode of cartel criminality that deserves special attention is the so-called *Culiacanazo,* or Battle of Culiacán, in 2019 ("El Chapo: Mexican President Says," 2019). In October of that year, following an arrest warrant issued by a U.S. federal judge ("Washington DC Federal Judge's Arrest Warrant," 2019), Mexican federal authorities arrested Ovidio Guzmán López, the son of Joaquín "El Chapo" Guzmán, in the city of Culiacán. Sinaloa Cartel forces responded to this arrest with a degree of organization and firepower that made them more than the equals of Mexican authorities (Grillo, 2019). Using high-caliber weapons and ruthless tactics, they took eight Mexican officials hostage and effectively wrested control of Culiacán from the Mexican state. Seeking, in his words, to prevent further loss of life (Magallán, 2021), President Andrés Manuel López Obrador (AMLO) ordered the release of Guzmán López and the violence in Culiacán subsided. The episode revealed that the Sinaloa Cartel was capable of doing two things: (1) capturing and holding Mexican territory, however modestly and temporarily, and (2) coercing the Mexican state into complying with cartel goals.

The last item is critical, for the definition of terrorism in both Section 212 of the INA and Section 2656f of the Foreign Relations Authorization Act includes a political dimension. That is, not only the acts themselves but for the sake of which the acts are done, not only the means but the ends, are relevant to the definition of terrorism under both provisions of U.S. law. Section 212 of the INA, as we have seen, refers to violence that "compel[s] 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" (8 U.S.C. 1182). And Section 2656f of the Foreign Relations Authorization Act, as we have seen, does not refer to just any form of violence but specifically to "politically motivated violence" (22 U.S.C. 2656f).

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Since one cannot be too demanding with regard to the clarity of legal definitions, however, we must pause to reflect on the meaning of "politically motivated." Every criminal organization must exert such a degree of violence as it needs to keep the forces of law and order from obstructing its operations. For this reason, every organized criminal enterprise must engage in or be prepared to engage in the coercion of a government organization if it is to be successful. But does this requirement make the enterprise in question, and the violence accompanying it, "politically motivated"? If so, then every mafia is a terrorist organization. To avoid collapsing the definition of terrorism into that of organized crime, must we not then understand "politically motivated" violence as violence that aims at a political end as opposed to one that merely coerces or intimidates political institutions for the sake of a non-political end? Clearly, we do—and here, the well-documented mutual use and engagement of the cartels and the Mexican state provide an understanding of cartels as not just criminal actors, but *political* ones within the definition of this statute.

For example, the evidence showing Mexican cartels have intervened on behalf of MORENA, the party of the current president, points to a more complicated purpose than simply making profits. In March 2022, Deutsche Welle revealed that MORENA had made an "electoral narco-pact" with El Chapo's family during the 2021 elections for the governorship of the Mexican state of Sinaloa (Hernández, 2022). Hernández, the investigative journalist who revealed the pact, alleges that the collusion between

the drug cartels and AMLO's political movement could go back to 2006. More recently, "leaked diplomatic cables alleg[ed that] the campaign of incoming Tamaulipas governor Américo Villarreal received funding from the Cartel del Noreste. … Villarreal won the June 5 [2022] gubernatorial contest for the ruling MORENA party" (Agren, 2022, para. 1).

Former Attorney General Bill Barr (Cacciatore, 2022) recently described Mexico as "well on its way to being a failed narco-state" (para. 2) and disagreed with the recommendation to treat Mexican cartels like the mafia:

> We have to be more active against the cartels. In my mind, we have to approach the cartels more like ISIS and less like the mafia. …
>
> They are effectively terrorist organizations. ... Their paramilitary can take on the Mexican military, and they have so much money they can corrupt any system. (paras. 4, 6)

Cartels have also recurrently used the most brutal forms of violence on a mass scale to coerce the Mexican government into adopting policies favorable to them or ceasing to enforce policies harmful to them (Treviño, 2022). This shows that the cartels meet at least one of the two previously mentioned definitions of terror under U.S. law, the definition under Section 212 of the INA. Unlike the definition under Title 22 (22 U.S.C. 2656f), the definition under Section 212 does not require a political motivation on the part of the group to be designated. Additionally, Section 219 of the INA stipulates that "the Secretary is authorized to designate an organization as a foreign terrorist organization … if the Secretary finds that …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)" (8 U.S.C. 1189). The crucial thing here is the disjunctive break indicated by "or." For the secretary to be authorized by law to designate a terrorist organization, the organization need only meet the definition under Section 212 of the INA (that is, Section 1182 of Title 8 the U.S. Code) *or* Section 2656f of Title 22 of the U.S. Code. So long as the Mexican cartels meet *one* of these definitions, they satisfy the requirements of Section 219.

Terrorist Designation Regimes

There are different kinds of terrorist designation regimes, however, and they are not all equal with respect to their legal ramifications. A question to consider is whether the secretary of state should designate Mexican cartels as terrorist organizations *only* with a view to deporting or preventing the entry into the U.S. of members or associates of these organizations. In this case, the secretary should designate the cartels as terrorist organizations under the Terrorist Exclusion List (TEL) authority. The TEL is statutorily grounded in Section 411 of the Patriot Act (115 Stat. 272). It authorizes the secretary of state, in consultation with or upon the request of the attorney general, to designate terrorist organizations "for immigration purposes" (U.S. State Department, n.d.-c; 115 Stat. 345–350). That is, the secretary may add and appeal to a list of designated terrorist organizations in order to exclude aliens who are members or associates of these organizations from entering the U.S or in order to deport those already in the U.S. (U.S. State Department, n.d.-c). In deciding what organizations to add to the TEL, the secretary is charged with appealing to the above-mentioned legal standards.

If more aggression against the cartels is warranted, and the aim of the designation is to increase the financial leverage the U.S. is able to exert against them, then the TEL is by itself insufficient. The secretary of state should in this case designate the cartels under Executive Order 13224 (U.S. State Department, n.d.-a). Executive Order 13224, signed by President Bush on September 23, 2001, authorizes the U.S. government to "block the assets of foreign individuals and entities that commit, or pose a significant risk of committing, acts of terrorism" as well as "the assets of individuals and entities that provide support, services, or assistance to, or otherwise associate with, terrorists and terrorist organizations" under designation (para. 2).

If even more aggression against the cartels is warranted, and the aim of the designation is to increase the financial *and* prosecutorial leverage the U.S. is able to exert against them, then Executive Order 13224 is by itself insufficient. The secretary of state should then designate the cartels as Foreign Terrorist Organizations (U.S. State Department, n.d.-b). A Foreign Terrorist Organization (FTO) designation entails the following penalties for the groups or individuals subject to or prosecuted under its authority: alien inadmissibility, asset freezes, fines, and/or imprisonment. Financial institutions that come into possession of FTO assets and do not freeze them are subject to fines of not less than $50,000 or double the amount of the FTO assets in their possession (18 U.S.C. 2339B). If convicted, material supporters of FTOs can be imprisoned for up to 20 years or even life if their support results in someone's death. As we shall see, however, it is not its penalties but its investigative and prosecutorial scope that most distinguishes an FTO designation.

Issues attendant to an FTO Designation

We have established a legal ground for the U.S. secretary of state to designate the Mexican cartels as terrorist organizations. But is this the only ground that the secretary, and U.S. policymakers in general, should consider? Section 219 of the INA, after all, does not *require* the secretary to designate organizations as terrorist organizations if they meet the relevant legal standard. It merely *authorizes* the secretary to do so. The secretary retains discretionary power, in other words, to designate terrorist organizations under U.S. law. This discretion gives the secretary the prudential latitude required for him to ensure that the decision to designate a terrorist organization is not only legally sound but also in the national interest of the United States. That is, Section 219 of the INA reflects the understanding that the secretary's decision to designate a terrorist organization is not merely or even primarily a legal but also a political decision. It must therefore be considered primarily from a political perspective. The issue may be put as follows: Given the myriad vicissitudes of international relations, it will not always be the case that a foreign policy that satisfies the requirements of U.S. law will satisfy the requirements of the U.S. national interest. To return to the issue at hand, if the designation of Mexican cartels by the U.S. were to affect U.S.–Mexico relations in such a way as to harm the U.S. national interest in areas beyond the scope of the designation, the prudent policymaker would counsel against such a policy.

The first political question that anyone considering the adoption of this policy must consider, then, is the effect it is likely to have on U.S.–Mexico relations and on the set of U.S. interests that are bound up with those relations. The Mexican government has not been shy about rejecting the idea of the U.S. designating the cartels as terrorist organizations. In response to President Trump entertaining it, the Mexican Foreign Minister Marcelo Ebrard tweeted the official position of the Mexican government:

> Mexico will never accept any action that entails a violation of its national sovereignty. We will act firmly. I have already sent our position to the U.S. as well as our resolution to stand up to transnational organized crime. Mutual respect is the basis of cooperation (Ebrard, 2019; Sheridan, 2019a).

This remark points to a critical political fact: Mexico, at least under its current government, regards a possible U.S. designation of the cartels as terrorist organizations to be tantamount to a violation of Mexican sovereignty. And the Mexican government might interpret this policy as a harbinger of future policies that will entail a greater degree of U.S. involvement in Mexican politics (Sheridan, 2019b). All this should be prudentially considered; however the near-total collapse of U.S.-Mexico security cooperation under the AMLO regime (Treviño, 2022) means that there is little left to lose when it comes to Mexican-state collaboration.

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To discover the most prudent path forward, U.S. policymakers must compare the previously mentioned risks with the interests the U.S. would likely advance by designating the cartels as terrorist organizations, and judge whether the potential risks are compensated by the prospective gains. To do this, policymakers must first understand how, and how much, the U.S. would be able to harm the cartels by designating them as terrorist organizations.

To harm the cartels, their designation as terrorist organizations must provide the U.S. with prosecutorial tools not otherwise available. Currently, the major Mexican cartels are designated under the Kingpin Act (113 Stat. 1626), which is designed to combat major foreign narcotics traffickers (that is, kingpins) and "which imposes severe criminal economic penalties on those who support or are part of these criminal networks" (Blazakis, 2019). These penalties include asset freezes, alien inadmissibility, and fines of up to $10 million for corporate violators and/or imprisonment for up to 30 years for corporate officers (Rosen et al., 2019).

In designating cartels as FTOs, the U.S. would be able to significantly increase the number of individuals subject to prosecution. This is because the designation of Mexican cartels as FTOs would enable U.S. prosecutors to appeal to Section 2339B of Title 18 of the U.S. Code. This gives prosecutors two basic advantages. First, Section 2339B explicitly provides for "extraterritorial jurisdiction" (Halliday & Veneski, 2020; 18 U.S.C. 2339B). This means prosecutors would be able "to bring cases against foreign nationals acting entirely in foreign countries with little connection to the U.S." (Halliday & Veneski, 2020, para. 10). This prosecutorial power is obviously of critical importance in

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the fight against organizations whose base of operations lies beyond U.S. borders. Second, and more importantly, Section 2339B prohibits the provision of, or the attempt or conspiracy to provide, "material support or resources to a foreign terrorist organization" (18 U.S.C. 2339B). The reach and severity of "material support" charges are described by an American Civil Liberties Union briefing paper in the following terms: "U.S. and foreign financial institutions, organizations, and individuals can face criminal charges for knowingly providing 'material support'—including services, resources, or 'expert advice or assistance'—to FTOs" (American Civil Liberties Union, n.d., p. 2). Texas Congressman Michael T. McCaul, who was an early advocate of designating the Mexican cartels as FTOs, described the insufficiency of the Kingpin Act in relation to an FTO designation when he said that the former "only allows [the government] to take care of the head of the cartel rather than the body" (Aguilar, 2011, para. 13). This metaphoric description is made more concrete by the Center for Immigration Studies: "in counterterrorism concerning Islamist FTOs, anyone who associates with them—even with a telephone call—becomes potentially subject to placement on terrorism watch lists and no-fly lists and added to prosecutorial and investigative caseloads" (Bensman, 2019, "Overloading" section).

In line with the preceding, it should be borne in mind that an FTO designation would allow U.S. prosecutors to bring material support charges against every U.S.-based drug dealer who, in buying drugs from cartels or their associates, provides a degree of material support to an organization designated as an FTO (Jones, 2019). This poses a challenge for advocates of this policy. The reverse side of this problem is the possibility that an FTO designation for the cartels might overwhelm the U.S. counterterrorism infrastructure, since it is not known how many people the cartels have in their employ—a former safety captain for the Texas Department of Public Safety suspects that the Sinaloa Cartel has around 35,000 persons who work for it in some capacity (Bensman, 2019). These problems may be partly avoided or leveraged against the cartels, through the use of a tiered strategy that prioritizes or enables the prosecution only of high-level drug dealers (Jones, 2019). Bensman, however, does not think these problems can be solved without "needs analysis, criteria-setting, and human-resources planning" well in advance of the FTO designation (Bensman, 2019). It is worth adding, moreover, that since the Sinaloa and the Jalisco cartels are major fentanyl traffickers and since fentanyl overdoses have become one of the leading causes of death among young Americans aged 25–44 (Kamp et al., 2022; Coggin, 2022), the broad prosecutorial implications of an FTO designation could serve a much-needed purpose, provided they are carefully calibrated and intelligently directed.

Immigration is another area in which the prosecutorial powers entailed by an FTO designation could have unintended consequences to which U.S. policymakers must attend if they are to ensure the advancement of U.S. national interests. The designation of the cartels as FTOs would ensnare migrants trying to illegally cross the U.S.–Mexico border because they would become subject to charges of providing material support to terrorist organizations. Migrants provide material support to cartels by paying the *piso*—the tax that cartel groups demand of those who travel through Mexican territory under their effective control on the way to the border—and/or by paying or arranging for the payment of their ransom if, while trying to cross, they are kidnapped by cartel groups or criminal groups associated with them (Halliday & Veneski, 2020). A migrant could not claim that they did not know they were aiding the cartels when they paid the *piso* or when they paid to be smuggled across the border, because it is well established that such migrants are aware that the cartels are heavily involved in the smuggling of persons across the border (United Nations High Commissioner for Refugees, 2015). Additionally, the Board of Immigration Appeals has rejected the duress exception for aliens who appeal to it[2] to avoid being denied asylum in the U.S. for providing material support to a terrorist organization (U.S. Board of Immigration Appeals, 2018; Halliday & Veneski, 2020). The board has also affirmed a *de minimis* standard for evaluating what counts as material support, lest anyone think that the degree of material support a migrant may provide

2 Migrants who claimed that they only provided material support under circumstances of duress and are thereby not liable under materials support charges.

under these circumstances is negligible in light of the gargantuan operating costs and profits of the cartels:

> we conclude that the meaning [of "material support"] does not relate to a quantitative requirement. We reiterate that there is no legislative history to support taking a quantitative approach and separating out what amount of support is necessary to make it "material." If an alien affords material support to a terrorist organization, he or she is subject to the bar, regardless of how limited that support is in amount. (U.S. Board of Immigration Appeals, 2018, p. 307).

Under certain legally defined circumstances, however, the attorney general can exempt aliens or groups of aliens from the material support ban (8 U.S.C. 1182 (b)(2)(A)(v)). Alternatively, policymakers may wish to lean into these ramifications, leveraging them against the well-known and widespread problem of U.S. asylum policy abuse (Committee on the Judiciary, 2013; Van Buren, 2019). However this discretionary latitude is used, and one would expect it to be used with vastly different degrees of leniency by different administrations, it cannot provide a definitive solution to this problem. It can only be definitively solved at a statutory level.

There have been numerous cases of corruption and complicity with cartels at all levels of the Mexican government, and there is abundant evidence that the Mexican state is intertwined with organized crime, which in turn has led to elements of that state—for example, police and military—victimizing and persecuting its citizens. There is no disputing there has been a massive loss and/or handover of Mexican sovereignty over its territory in past years, with estimates suggesting that up to 35%–40% of Mexico is under direct cartel rule (Davidson, 2021). However, cartels and their agents in the state still do not hold complete territorial control of Mexico, which means that it is technically possible for asylum claimants under putative threat from one cartel to move to safe harbor elsewhere within the same country.

If the designation of the Mexican cartels as FTOs is to advance U.S. interests overall, policymakers must attend to the previously mentioned difficulties.

Potential Unintended Impacts of an FTO Designation

Policymakers should be aware that designating cartels as terrorist organizations *could*—but would not necessarily—have the unintended consequence of increasing illegal immigration through a flood of asylum claimants, alleging they are fleeing violence from terrorist organizations. There is no precedent for terror designations leading to a surge in asylum claims, however the case of Mexican cartels is obviously *sui generis*.

Section 208 of the Immigration and Nationality Act ("INA"), 8 U.S.C.S. § 1158, makes asylum available to any alien who is determined to be a refugee by the secretary of homeland security or the attorney general, regardless of the alien's immigration status (8 U.S.C.S. § 1158(a)(1), (b)(1)(A)). "Refugee" generally means anyone who cannot return to their home country because of persecution or a well-founded fear of persecution on account of their race, religion, nationality, membership in a particular social group, or political opinion (8 U.S.C.S. § 1101(a)(42)). Once granted asylum, an alien may avoid removal, seek employment, and travel from and return to the United States (8 U.S.C.S. § 1158(c)(1)). Section 241(b)(3) of the INA, 8 U.S.C.S. § 1231(b)(3), provides for withholding of an alien's removal from the United States to a country where the alien's life or freedom would be threatened in that country because of his race, religion, nationality, membership in a particular social group, or political opinion.

Asylum applicants must fill out Form I-589 ("Application for Asylum and for Withholding of Removal"), which contains six separate categories for applicants to designate as the rationale for their applications: (1) race; (2) religion; (3) nationality; (4) political opinion; (5) membership in a particular social group; or (6) Torture Convention. The U.S. government does not track upon which of these categories asylum applications are made or granted (moreover, applicants may designate more than one category, and often do).

Construing INA § 208, 8 U.S.C. § 1158, the U.S. Court of Appeals for the Second Circuit pointed out that "The [asylum] statute protects against persecution not only by government forces but also by nongovernmental groups that the government cannot control" (*Sotelo-Aquije v. Slattery*, 1994, p. 37). In *INS v. Elias-Zacarias* (1992), the U.S. Supreme Court held that "Persecution on account of ... political opinion ... is persecution on account of the *victim's* political opinion, not the persecutor's" (p. 482).

Whether fear of terrorist-designated groups may constitute persecution on account of membership in a social group, or political opinion, is a question that has been treated

inconsistently by the federal judiciary and immigration tribunals. To the extent that a group acts as a criminal enterprise, its victims and opponents are not eligible for asylum based on the claim they are members of a social group enduring persecution. For instance, a high crime rate in an asylee's home country does not make him a member of a persecuted social group. In *Burgos v. U.S. Attorney Gen'l* (2017), the U.S. Court of Appeals for the Eleventh Circuit found that El Salvador's high crime rate did not constitute protected social group persecution of asylees. In *Hapidudin v. Gonzales* (2005), the U.S. Appeals Court for the Ninth Circuit ruled that the applicant's fear that he would suffer because of civil unrest, high incidents of violent crime, socioeconomic conditions, random bombings, and Islamic militia recruiting was not persecution on the basis of a particular social group when those conditions were general to Indonesia. General recruitment efforts by criminal organizations using threats of violence also do not qualify as social group persecution. In, *Barrera v. Garland* (unpublished; 2022), the Ninth Circuit ruled that violent threats by Caballeros Templarios cartel against a Mexican national were not social group persecution, but simply a desire to increase the organization's numbers and strength.

But the legal analyses have been more splintered when asylees invoke "political opinion" based on their interactions with criminal and terrorist organizations. As a baseline, the U.S. Supreme Court has held that evidence that an anti-government group's demands for cooperation were based on political motives is insufficient to demonstrate fear of persecution based on political opinion. In *Elias-Zacarias* (1992), the court held that "The mere existence of a generalized 'political' motive underlying the guerrillas' forced recruitment is inadequate to establish ... [fear of] persecution *on account of* political opinion" (p. 482). Merely refusing to take sides in a violent political conflict does not constitute a "political opinion" for purposes of the asylum law.

In that vein, being subjected to recruitment by a terrorist organization with threats of violence does not comprise persecution on the basis of political opinion where the applicant cannot show he held specific political opinions that caused him to be targeted by the organization. In *Carrasco-Humanani v. INS* (2001), the Ninth Circuit held that Shining Path's murders of Peruvian applicant's family members did not demonstrate he was targeted for his own political opinions.[3] Similarly, an individual's general disapproval of drug cartels has been held not to be a "political opinion" protected by U.S. asylum law. In *Saldarriaga v. Gonzales* (2005), the Fourth Circuit held that "Indeed, to credit such disapproval [of drug cartels] as grounds for asylum would enlarge the category of political opinions to include almost any quarrel with the activities of almost any organization." (p. 467). Other courts, however, have construed political opinion persecution far more broadly. In *Hernandez-Chacon v. Barr* (2020), the Second Circuit held that refusing to submit to the violent advances of gang members may be akin to a political opinion taking a stance against a culture of male domination.

The federal courts' inconsistencies and contradictions in applying political opinion persecution claims have been long-standing and wide-ranging. For instance, the courts do not agree on whether simply being coerced to support a terrorist group creates a political opinion that can be imputed to the asylee victim. In *Aid v. Mukasey* (2008), the Seventh Circuit decided that an Algerian hardware store owner being robbed and threatened by Islamist terrorists for money and supplies was not political opinion persecution. In contrast, in *Delgado v. Mukasey* (2007), the Second Circuit held that refusing to give technical assistance to the FARC in Colombia can be expression of political opinion. Still in further conflict, the Fifth Circuit decided in *Arboleda-Jaramillo v. Mukasey* (2008) that the applicant's desire not to be coerced into joining the FARC was not a political opinion.

The courts are inconsistent on whether and when a political opinion can be imputed to an asylee based on their affiliation with someone the government believes is a terrorist, or their support for the government in opposing terrorist organizations. In *Singh v. Holder* (2014), the Ninth Circuit upheld asylum based on imputed political opinion where the Indian police believed that the applicant, whom they tortured and extorted, was a Kashmiri terrorist based on the affiliation of his former domestic servant. And in *Vilchez-Zarate v. Ashcroft* (unpublished; 2004), the Ninth Circuit held that a Peruvian policeman targeted for assassination by Shining Path terrorists was eligible for asylum based on his imputed political opinion. However, in *Cruz-Navarro v. INS* (2000), the Ninth Circuit held that a Peruvian policeman targeted for assassination by the Shining Path based on his imputed anti-communism was not persecuted for his political opinion.

3 The Shining Path is a Peruvian communist guerrilla group.

Judicial disagreement exists even over whether an asylee's anti-terrorist efforts have been too little, or too much, to qualify for political opinion protection. In *Zhakira v. Barr* (2020), the First Circuit held that a citizen's general support for Kenyan government's efforts against Al-Shabaab was not a protected political opinion absent affirmative acts demonstrating that opinion. In accord with that reasoning, the Eleventh Circuit held in *Warsame v. U.S. Attorney General* (2020) that political opinion asylum might be warranted where Somali educator claimed to have denounced Al-Shabaab and instructed others on the errors of the group's teachings. In stark contrast, in *Adhiyappa v. INS* (1995), the Sixth Circuit upheld denial of asylum because Tamil terrorists targeted a Sri Lankan asylee because he was a government informant against the terrorists, not merely because of his political opinion opposing them.

Seeking to provide a more consistent and rules-based framework for evaluating asylum claims, the Trump administration proposed regulatory changes to the interpretation of "political opinion" in June 2020 (Procedures for Asylum and Withholding of Removal, 2020a). Recognizing "both statutory requirements and the general understanding that a political opinion is intended to advance or further a discrete cause related to political control of a state" (p. 36280), the administration proposed "to define political opinion as one expressed by or imputed to an applicant in which the applicant possesses an ideal or conviction in support of the furtherance of a discrete cause related to political control of a state or a unit thereof" (p. 36280). Under that definition, the administration sought to deny "claims of persecution on account of a political opinion defined solely by generalized disapproval of, disagreement with, or opposition to criminal, terrorist, gang, guerilla, or other non-state organizations absent expressive behavior in furtherance of a cause against such organizations related to efforts by the state to control such organizations or behavior" (p. 36280) against the lawful government. The proposed changes were enacted by final rule on December 11, 2020 (Procedures for Asylum and Withholding of Removal, 2020b), but enjoined from taking effect on January 8, 2021 on the ground that the then-acting secretary of homeland security lacked rulemaking authority (*Pangea Legal Servs. v. U.S. Dep't of Homeland Sec.*, 2021).

Because the U.S. government does not track the categories asylees invoke in support of their applications, or the reasons for which they are granted, it is impossible to ascertain with any degree of numerical certainty what effect an FTO designation might have on asylum claims, or on such claims being granted.

First, it bears noting that in recent years, both the percentage and absolute number of asylum grants to Mexican applicants has been relatively tiny. In the last three years for which data are available (2018-2020), between 1,200 and 1,600 Mexicans have been granted asylum each year (Baugh, 2022, p. 19). For 2018, 4.2% of applicants received asylum; for 2019, 4.5%; and for 2020, 4.8% (pp. 17, 19).

Second, while *ceteris parabis* applies, the United States' recent experience with Colombian asylum applications suggests that designating drug-cartel fueled terrorist groups as FTOs will result in large increases of both asylum applications and asylum grants. The U.S. first began designating FTOs in 1997 (Bureau of Counterterrorism, n.d.). At that time, Colombia was contending with terrorist insurgencies by both FARC and the United Self Defense Forces of Colombia, both of which financed their operations through the drug trade, and both of which were designated FTOs that same year. In 1996, the last full year before the FTO designation, the U.S. received 250 asylum applications and granted 92 such applications (Immigration and Naturalization Service, 1997). By 2001, those numbers had risen to a peak of 7,307 applications, and 5,672 grants, respectively (Immigration and Naturalization Service, 2003). As the Colombian government successfully combatted those insurgencies, both asylum applications and grants gradually diminished (Office of Immigration Statistics, 2013).

In short, while the U.S. government's qualitatively limited statistics make it impossible to measure with any precision how FTO designations affect the number of asylum applications from nations facing those terrorist organizations, the vagueness and judicial flexibility of the U.S. immigration system in applying the "political opinion" persecution standard to asylees provides an incentive for asylees to apply on that basis. Moreover, as the Colombian experience suggests, foreign nationals facing the depredations of FTOs will have more meritorious asylum applications to file than potential asylees not facing a recognized terrorist threat. Given another immigration lever on which to pull, those seeking admittance to the U.S. will do so.

As discussed, *supra*, the U.S. government does not compile statistics tracking the grounds upon which asylum applications are granted. However, asylum grants in total are but a fraction of the immigration burden incurred by

[D]esignating cartels as FTOs is unlikely on its own accord to result in an increase in asylum grants to Mexican nationals.

the U.S. In the pre-pandemic years of 2015–2019, the U.S. granted only between 20,000 and 47,000 asylum applications per year (U.S. Department of State et al., n.d.). By contrast, according to a Cato Institute report, the backlog in the Department of Justice's immigration court system alone (not including other federal agencies handling immigration matters) exceeded 1,000,000 cases in 2019, and rose above 1.8 million in 2022 (Bier, 2022). Those numbers, in turn, pale in comparison to the over 2.76 million immigrants who entered the U.S. illegally through the southern border in just fiscal year 2022 (Ainsley, 2022).

The sheer number of immigration cases impedes the immigration system's ability to ferret out meritless claims, including asylum applications from FTO-affiliated individuals who use political opinion persecution claims as a pretext for obtaining asylum. Anecdotal evidence provides multiple instances of terrorists using the asylum process (as well as other immigration mechanisms) to enter or remain in the U.S. (H.R. 1268, 2005). According to a U.S. House conference committee report (H.R. 1268, 2005), "Ramzi Yousef and Ahmad Ajaj, plotters of the first World Trade Center bombing, concocted bogus political asylum stories when they arrived to remain in the United States in 1992. Similarly, the Blind Sheikh, Sheikh Abdul Rahman, avoided being removed from the United States by filing an application for asylum and withholding of deportation to Egypt in 1992" (p. 160). In addition, "In January 1993, 11 months after he applied for asylum, Mir Aimal Kansi, also known as Mir Aimal Kasi, killed two CIA employees in front of CIA headquarters in Langley, Virginia. ... Kansi had been a visa overstay for almost a year before filing that application" (p. 160). Hesham Hedayet, who "killed two in a shooting spree at LAX on July 4, 2002" entered "the United States in 1992, and extended his stay by filing an asylum application one month before his stay ended. His application was administratively denied, but he adjusted his status 17 months later after his wife won the visa lottery" (pp. 160–161).

According to the same report (H.R. 1268, 2005), in February 1997, "Gazi Ibrahim Abu Mezer was released after entering the United States illegally and after stating that he would be applying for asylum. … In April 1997, he filed an asylum application in which he claimed that 'the Israeli government continuously persecuted him.' … On July 31, 1997, Mezer was arrested in a Brooklyn apartment for allegedly planning to bomb the New York City subway system" (p. 161). "In January 1999, Somali national Nuradin Abdi was granted asylum. … Abdi purportedly used that status to apply for a travel document to facilitate an act of international terrorism. … After he returned to the United States, he was charged with conspiring to provide material support to al Qaeda, and the Justice Department claims 'that Abdi, along with admitted al Qaeda operative Iyman Ferris and other co-conspirators, initiated a plot to blow up a Columbus [Ohio] area shopping mall. ... [W]ith the exception of some minor biographical data, every aspect of Abdi's asylum application was false" (p. 161).

"Gazi Ibrahim Abu Mezer, who was sentenced to life imprisonment for planning to bomb the New York subway system in 1997" (H.R. 1268, 2005, p. 164), provides another illustration of the difficulty judges have in discerning terrorists from legitimate asylum applicants. "Mezer was free in the United States after he was arrested in Washington State by the Border Patrol, which initiated formal deportation proceedings against him. … While in proceedings, Mezer was released on a $5,000 bond and filed an application for political asylum in the United States." His asylum application "claimed that Israeli authorities had persecuted him because they wrongly believed he was a member of Hamas. … In support of his claim that Israel authorities had detained him twice without cause, Mezer attached two documents from the International Committee of the Red Cross. … One document reflected that Mezer was arrested on July 31, 1990, and held for 42 days for a 'security' violation. … The second document indicated that Mezer was arrested on November 25, 1990, and held for approximately 90 days for 'administrative' reasons ... [and] the judge who received that application 'did not notice that Mezer had said he was suspected of being a terrorist in Israel. She added that the assertion about Hamas, in itself, was not persuasive evidence that Mezer was a terrorist or that he should be detained, particularly because Mezer denied the assertion and also because he returned for this hearing after he had posted bond" (pp. 164–165).

Government immigration trial attorneys indicate claims by asylum applicants that they have been falsely accused in their native countries of terrorist connections are commonplace (H.R. 1268, 2005, p. 165). Hence, designating cartels as FTOs is unlikely on its own accord to result in an increase in asylum grants to Mexican nationals, but it is likely to add a greater veneer of plausibility to political opinion persecution claims by asylees, both legitimate and fraudulent. But, overburdened immigration judges have limited evidence at their disposal to evaluate asylum claims. Designating cartels as FTOs will effectively provide additional evidentiary "weight" to political opinion asylum claims before those judges, which will likely result in a marginal increase of asylum grants above the current, relatively small number of such grants.

Concerns About the Potential Impacts of an FTO Designation on American Citizens

Policymakers should also be aware that there are legitimate concerns over whether the relevant statutes and authorizations allowing for a foreign-terror designation for Mexican cartels could plausibly result in innocent American citizens finding themselves vulnerable to prosecution or arrest.

The material support statutes criminalizing material support for terrorist organizations and activities, 18 U.S.C. §§ 2339A and 2339B, serve two separate purposes: (1) §§ 2339A and 2339C prohibit providing "material support" or collecting funds to facilitate a terrorist activity, and (2) § 2339B prohibits providing "material support" to an FTO.

Specifically, § 2339A penalizes "Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, *knowing or intending* [emphasis added] that they are to be used in preparation for, or in carrying out, a violation" of an extensive list of federal criminal statutes. Section 2339B penalizes "Whoever *knowingly* [emphasis added] provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so." Section 2339C sets criminal penalties for one who "unlawfully and *willfully* [emphasis added] provides or collects funds *with the intention* [emphasis added] that such funds be used, *or with the knowledge* [emphasis added] that such funds are to be used, in full or in part, in order to carry out" other unlawful acts.

Citing 18 U.S.C § 2339B(a)(1), the U.S. Supreme Court held in *Holder v. Humanitarian Law Project* (2010) that "the mental state necessary to violate § 2339B [requires only] knowledge of the foreign group's designation as a terrorist organization or the group's commission of terrorist acts." The *Holder* Court further noted, "No person may be prosecuted under [§ 2339B] in connection with the term 'personnel' unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control." For § 2339B's purposes, "Congress plainly ... chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities." Following that logic, the Second Circuit held in *Honickman v. BLOM Bank SAL* (2021) that the defendant bank in that case could not be held liable for material support under § 2339B where the plaintiffs' allegations lacked a reasonable inference that the bank knew of its customer's Hamas ties.

By contrast, the mental state for §§ 2339A (material support) and 2339C (collecting funds) both require knowledge and intent that one's activity will be in furtherance of carrying out an unlawful act (*Holder v. Humanitarian Law Project*, 2010). Put differently, § 2339A "requires proof of a heightened *mens rea*" by which "the defendant must have provided the support or resources acting with the knowledge or intent that the support would be used in preparation for, or in carrying out, specific terror-related crimes" (*In re Chiquita Brands Int'l, Inc.*, 2018, p. 1309).[4] "Thus, the mental state required under § 2339A 'extends both to the support itself, *and* to the underlying purposes for which the support is given,' … and an ATA [Anti-Terrorism Act] plaintiff proceeding on a 2339A predicate must show evidence of the defendant's specific knowledge of, or intent to further, the specified underlying crime."[5] Section 2339C's *mens rea* requirement operates similarly to that of § 2339A (*Schansman v. Sberbank of Russia*, 2021).

4 Citing *U.S. v. Mehanna*, 735 F.3d 32, 43 (1st Cir. 2013) and *U.S. v. Stewart*, 590 F.3d 93, 113 (2d. Cir. 2009).

5 Citing *Mehanna*, 735 F.3d at 43; *U.S. v. Awan*, 459 F.Supp.2d 167, 179 (E.D.N.Y. 2006), *aff'd*, 384 Fed. Appx. 9 (2d Cir. 2010).

It also bears noting that none of the three material support statutes contain exemptions for *de minimis* support; any support of terrorist acts or FTOs, no matter how small, is unlawful. In *U.S. v. Carpenter* (2022), the court recognized that there is no *de minimis* exception to § 2339B's materiality element. In *Rayamahji v. Whitaker* (2019), Circuit Judge Bennett's concurrence observed there is no *de minimis* exception to § 2339A's materiality element (p. 1247).

In sum, individuals or entities who unknowingly, inadvertently, or innocently provide support to cartels or their criminal activities are not criminally or civilly liable under the material support statutes. However, anyone who knowingly provides support to an FTO-designated cartel—even if that support is intrinsically legal—would violate § 2339B. And anyone who knowingly or intentionally collects funds or otherwise provides material support for an unlawful act designated under §§ 2339A or 2339C by or for an FTO-designated cartel, would likely be considered to have provided material support for terrorism under those statutes.

While designating Mexican cartels as FTOs will likely increase the number of asylum applications claiming political opinion persecution and may slightly bolster the odds of asylum being granted on that basis, that outcome is largely a function of the U.S. government's overall failure to grapple with the immigration problem generally. Whether potential terrorists reach American soil, and whether asylum seekers are allowed to be in the U.S., are not outcomes attributable to the U.S. government's decision to designate an organization as an FTO, or whether such a designation assists individuals in successfully obtaining asylum. On the margin, adopting (whether legislatively or administratively) the clarifying criteria for political opinion asylum cases administratively proposed by the Trump administration would probably aid the immigration system in narrowing the kinds of cases to which asylum ought to be granted. However, the relatively small number of people who apply for asylum, and the smaller fraction who gets it, make this change unlikely to noticeably alter net legal Mexican migration into the U.S.

At bottom, however, the willingness to control the border, and to provide the resources needed to timely process immigration claims, are the determinative factors. Requiring would-be immigrants to remain outside of the United States until their applications are lawfully processed, refusing to release apprehended illegal aliens who are in the country, and timely adjudicating and repatriating illegal aliens, are the keys to addressing the immigration problem. Designating cartels as FTOs is unlikely to alter the motivations of Mexican nationals in deciding whether to migrate to America, although it may result in a slight uptick in asylum grants. If the U.S. government designates cartels as FTOs, how it uses that designation to alter the conditions within Mexico will have a far greater impact on migration flows to the north than the FTO designation might on asylum applications.

Conclusion

The increased powers entailed by an FTO designation will enable the U.S. to obstruct cartel operations, arrest or neutralize cartels leaders and associates, and eventually turn the cartels themselves into negligible sources of crime and corruption in Mexico. Given the crisis of security imposed upon the United States and Texas by both factors, an FTO designation is a recommended tool in the kit for policymakers seeking new pathways toward a secure border.

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