

# Applying the “War on Terror” to the “War on Drugs:” The Legal Implications and Benefits of Recategorizing Latin American Drug Cartels as Foreign Terrorist Organizations

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## I. INTRODUCTION

On October 17, 2019, the United States and the Mexican governments attempted to capture Ovidio Guzman Lopez, son of the infamous drug lord Joaquin “El Chapo” Guzman, for extradition to the United States for multiple drug related charges.<sup>1</sup> Government officials believed that Lopez was the newest kingpin of the Sinaloa drug cartel and, therefore, was integral to the cartel’s operation.<sup>2</sup> Although soldiers were prepared, the mission to capture Lopez flooded the city with terror and chaos.<sup>3</sup> Mexican officials were initially able to detain Lopez, but police were soon outnumbered and out-gunned when the cartel’s reinforcements arrived.<sup>4</sup> Some residents fled

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1. Natalie Gallón, *Son of ‘El Chapo’ Was Caught During a Massive Shootout. Mexican Officials Say they Released him to Save Lives*, CNN (Oct. 18, 2019, 5:04 PM), <https://www.cnn.com/2019/10/18/americas/el-chapo-son-custody-shootout-intl-hnk/index.html> [http://perma.cc/D9LU-DRUS].

2. *Id.*  
3. *Id.*  
4. *Id.*

the area while others were helplessly pinned in their homes as federal troops fought cartel members who were armed with heavy artillery and armored vehicles.<sup>5</sup> The mission failed as Lopez was ultimately released by officials in order to stop the violence.<sup>6</sup>

This battle is not an isolated incident. Drug cartels have turned parts of Mexico into warzones. In November 2019, a Mexican drug cartel ambushed a vehicle carrying nine U.S. citizens, six of whom were children.<sup>7</sup> Nine bodies were found burned in a vehicle peppered with bullet holes.<sup>8</sup> One child's body was found "[f]acedown, crunched up in fetal position" out of fear.<sup>9</sup>

Since 2006, when Mexico began its anti-drug campaigns, assisted heavily by the United States, there have been over 300,000 drug-related homicides in Mexico.<sup>10</sup> In 2018, a record high of nearly 36,000 homicides in Mexico were tied to drug cartels.<sup>11</sup> This trend continued in 2019 with approximately ninety murders a day related to Mexico's war on cartels.<sup>12</sup>

The global "War on Drugs" has been highly criticized, especially in recent years.<sup>13</sup> With the flaws discussed below, former President Trump

5. *Id.*

6. *Id.*

7. Suzanne Gamboa, *The U.S. and Mexico have Waged War on Drug Cartels for Decades. They've Fallen Short*, NBC NEWS (Nov. 5, 2019, 2:38 PM), <https://www.nbcnews.com/news/latino/u-s-mexico-have-waged-war-drug-cartels-decades-they-n1076781> [<http://perma.cc/B9RF-2Q84>]; Lizbeth Diaz, *Killed American Family May Have Been 'Bait' in Mexican Cartel Fight: Relatives*, REUTERS (Nov. 6, 2019, 10:24 AM), <https://www.reuters.com/article/us-mexico-violence/killed-american-family-may-have-been-bait-in-mexican-cartel-fight-relatives-idUSKBN1XG2MZ> [<https://perma.cc/89B4-C2C7>] ("The nine American women and children killed in northern Mexico were victims of a territorial dispute between an arm of the Sinaloa Cartel and a rival gang . . .").

8. Diaz, *supra* note 7.

9. Joel Rose, *This Grieving Family Wants the U.S. to Designate Mexican Cartels as Terrorists*, NAT'L PUB. RADIO (Dec. 13, 2019, 5:48 PM), <https://www.npr.org/2019/12/13/787441881/this-grieving-family-wants-the-u-s-to-designate-mexican-cartels-as-terrorists> [<https://perma.cc/8MA5-NPUV>].

10. *Id.*

11. Brianna Lee, *Mexico's War on Drugs*, COUNCIL ON FOREIGN RELS. (Oct. 22, 2019), <https://www.cfr.org/backgrounder/mexicos-drug-war> [<http://perma.cc/VLX7-LQ72>].

12. *Id.*

13. George P. Shultz & Pedro Aspe, *The Failed War on Drugs*, N.Y. TIMES (Dec. 31, 2017), <https://www.nytimes.com/2017/12/31/opinion/failed-war-on-drugs.html> [<http://perma.cc/3ZWW-98VR>]; Christopher J. Coyne & Abigail R. Hall, *Four Decades and Counting: The Continued Failure of the War on Drugs*, CATO INST. (Apr. 12, 2017), <https://www.cato.org/publications/policy-analysis/four-decades-counting-continued-failure-war-drugs> [<http://perma.cc/KMZ3-78VU>].

and Congress proposed adapting the War on Drugs to become more like the “War on Terror” by recategorizing drug cartels as foreign terrorist organizations (FTOs).<sup>14</sup> Although recategorization could be applied to drug cartels throughout the world, this Comment will only discuss implications towards Latin American drug cartels (LADCs).

Since policies and laws from the War on Terror would be applied to LADCs under this recategorization to FTOs, it is important to have a basic working knowledge about the War on Terror. The War on Drugs and the War on Terror are based on different societal emotions and histories, so fleshing out the similarities and differences will allow for a fuller comparison.

First, this Comment will provide a brief history about the War on Drugs, the ineffectiveness of the policies implemented to combat the War on Drugs, and a brief history about the War on Terror. Then, this Comment will discuss applicable international and domestic laws, including the Geneva Conventions, international human rights law, U.S. terrorism laws, U.S. drug laws, and U.S. case law. Additionally, this Comment will consider whether LADCs can be recategorized as FTOs under current U.S. law, analyze how international laws would interact with the recategorized LADCs, and outline both the benefits and consequences with recategorizing LADCs as FTOs. Finally, this Comment will advocate against the recategorization of LADCs as FTOs. Rather, this Comment will advocate for change in U.S. domestic drug laws, which would have an international impact and fundamentally alter the war on drugs.

#### *A. A Brief History About the War on Drugs*

Until the twentieth century, most federally illicit drugs were legal, including cocaine, marijuana, and heroin.<sup>15</sup> However, around the turn of the twentieth century, Congress passed various laws that taxed or restricted the right to import, possess, and use various drugs.<sup>16</sup> For example, the Harrison Act in 1914 regulated and taxed opiates and cocaine, the Smoking Opium Exclusion Act in 1909 banned the non-medicinal use of opium, and the Marihuana

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14. Drug Cartel Terrorist Designation Act, H.R. 1700, 116th Cong. (2019); John Wagner, *Trump: 'Very Seriously' Considering Designating Mexican Drug Cartels as Terrorists*, WASH. POST (Mar. 27, 2019, 7:05 AM), [https://www.washingtonpost.com/politics/trump-very-seriously-considering-designating-mexican-drug-cartels-as-terrorists/2019/03/12/9bfc30f0-44cb-11e9-8aab-95b8d80a1e4f\\_story.html](https://www.washingtonpost.com/politics/trump-very-seriously-considering-designating-mexican-drug-cartels-as-terrorists/2019/03/12/9bfc30f0-44cb-11e9-8aab-95b8d80a1e4f_story.html) [http://perma.cc/Z5S7-EZBV].

15. Coyne & Hall, *supra* note 13.

16. *War on Drugs – Timeline in America, Definition & Facts*, HISTORY (Dec. 7, 2019), <https://www.history.com/topics/crime/the-war-on-drugs> [http://perma.cc/WG2Q-ZGLC] [hereinafter *War on Drugs*].

Tax Act in 1937 placed a federal tax on the sale of cannabis and hemp products.<sup>17</sup>

In 1971, President Nixon began the “War on Drugs” due to a perceived increase of recreational drug use during the 1960s.<sup>18</sup> Drugs were declared “public enemy number one” and the Controlled Substances Act was signed into law.<sup>19</sup> The Act lays schedules of drug classifications—that are later discussed in this Comment—and became the foundation of the modern War on Drugs.<sup>20</sup>

The War on Drugs continued in the Regan administration and expanded with force. First Lady Nancy Reagan began the “Just Say No” campaign in an effort to educate young children on the dangers of drug usage.<sup>21</sup> Congress also passed the Anti-Drug Abuse Act in 1986, which implemented mandatory minimum sentences for certain federal drug offenses.<sup>22</sup>

While the Controlled Substances Act is still in effect today and the Trump administration continued to focus on combatting drug use,<sup>23</sup> many states have begun to push back against the Act’s framework. As of 2019, more than thirty states legalized marijuana, a schedule one drug under the Controlled Substances Act, for either recreational or medical use.<sup>24</sup> Moreover, resistance to the War on Drugs is not unique to the United States. Portugal decriminalized all drugs in 2001 and Oregon decriminalized the possession of small amounts of various schedule drugs.<sup>25</sup> Despite the ongoing global

17. Harrison Narcotics Tax Act, H.R. 6252, 63rd Cong. (1914); Marihuana Tax Act, Pub. L. No. 75-238, 50 Stat. 551, 551–56 (1937) (enacted); *War on Drugs*, *supra* note 16.

18. *War on Drugs*, *supra* note 16.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. See *Ending America’s Opioid Crisis*, WHITE HOUSE, <https://www.whitehouse.gov/opioids/> [http://perma.cc/MG9D-CPLN].

24. See Skye Gould & Jeremy Berke, *Legal Marijuana Just Went on Sale in Illinois. Here Are All the States Where Cannabis is Legal*, BUS. INSIDER (Jan. 1, 2020), <https://www.businessinsider.nl/legal-marijuana-states-2018-1?international=true&r=US> [https://perma.cc/YUN7-DX4X].

25. Chris Ingraham, *Portugal Decriminalised Drugs 14 Years Ago – and Now Hardly Anyone Dies From Overdosing*, INDEPENDENT (June 7, 2015, 6:59 AM), <https://www.independent.co.uk/news/world/europe/portugal-decriminalised-drugs-14-years-ago-and-now-hardly-anyone-dies-from-overdosing-10301780.html> [http://perma.cc/GR9Z-NLSZ]; Cleve R. Wootson Jr. & Jaelyn Peiser, *Oregon Decriminalizes Possession of Hard Drugs, as Four Other States Legalize Recreational Marijuana*, WASH. POST (Nov. 4, 2020), <https://www.washingtonpost.com/nation/2020/11/04/election-drugs-oregon-new-jersey/> [https://perma.cc/64ZV-DJDR].

War on Drugs, many have questioned the effectiveness of current policies and call for its end.

*B. The Current International War on Drugs is Ineffective*

The War on Drugs has profoundly affected the United States and the world, but these effects were not likely intended. To fight the War on Drugs, taxpayers have paid over \$1 trillion since 1970 and continue to pay over \$51 billion every year.<sup>26</sup>

Proponents claim that this spending results in benefits to society, such as the reduction of drug-related crimes, diseases, overdoses, and the establishment of effective means for dismantling organized criminal enterprises.<sup>27</sup>

These proclaimed benefits, however, do not reflect the experiences of U.S. society. For example, incarceration rates for minor drug offenses have increased while disproportionately affecting ethnic minorities and poor communities.<sup>28</sup> Also, once an individual is convicted of a drug-related crime, they are punished even after they serve their sentence.<sup>29</sup> The American Civil Liberties Union (ACLU) has referred to the current drug laws as the “new Jim Crow.”<sup>30</sup> Finally, the House of Representatives created a simple resolution “[t]o acknowledge that the War on Drugs has been a failed policy in achieving the goal of reducing drug use, and . . . to apologize to the individuals and communities that were victimized by this policy.”<sup>31</sup>

Although the United States has led the War on Drugs, its effects have negatively impacted other countries. For example, since the United States began assisting former Mexican President Calderón in anti-drug operations, there has been over 85,000 drug-related deaths.<sup>32</sup> Additionally, the United States’ eradication of opium cultivation in Afghanistan “not only failed to reduce global supply but [has] also empowered and funded the Taliban.”<sup>33</sup>

Likewise, some negative effects have been felt both internationally and domestically. Cartels and dealers have started to sell more pure and potent drugs.<sup>34</sup> Currently, there is no agency ensuring potency or regulating

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26. Coyne & Hall, *supra* note 13.

27. *Id.*

28. *Id.*

29. Tens of thousands of students are denied financial aid for higher education and job opportunities; promotions are also often limited once a person is convicted of a drug-related offense. *Id.*

30. Graham Boyd, *The Drug War Is the New Jim Crow*, NACLA REPORT ON THE AMERICAS (Aug. 2001), <https://www.aclu.org/drug-war-new-jim-crow> [<http://perma.cc/6ZYC-8YBB>].

31. H.R. 933, 115th Cong. (2018).

32. Coyne & Hall, *supra* note 13.

33. *Id.*

34. *Id.*

impurities in substances because the drugs are illegal.<sup>35</sup> As a consequence, it is suspected that the use of these more pure and potent substances has caused an increase in overdose deaths.<sup>36</sup> In 2014, there were almost fifteen deaths for every 100,000 people in the United States, compared to the approximately one death for every 100,000 people in 1971.<sup>37</sup> Moreover, due to various state and federal laws that prohibit buying needles without a prescription, drug users often reuse dirty needles, which increases the risk of transmitting illnesses like Hepatitis C, Hepatitis B, and HIV/AIDS.<sup>38</sup> In 2012, an estimated 91,000 Americans were living with HIV/AIDS acquired by drug use.<sup>39</sup>

The War on Drugs has increased drug-related violence because people have no legal means to resolve disputes or protect their businesses interests.<sup>40</sup> Sellers and buyers cannot turn to police or other legal “dispute-resolution mechanisms” because their participation in the drug trade would result in incarceration.<sup>41</sup> Since legal means of solving disputes are not possible, “individuals must solve their own problems, which often means they use violence.”<sup>42</sup>

Finally, the War on Drugs directly led to the “cartelization” of the drug trade for two main reasons.<sup>43</sup> First, drug prohibition keeps only some manufacturers out of the industry, but those remaining are “more comfortable with using violence and engaging in illicit activity.”<sup>44</sup> Secondly, government prohibitions “effectively drive out would-be competitors, making it easier for cartels to form and maintain their dominant market position.”<sup>45</sup> This is because the operations of incarcerated small independent manufacturers, distributors, and dealers is unlikely to survive because users can find a new source for their drugs.<sup>46</sup> Large cartels, on the other hand, continue their business when members are incarcerated because there are other members

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35. *Id.*  
36. *Id.*  
37. *Id.*  
38. *Id.*  
39. *Id.*  
40. *Id.*  
41. *Id.*  
42. *Id.*  
43. *Id.*  
44. *Id.*  
45. *Id.*  
46. *Id.*

to fill the void.<sup>47</sup> This phenomena creates cartel monopolies because only cartels are left to compete with one another when smaller manufacturers are incarcerated, which leads to higher prices, increased violence, and corruption.<sup>48</sup>

Although arguments in favor of the drug prohibition have existed since the inception of the War on Drugs, history and statistics prove its ineffectiveness. This means that the United States needs to determine a new approach to the drug epidemic. This Comment considers two solutions: (1) the recategorization of LADCs to FTOs and (2) the legalization of recreational drugs in the United States.

### C. *A Brief History About the War on Terror*

On September 11, 2001, nineteen terrorists hijacked four East Coast flights.<sup>49</sup> Three of these flights crashed into heavily populated and iconic landmarks, including the New York City Twin Towers and the Pentagon in Washington D.C.<sup>50</sup> Almost 3,000 people died.<sup>51</sup> The infamous terrorist attacks of September 11, 2001 shook the world and began the United States-led global War on Terror.<sup>52</sup> After discovering that al-Qaeda and its leader, Osama bin Laden, were behind the terrorist attack,<sup>53</sup> the United States launched “Operation Enduring Freedom,” which aimed at removing the Taliban from power in Afghanistan and crippling al-Qaeda.<sup>54</sup> Afghanistan’s Taliban regime protected al-Qaeda after the September 2001 terrorist attacks at the cost of people struggling to survive in Afghanistan, so the United States and its allies joined in air strikes and ground war.<sup>55</sup> Operation Enduring Freedom was never meant to be a short war, but rather it was purposely going to take years to fight.<sup>56</sup>

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47. *Id.*

48. *Id.*

49. *A Timeline of the U.S.-Led War on Terror*, HISTORY (May 5, 2020), <https://www.history.com/topics/21st-century/war-on-terror-timeline> [<http://perma.cc/5LX4-MFTZ>] [hereinafter *U.S.-led War on Terror*].

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Operation Enduring Freedom*, NAVAL HIST. & HERITAGE COMMAND (Aug. 7, 2020, 1:27 PM), <https://www.history.navy.mil/browse-by-topic/wars-conflicts-and-operations/middle-east/operation-enduring-freedom.html> [[perma.cc/U8EQ-L633](https://perma.cc/U8EQ-L633)].

55. *The Global War on Terror: The First 100 Days*, U.S. DEP’T OF STATE (Jan. 20, 2009), <https://2001-2009.state.gov/s/ct/rls/wh/6947.htm> [<https://perma.cc/5ZED-MCTG>]; *U.S.-led War on Terror*, *supra* note 49.

56. *See id.* It is not clear that the public was aware of the U.S. government’s intent for Operation Enduring Freedom to last an extended period of time.

The War on Terror spread to Iraq in early 2003 when the United States attempted to stop Iraqi dictator, Saddam Hussein, from using “weapons of mass destruction.”<sup>57</sup> By December 2003, Hussein was captured.<sup>58</sup> In 2006, Hussein was executed for war crimes and crimes against humanity.<sup>59</sup> President Obama ultimately declared an end to military operations in Iraq in August 2010.<sup>60</sup>

Finally, in May 2011, Osama bin Laden was found in a Pakistan compound where he was killed by U.S. Special Forces.<sup>61</sup> Although President Obama announced a withdrawal of U.S. troops from Afghanistan in June 2011, the war in Afghanistan did not officially end until December 2014.<sup>62</sup>

Under the Trump administration, the United States and the Taliban worked towards an agreement to withdraw the remaining 14,000 U.S. troops in Afghanistan.<sup>63</sup> Although the United States had been withdrawing from Afghanistan, the birthplace of the War on Terror, the U.S. military continues to fight the War on Terror in 80 countries worldwide, which is more than “40% of the world’s nations.”<sup>64</sup>

While the United States focused on Hussein and bin Laden, another terrorist group gained strength in the Middle East—the Islamic State of Iraq and the Levant group (ISIL).<sup>65</sup> Once Hussein was killed and his regime in Iraq collapsed in 2003, ISIL filled the void and fanned the flames of civil war.<sup>66</sup> ISIL grew because of “deepening furrows between Sunni and Shia Muslims” and, therefore, was able to build terrorist “underground

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Stephanie Savell, *This Map Shows Where in the World the U.S. Military Is Combatting Terrorism*, SMITHSONIAN MAG. (Jan.–Feb. 2019), <https://www.smithsonianmag.com/history/map-sh70ows-places-world-where-us-military-operate72s-180970997/> [http://per73ma.cc/Z35A-A7FP].

65. ISIL was originally known as the Islamic State in Iraq and al Sham (“ISIS”). See *The Rise and Fall of ISIL Explained*, AL JAZEERA (June 20, 2017), <https://www.aljazeera.com/features/2017/6/20/the-rise-and-fall-of-isil-explained> [https://perma.cc/34Y9-CTSV] [hereinafter *Rise and Fall of ISIL*].

66. See Daniel Byman, *Worried About an Islamic State Comeback? Here’s Why That’s Unlikely*, WASH. POST (Oct. 29, 2019, 4:00 AM), <https://www.washingtonpost.com/politics/2019/10/29/worried-about-an-islamic-state-comeback-heres-why-thats-unlikely/> [https://perma.cc/TDS9-AWSH].

networks and sleeper cells.”<sup>67</sup> While ISIL was originally part of al-Qaeda, it became the notorious terrorist organization known today in 2013 when it built its own independent terrorist cell in Syria.<sup>68</sup> ISIL became widely known for brutal violence and terrorist attacks in Iraq.<sup>69</sup>

There have also been numerous international terrorist attacks. In July 2005, al-Qaeda bombed London, England, injuring over 700 individuals and killing 52 people.<sup>70</sup> In 2015, ISIL attacked Paris, France, resulting in 130 deaths and nearly 500 injured people.<sup>71</sup>

While fighting the War on Terror, the U.S. military has been accused of detainee abuse and torture. Between the military base in Guantánamo Bay, Cuba and Abu Ghraib prison in Iraq, the United States has undoubtedly engaged in unthinkable behavior for the sake of fighting terror.<sup>72</sup> These allegations have led to inquiries and lawsuits as discussed in Section II.

The War on Terror, and how the United States fights it, has grown from its inception under former President George W. Bush as international threats have changed. Under the Obama and Trump administrations, drone strikes became the predominant method of fighting the War on Terror because such warfare “makes it easier and cheaper to conduct counterterrorism operations, thus reducing casualty risk for U.S. and allied troops.”<sup>73</sup> During Obama’s eight years as President, there were 1,878 drone strikes, compared to the 2,243 drone strikes under the Trump administration.<sup>74</sup>

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67. *Rise and Fall of ISIL*, *supra* note 65.

68. *Id.* See also Martin Smith & Linda Hirsch, *Frontline: The Rise of ISIS*, PUB. BROAD. SERV. (Oct. 18, 2014), <https://www.pbs.org/wgbh/frontline/film/rise-of-isis/transcript/> [<http://perma.cc/2QSY-778A>] (“ISIS didn’t become the group that it is today until they went to Syria. Syria is what made ISIS[,] ISIS.”).

69. *Rise and Fall of ISIL*, *supra* note 65.

70. *U.S.-led War on Terror*, *supra* note 49.

71. *2015 Paris Terror Attacks Fast Facts*, CNN (Dec. 19, 2018, 3:38 PM), <https://www.cnn.com/2015/12/08/europe/2015-paris-terror-attacks-fast-facts/index.html> [<http://perma.cc/D8BC-2ECR>].

72. Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, N.Y. TIMES (Nov. 30, 2004), <https://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in-guantanamo.html> [<http://perma.cc/KNG3-5GFL>]; Jenifer Fenton, *Ex-Guantanamo Guard Tells of Violence Against Detainees*, CNN (Oct. 28, 2011, 11:14 AM), <https://www.cnn.com/2011/10/28/world/meast/guantanamo-guard/index.html> [<http://perma.cc/CWM6-YTDU>]; Maha Hilal, *Abu Ghraib: The Legacy of Torture in the War on Terror*, AL JAZEERA (Oct. 1, 2017), <https://www.aljazeera.com/indepth/opinion/abu-ghraib-legacy-torture-war-terror-170928154012053.html> [<http://perma.cc/AFK2-BCMB>].

73. Marcus Müller, *The Fog of Drone War: Lessons from the U.S. and European Armed Drone Policy*, AM. INST. FOR CONTEMP. GER. STUD. (Apr. 10, 2019), <https://www.aicgs.org/2019/04/the-fog-of-drone-war-lessons-from-the-u-s-and-european-armed-drone-policy/> [<http://perma.cc/B9YJ-P34W>].

74. *Trump Revokes Obama Rule on Reporting Drone Strike Deaths*, BBC (Mar. 7, 2019), <https://www.bbc.com/news/world-us-canada-47480207> [<http://perma.cc/RZ2B-SJBU>].

## II. APPLICABLE LAW

The applicable law for recategorizing LADCs as FTOs is divided into two sections: (1) domestic laws and (2) international laws governing the United States. The relevant domestic laws include terrorism laws and drug laws. Pertinent international laws include the Geneva Conventions and International Humanitarian Law, both of which govern how the United States interacts with foreign countries and entities.

### A. Domestic Laws

#### 1. Terrorism Laws

##### a. Statutory Law

The United States established various laws to combat terrorism. Under 8 U.S.C. § 1189 (a)(1)(A-C), the Secretary of State can designate an organization as a foreign terrorist organization if: (1) it is a foreign organization; (2) the organization engages in terrorist activity, terrorism, or retains the ability and intent to do so; and (3) said activity threatens the security of United States nationals or United States national security.<sup>75</sup> Terrorism is defined as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.”<sup>76</sup> Terrorist activity includes:

(I) The hijacking [sic] or sabotage of any conveyance . . . (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person . . . (III) A violent attack upon an internationally protected 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.<sup>77</sup>

This law also allows terrorist activity to be prosecuted in the United States if (1) the activities were illegal in the place it was committed (i.e. outside of U.S. jurisdiction) or (2) if the activity would have been committed

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75. 8 U.S.C. § 1182(a)(3)(B)(iii) (defining terrorist activity); 22 U.S.C. § 2656f(d)(2) (defining terrorist activity); 8 U.S.C. § 1189(a)(1)(A)–(C).

76. 22 U.S.C. § 2656f(d)(2).

77. 8 U.S.C. § 1182(a)(3)(B)(iii)(I)–(VI).

in the United States and was illegal in the United States.<sup>78</sup> Once deemed a terrorist organization, the organization is subject to all U.S. laws in place to protect national security.<sup>79</sup> An organization can file a petition for revocation and submit evidence that they are not an FTO, which the Secretary of State will review.<sup>80</sup> The only other way to change an FTO designation is by an act of Congress.<sup>81</sup>

Under 18 U.S.C. § 2339B(b)(1), it is illegal in the United States to provide material support to foreign terrorists.<sup>82</sup> In this context, material support includes “property . . . or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . and transportation.”<sup>83</sup>

The detention of prisoners designated as terrorists has led to many controversies both internationally and domestically. Almost immediately after the September 2001 terrorist attacks on the United States, Congress passed the Authorization for Use of Military Force (AUMF) to fight international terrorism.<sup>84</sup> The AUMF allows the President to “use all necessary and appropriate force” against nations or forces that the President determines were involved in the September 2001 terrorist attacks.<sup>85</sup> Former President George W. Bush issued Executive Order 13440, which interpreted the Geneva Conventions Common Article 3 to be inapplicable to the Central Intelligence Agency’s detention and interrogation of detainees in the War on Terror.<sup>86</sup> He also decided that captured Taliban and al-Qaeda members are not protected by prisoner of war status; nonetheless, he claimed they would be treated humanely.<sup>87</sup>

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78. 8 U.S.C. § 1182(a)(3)(B)(iii).

79. 8 U.S.C. § 1189(a)(2)(B). These laws include but are not limited to the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001), Foreign Intelligence Surveillance Act of 1978, Pub. L. 95-511, 92 Stat. 1783 (1978), and the Military Force Authorization resolution 2001, Pub. L. 107-40, 115 Stat. 224 (2001).

80. 8 U.S.C. § 1189(a)(4)(B).

81. 8 U.S.C. § 1189(a)(5).

82. 18 U.S.C. § 2339B.

83. 18 U.S.C. § 2339A.

84. Military Force Authorization Resolution 2001, S.J. Res. 23, 107th Cong. (2001).

85. *Id.*

86. See *infra* Section II(B)(1); Exec. Order No. 13,440, 3 C.F.R. 13440 (2007).

87. George H. Aldrich, *The Taliban, al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT’L L. 891, 892 (2002). But see Adam Zagorin & Michael Duffy, *Inside the Interrogation of Detainee 063*, TIME (June 19, 2005), <https://time.com/3624326/inside-the-interrogation-of-detainee-063/> [<http://perma.cc/9AES-CYM5>] (explaining inhumane conditions of detainees).

Congress also quickly passed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act to fight domestic terrorism.<sup>88</sup> The PATRIOT Act is designed to arm law enforcement with new tools to detect and prevent terrorism.<sup>89</sup> This Act allows for increased surveillance, delayed informing to suspects of warrants used to search private spaces, information sharing across agencies, obtaining search warrants in any jurisdiction, increase in penalties for convicted terrorists, and many other tools.<sup>90</sup>

*b. Case Law*

Operating under the AUMF framework, the federal government attempted to exclude all War on Terror detainee cases from judicial review.<sup>91</sup> The government sought locations to hold detainees labeled as enemy combatants where U.S. courts would not have jurisdiction in attempts to avoid courts from “imposing the peacetime standards with which they were most familiar.”<sup>92</sup> The government settled on U.S. Naval base in Guantánamo Bay, Cuba (GTMO), where individuals suspected of being a terrorist were held for extended periods of time without being formally charged with crimes and received no right to judicial review.<sup>93</sup>

The U.S. Supreme Court finally heard and consolidated two habeas corpus cases from Guantánamo Bay detainees in June 2004. In the first case, *Hamdi v. Rumsfeld*, a U.S. citizen named Hamdi was detained while visiting Afghanistan, labeled an enemy combatant, and held indefinitely by U.S. military forces at GTMO.<sup>94</sup> Hamdi filed a writ of habeas corpus claiming he was being denied due process under the Fifth Amendment and sought to challenge his status as an “enemy combatant.”<sup>95</sup> The government argued

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88. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter USA PATRIOT Act].

89. *Id.*; *The USA PATRIOT Act: Preserving Life and Liberty*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/archive/ll/highlights.htm> [<http://perma.cc/C5NV-ML7V>].

90. *See* USA PATRIOT Act, *supra* note 88; *The USA PATRIOT Act: Preserving Life and Liberty*, *supra* note 89.

91. Jonathan Shaw, *The War and the Writ Habeas Corpus and Security in an Age of Terrorism*, HARV. MAG. (Jan. 2009), <https://harvardmagazine.com/2009/01/the-war-the-writ> [<http://perma.cc/8ZED-UX9C>].

92. *Id.*

93. *See id.*

94. *Hamdi v. Rumsfeld*, 542 U.S. 507, 511–13 (2004).

95. *Id.* at 515.

that during a time of war, the Executive could declare detainees who were suspected of fighting against the United States as “enemy combatants” and, therefore, restrict their access to the courts.<sup>96</sup> The Court held that the judiciary did not have to defer to the Executive as to the status of “enemy combatants” and, thus, detainees had a right to challenge their status in court.<sup>97</sup>

In the second case, *Rasul v. Bush*, non-U.S. citizens were detained by U.S. military forces in the Middle East and were held indefinitely at GTMO.<sup>98</sup> The detainee’s families filed a petition seeking a writ of habeas corpus claiming that the U.S. government could not hold non-citizens indefinitely and deny the detainees access to the courts.<sup>99</sup> The government argued U.S. courts lacked jurisdiction over non-citizens and the detainees were being held in a country where the United States was not sovereign—Cuba.<sup>100</sup> The Court found that the United States had sufficient control over GTMO to ensure habeas corpus rights and, therefore, federal courts had jurisdiction.<sup>101</sup>

Two years later, the U.S. Supreme Court heard *Hamdan v. Rumsfeld*.<sup>102</sup> Hamdan was Osama bin Laden’s former driver and was detained by U.S. military forces and held indefinitely at GTMO.<sup>103</sup> After Hamdan filed a petition for a writ of habeas corpus challenging his detention and enemy combatant status, he received a trial before a military tribunal that designated him as an enemy combatant.<sup>104</sup> The Court held that Congress did not properly authorize military tribunals to hear detainee cases and, therefore, the use of the military tribunals violated the Uniform Code of Military Justice and Geneva Conventions Common Article 3.<sup>105</sup>

Congress responded to *Hamdan* by passing the Military Commission Act of 2006, which explicitly established new Military Commissions to hear GTMO detainee cases.<sup>106</sup> Some political scientists, lawyers, and humanitarians theorized that Congress and President Bush were trying to keep high-profile cases out of civilian federal courts.<sup>107</sup> Ultimately, the Court held that the Military Commission Act of 2006 operated in violation of the Geneva Conventions and unconstitutionally suspended detainees’

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96. *Id.* at 519.

97. *See id.* at 525.

98. *Rasul v. Bush*, 542 U.S. 466, 470 (2004).

99. *Id.* at 471–72.

100. *Id.* at 475–76.

101. *Id.* at 481.

102. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

103. *Id.* at 570.

104. *Id.* at 570–71.

105. *Id.* at 593–95, 628–32.

106. HELEN DUFFY, *THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW 687* (Cambridge Univ. Press, 2d ed. 2015).

107. *Id.*

writ of habeas corpus and, thus, detainees who were labeled as enemy combatants could seek writs of habeas corpus.<sup>108</sup>

## 2. Drug Laws

American drug laws are comprehensive and reach outside U.S. jurisdiction in the guise of national security. Congress passed 21 U.S.C. § 812, which categorized drugs into five “schedules” ranging from Schedule I to Schedule V.<sup>109</sup> Schedule I substances are completely prohibited because they have a “high potential for abuse,” no accepted medical purpose, and “a lack of accepted safety for use under medical supervision.”<sup>110</sup> Schedule V substances are not prohibited but rather require a prescription from a medical professional because these substances have “low potential for abuse” and “abuse of the drug . . . may lead to limited physical dependence” but has current accepted medical use for treatment.<sup>111</sup> Schedule I and Schedule II are most relevant for this Comment because they are the predominant drugs that cartels use in their drug trade.<sup>112</sup>

The U.S. government has expanded the reach of the Drug Enforcement Agency (DEA) with the enactment of several laws. For instance, 21 U.S.C. § 959 prohibits the manufacturing or distribution of controlled substances in which a person intended, knew, or reasonably should have known that the substance would be imported into the United States.<sup>113</sup> This act “is intended to reach acts of manufactur[ing] or distribution committed outside the territorial jurisdiction of the United States.”<sup>114</sup>

Additionally, 21 U.S.C. § 960 prohibits unlawful acts, such as “knowingly or intentionally import[ing] or export[ing] a controlled substance” and “manufactur[ing] [or] possess[ing] with intent to distribute . . . a controlled substance.”<sup>115</sup> The law also sets forth the penalties for committing such

108. See *Boumediene v. Bush*, 553 U.S. 723, 792 (2008).

109. 21 U.S.C. § 812(a)–(b); *Understanding the Controlled Substances Act*, ADDICTION CTR., <https://www.addictioncenter.com/addiction/controlled-substances-act-and-scheduling/> [<http://perma.cc/83T9-R6H2>].

110. 21 U.S.C. § 812(b)(1); see also *Understanding the Controlled Substances Act*, *supra* note 109.

111. 21 U.S.C. § 812(b)(2).

112. Schedule II substances are deemed to have a “high potential for abuse,” current accepted medical use, and “abuse of the drug . . . may lead to severe psychological or physical dependence.” *Id.* at § 812(b)(3).

113. 21 U.S.C. § 959.

114. *Id.* at § 959(d).

115. *Id.* at § 960(a)(1)–(3).

unlawful acts.<sup>116</sup> 21 U.S.C. § 960a then extends the penalties for unlawful acts to foreign terrorist organizations.<sup>117</sup> The statute also expands jurisdiction beyond U.S. borders if the offense affects foreign commerce.<sup>118</sup> Finally, if the offense occurs outside of the United States but the “offender is brought into or found in the United States,” the United States has jurisdiction to prosecute.<sup>119</sup>

## B. International Laws

### 1. The Geneva Conventions & Additional Protocols

The four Geneva Conventions and three Additional Protocols are a series of international treaties created to establish the Humanitarian Law of Armed Conflict.<sup>120</sup> These Conventions and the Additional Protocols “are at the core of international humanitarian law.”<sup>121</sup> Common Article 3 was considered a breakthrough because it was the first international agreement to cover a Non-International Armed Conflict (NIAC).<sup>122</sup> A NIAC involves only *one* sovereign state and includes a variety of conflicts, such as “civil wars, internal armed conflicts that spill over into other States [and] internal conflicts in which third States . . . intervene alongside the government.”<sup>123</sup>

The Geneva Conventions apply International Humanitarian Law (IHL) only to International Armed Conflicts (IACs) or NIACs.<sup>124</sup> IACs are subject to most of the Geneva Conventions, whereas NIACs are only subject to

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116. *Id.* at § 960(b).

117. *Id.* at § 960a.

118. *Id.* at § 960a(b)(2).

119. *Id.* at § 960a(b)(5).

120. The first Geneva Convention “protects wounded and sick soldiers on land during war,” the second Geneva Convention “protects wounded, sick and shipwrecked military personnel at sea during war,” the third Geneva Convention “applies to prisoners of war” and the fourth Geneva Convention “protects civilians.” *The Geneva Conventions of 1949 and Their Additional Protocols*, INT’L COMM. OF THE RED CROSS (Jan. 1, 2014), <https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols> [http://perma.cc/3RBC-JJAW] [hereinafter *The Geneva Conventions*]; *Geneva Conventions*, HISTORY (Aug. 21, 2018), <https://www.history.com/topics/world-war-ii/geneva-convention> [http://perma.cc/UM8R-BS9W].

121. *The Geneva Conventions*, *supra* note 120.

122. *Id.*

123. *Advisory Service on International Humanitarian Law: What is International Humanitarian Law?*, INT’L COMM. OF THE RED CROSS (July 2004), [https://www.icrc.org/en/doc/assets/files/other/what\\_is\\_ihl.pdf](https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf) [http://perma.cc/AQN8-SMJ6] [hereinafter *Advisory Service*]; *The Geneva Conventions*, *supra* note 120.

124. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; *Advisory Service*, *supra* note 123.

Geneva Convention Common Article 3 (Common Article 3) and Additional Protocol II Article I (Protocol II Article I).<sup>125</sup>

Common Article 3 only applies to armed conflicts occurring between non-state armed groups.<sup>126</sup> Despite Common Article 3's requirement that a NIAC occur "in the territory of one of the High Contracting Parties," this language has lost its importance over time and is often overlooked in practice.<sup>127</sup> This is because "any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention."<sup>128</sup> The term "High Contracting Parties" in the Geneva Conventions refers to state governments that are a party to the Conventions and could cause legal problems in armed conflicts.<sup>129</sup>

Additionally, Protocol II Article 1 supplements and develops Common Article 3 but does not amend it.<sup>130</sup> It mandates that NIACs are not internal disturbances, such as riots or sporadic acts of violence.<sup>131</sup> To determine whether this minimum level of violence is met, the International Committee of the Red Cross (ICRC) suggests two requirements.<sup>132</sup> First, there must be a minimum level of intensity in the hostilities.<sup>133</sup> Second, nongovernmental entities who are considered "parties to the conflict" must possess organized

125. See *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*, INT'L COMM. OF THE RED CROSS 1–4 (Mar. 2008), <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf> [<http://perma.cc/R76R-K94N>] [hereinafter *Armed Conflict Defined*]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter *Additional Protocol II*]; *The Geneva Conventions*, *supra* note 120.

126. See *Armed Conflict Defined*, *supra* note 125, at 3.

127. See *id.*

128. *Id.*

129. See *Commentary of 2017 Article 1: Respect for the Convention*, INT'L COMM. OF THE RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=76AB35F0B510E070C1258115003B9413> [<http://perma.cc/9ZK3-EZP6>]; "The ICRC is an independent, neutral organization ensuring humanitarian protection and assistance for victims of armed conflict and other situations of violence," and was adopted under the original Geneva Conventions of 1864. *Mandate and Mission*, INT'L COMM. OF THE RED CROSS, <https://www.icrc.org/en/who-we-are/mandate> [<http://perma.cc/ZLH5-ABNV>].

130. *Armed Conflict Defined*, *supra* note 125, at 3.

131. *Id.*

132. *Id.*

133. *Id.*

armed forces as to essentially have control of an area.<sup>134</sup> Unlike Common Article 3, Additional Protocol II applies to state armed forces as well as non-state armed groups.<sup>135</sup>

It is important to determine the categorization of an individual under the Geneva Conventions in order to establish the individual's level of protected rights. Under the Geneva Conventions, someone is either a combatant, who can be lawfully attacked, or a civilian, who cannot be lawfully attacked unless they "directly participate in hostilities."<sup>136</sup> If an individual is a member of a state military or state armed group, they can lawfully be attacked even if they are not actively participating in combat because they serve a "continuous combat function."<sup>137</sup> A civilian directly participates in hostilities when "they carry out acts which aim to support one party to the conflict by directly causing harm to another party, either directly inflicting death, injury or destruction, or by directly harming the enemy's military operations or capacity."<sup>138</sup> Conversely, a civilian indirectly participates in hostilities when they contribute to "general war effort[s] of a party, but do[] not directly cause harm."<sup>139</sup> This indirect participation could lead to a loss of protection from attack, but such a determination is heavily fact dependent.<sup>140</sup>

## 2. *International Humanitarian Rights Law & the ICCPR*

During peacetime, when there is no armed conflict to trigger the Geneva Conventions requirements, International Human Rights Law (IHRL) operates in its place.<sup>141</sup> IHRL was established to create government obligations and ensure fundamental human rights and freedoms are protected.<sup>142</sup> Most IHRL provisions can be suspended in times of armed conflict but are then supplemented with the Geneva Conventions.<sup>143</sup> IHRL can be found in various

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134. *Id.*

135. *Id.*

136. See *Direct Participation in Hostilities: Questions & Answers*, INT'L COMM. OF THE RED CROSS, <https://www.icrc.org/en/doc/resources/documents/faq/direct-participation-ihl-faq-020609.htm> [<http://perma.cc/J8YB-XSSM>].

137. *Id.* For example, a member of the U.S. military can be deployed to Afghanistan and be killed while eating dinner without violating the Geneva Conventions.

138. *Id.*

139. *Id.*

140. *Id.* The determination of direct or indirect is fact determinative. For example, a truck full of ammunition driven from a factory to the front lines would be considered direct participation in hostilities, whereas driving the same truck full of ammunition far from the frontlines to a port to be traded would be considered indirect participation.

141. *Advisory Service*, *supra* note 123.

142. *Human Rights*, UNITED NATIONS, <https://www.un.org/en/global-issues/human-rights> [<http://perma.cc/P9F6-SMEG>].

143. An IAC is only between two states. *Advisory Service*, *supra* note 123.

treaties, including the International Covenant on Civil and Political Rights (ICCPR).<sup>144</sup> Countries, such as the United States, who ratified the ICCPR are obligated to:

[P]rotect and preserve basic human rights, such as: the right to life and human dignity; equality before the law; freedom of speech, assembly, and association; religious freedom and privacy; freedom from torture, ill-treatment, and arbitrary detention; gender equality; the right to a fair trial; right [to] family life and family unity; and minority rights.<sup>145</sup>

### III. LEGAL ANALYSIS

#### A. Latin American Drug Cartels Recategorized as Foreign Terrorist Organizations

The first step of this analysis is to determine if LADCs can be recategorized as terrorist organizations under 8 U.S.C. § 1189(a)(1)(A–C). This statute provides three requirements for an organization to be considered an FTO, which will be applied to LADCs to determine if they can be recategorized.<sup>146</sup> However, all of the elements are easily satisfied, therefore allowing recategorization: (1) the organization is foreign, (2) the organization engages in terrorism or terrorist activity, and (3) such activities threaten U.S. national security or citizens.<sup>147</sup>

The first element, whether the organization is foreign, is easily met.<sup>148</sup> Some notorious LADCs that concern the U.S. government include: the Sinaloa Cartel, the Jalisco New Generation Cartel, the Juarez Cartel, the Gulf Cartel, Los Zetas Cartel, and the Beltran-Leyva Organization.<sup>149</sup> The U.S. government has not focused explicitly on other Latin American countries recently, but has paid attention to Colombian and Dominican organizations that collaborate with Mexican cartels that smuggle drugs into the United States.<sup>150</sup>

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144. See International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

145. The United States ratified the ICCPR in 1992. *FAQ: The Covenant on Civil & Political Rights (ICCPR)*, AM. C.L. UNION, <https://www.aclu.org/other/faq-covenant-civil-political-rights-iccpr> [<http://perma.cc/LW55-9WZY>] [hereinafter *FAQ: ICCPR*].

146. 8 U.S.C. § 1189(a)(1)(A–C).

147. See *id.*

148. *Id.* § 1189(a)(1)(A).

149. U.S. DEP'T OF JUST. DRUG ENF'T ADMIN., 2018 NATIONAL DRUG THREAT ASSESSMENT 97 (Oct. 2018) [hereinafter NDTA].

150. See *id.* at 100, 102.

The second element, whether the organization engages in terrorist activities or terrorism, requires more discussion but is nonetheless satisfied.<sup>151</sup> This element does not require the acts of terror be committed in the United States.<sup>152</sup> In Mexico, there has been increased violence, assassinations, and intimidation of politicians since 2017, including a surge in the lead up to the 2018 elections.<sup>153</sup> Drug cartels have been responsible for hanging corpses in public, beheadings, and placing car bombs.<sup>154</sup> Violence has skyrocketed even though former Mexican President Felipe Calderón fought against the cartels with full military force in an effort to save Mexico from its deteriorating security.<sup>155</sup> Cartels target competing cartels, government officials, journalists, police, and ordinary civilians with brutal violence to show power and instill fear in their area.<sup>156</sup> This violence undoubtedly fits the definition of terrorism under 22 U.S.C. § 2656f(d)(2) and the definition of terrorist activities under 8 U.S.C. § 1182(a)(3)(B).<sup>157</sup>

The final element, whether the activities threaten U.S. citizens or national security, is also easily satisfied.<sup>158</sup> An essential and inherent component of the illicit drug trade is violence and fear, “Traffickers use it to settle disputes, and a credible threat of violence maintains employee discipline and a semblance of order with suppliers, creditors, and buyers.”<sup>159</sup> U.S. citizens are at high risk if they cross the border into Mexico, as demonstrated by the November 2019 massacre of women and children on their way back to the United States after visiting family in Mexico.<sup>160</sup>

Additionally, drugs brought into the United States have likely led, at least in part, to an increase in drug poisoning deaths.<sup>161</sup> In 2016, approximately 174 people died every day from drug poisoning, which is a greater number of deaths than homicide, motor vehicle crashes, firearms, and suicide.<sup>162</sup>

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151. 8 U.S.C. § 1189(a)(1)(B).

152. *Id.* § 1189(a)(1).

153. JUNE S. BEITTEL, CONG. RSCH. SERV., R41576, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS 1 (2020).

154. *Id.*

155. Christopher J. Curran, *Spillover: Evolving Threats and Converging Legal Authorities in the Fight Against Mexican Drug Cartels*, 6 HARV. NAT’L. SEC’Y J. 344, 352–53 (2015).

156. *Id.*

157. 22 U.S.C. § 2656f(d)(2); 8 U.S.C. § 1182(a)(3)(B).

158. 8 U.S.C. § 1189(a)(1)(C); NDTA, *supra* note 149, at v (“Illicit drugs, as well as the transnational and domestic criminal organizations who traffic them, continue to represent significant threats to public health, law enforcement, and national security in the United States.”).

159. BEITTEL, *supra* note 153, at 2.

160. Gamboa, *supra* note 7.

161. *See* NDTA, *supra* note 149, at v.

162. *See id.*

The spillover violence and increase of drug-related deaths are a threat to U.S. nationals and U.S. national security.<sup>163</sup>

For the reasons stated above, LADCs can be recategorized as terrorist organizations under 8 U.S.C. § 1189(a)(1)(A–C) with no changes to the current law.

*B. International Law Applied to the Recategorization of  
Latin American Drug Cartels*

*1. The Geneva Conventions Applied to the War on Terror*

President George W. Bush correctly identified two separate conflicts in the War on Terror.<sup>164</sup> The first conflict was against al-Qaeda, “A clandestine organization with elements in many countries and composed apparently of people of various nationalities, which has the purpose of advancing certain political and religious objectives by means of terrorist acts directed against the United States.”<sup>165</sup> Al-Qaeda was not considered a state and, therefore, not protected by the Geneva Conventions as an NIAC or IAC because the group lacked proper organizational structure and motives.<sup>166</sup>

The second conflict in the War on Terror was against the Taliban.<sup>167</sup> However, unlike al-Qaeda, the Taliban was effectively the government of Afghanistan at the time of the conflict.<sup>168</sup> Both the United States and Afghanistan were signing parties to the Geneva Conventions,<sup>169</sup> so this conflict was considered an IAC under the Geneva Conventions.<sup>170</sup> Since

163. John Burnett, ‘Spillover’ Violence From Mexico: Trickle or Flood, NAT’L PUB. RADIO (July 6, 2011), <https://www.npr.org/2011/07/06/137445310/spillover-violence-from-mexico-a-trickle-or-flood> [<https://perma.cc/HRF7-R6N9>].

164. Aldrich, *supra* note 87, at 893.

165. *Id.*

166. *Id.*; see also Jeffrey S. Schoenwald, *Terrorist Organizations Are Not Entitled To the Protection of the Geneva Conventions*, FORBES (Mar. 26, 2015), <https://www.forbes.com/sites/realspin/2015/03/26/terrorist-organizations-are-not-entitled-to-the-protection-of-the-geneva-conventions/#79e0c15d96e6> [<http://perma.cc/B6R6-7QDD>]; see also *International Humanitarian Law, Terrorism and Counter-Terrorism*, U.N. OFF. ON DRUGS & CRIME, <https://www.unodc.org/e4j/en/terrorism/module-6/key-issues/ihl-terrorism-and-counter-terrorism.html> [<http://perma.cc/3CAH-VJFY>]; Adam Roberts, *The Laws of War in the War on Terror*, 79 NAVAL WAR COLL. INT’L L. STUD. 175 (2002).

167. See Aldrich, *supra* note 87, at 893.

168. *Id.*

169. See Geneva Convention Relative to the Treatment of Prisoners of War, Dec 8, 1949, 75 U.N.T.S. 135.

170. Aldrich, *supra* note 87, at 893.

the Taliban was Afghanistan's de facto government, the Taliban was bound to obey and could be protected under the Geneva Conventions.<sup>171</sup> Aldrich concludes that "the legal difficulties . . . with the actions taken by the United States concerning prisoners captured in Afghanistan exist only with respect to persons who served in the armed forces of the Taliban, not with respect to those who were members of the [al-]Qaeda terrorist group."<sup>172</sup>

After *Hamdan*, which held that Common Article 3 is violated when detainees are labeled as "enemy combatants" in GTMO without due process,<sup>173</sup> the above two-part analysis of the War on Terror is likely outdated. *Hamdan* implicitly held that detainees must be treated as combatants or civilians under the Geneva Conventions.<sup>174</sup> Then, once they are captured, they must be treated as prisoners of war or civilians.<sup>175</sup> The Court in *Hamdan* rejected the U.S. government's argument that a person's rights under the Geneva Conventions and U.S. Constitution could be categorically infringed on after the person was labeled an "enemy combatant."<sup>176</sup> Therefore, the Geneva Conventions protect all persons during times of NIAC or IAC, and even if the Geneva Conventions do not apply, at the very least, IHRL will apply.

## 2. *The Geneva Conventions Applied to the War on Drugs*

The first step is to establish which part of the Geneva Conventions applies—Common Article 3 and Additional Protocol II Article I or the remaining Geneva Conventions—is to determine the type of conflict at issue. Unlike the Taliban, which acted as Afghanistan's de facto government,<sup>177</sup> drug cartels are not the legitimate governments in Latin American countries.<sup>178</sup> Rather, cartels operate with blatant disregard for the laws of their country and take advantage of the government's inability to fight back adequately.<sup>179</sup>

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171. *Id.*

172. *Id.* at 898.

173. *Hamdan*, 548 U.S. at 570–71.

174. *See id.*

175. *See id.*

176. *See id.*

177. Aldrich, *supra* note 87, at 893.

178. The United States recognizes the legitimate governments in Latin American countries, such as Mexico, Colombia, Venezuela, and Chile. There are no countries in Latin America that do not have a recognized legitimate government. Bureau of Intel. & Rsch., *Independent States in the World*, U.S. DEP'T OF STATE (Jan. 29, 2021), <https://www.state.gov/independent-states-in-the-world/> [<https://perma.cc/WA3F-5DSN>].

179. The illegal activities cartels engage in vary. For example, Los Zetas takes part in the illegal drug trade but also "fuel theft, extortion, kidnapping, human smuggling, and arms trafficking." NDTA, *supra* note 149, at 98. Whereas the Knights Templar operates in the illegal drug trade, extortion, and illegal mining. BEITTEL, *supra* note 153, at 26. Some cartels, such as the Colombian Medellín and Cali cartels, operate predominantly in the illegal drug trade. *Drug Wars: the Colombian Cartels*, PUB. BROAD. SERV., <https://www.pbs.org/wgbh/pages/>

This means cartels must be non-state dissident groups and the conflict must be labeled as an NIAC under Additional Protocol II.

It could be argued that cartels are similar to governments because they operate in and defend specific regions where they have power.<sup>180</sup> Cartels aggressively protect the regions they operate in with public displays of extreme violence and mayhem that are then published to social media to spread fear.<sup>181</sup> Although legitimate governments do not defend their borders with violence or mayhem against their citizens, governments do protect their borders from intrusion by engaging in wars and using government agencies to enforce the country's laws.<sup>182</sup> An example of how a cartel can act akin to a government, despite having a legitimate government in power in the country, is Pablo Escobar's Medellín Cartel.<sup>183</sup> Escobar ruthlessly protected his illegal cocaine enterprise, which made an estimated \$420 million per week and totaled approximately \$22 billion a year.<sup>184</sup> However, Escobar earned the nickname "Robinhood" because he "hand[ed] out cash to the poor, buil[t] housing for the homeless, construct[ed] 70 community soccer fields, and buil[t] a zoo."<sup>185</sup>

There is no evidence that modern cartels give back to their operational regions and people who live in those regions like the Medellín cartel. Notwithstanding this fact, the Medellín cartel was operating, albeit illegally and influentially, under an established and recognized sovereign government.<sup>186</sup>

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frontline/shows/drugs/business/inside/colombian.html [http://perma.cc/6YMU-C4N4]; see Jeremy Kryt, *Why the Military Will Never Beat Mexico's Cartels*, DAILY BEAST (July 12, 2017, 6:57 PM), <https://www.thedailybeast.com/why-the-military-will-never-beat-mexicos-cartels> [http://perma.cc/ZN6W-EXJA].

180. See Scott Steward, *Tracking Mexico's Cartels in 2019*, STRATFOR (Jan. 29, 2019), <https://worldview.stratfor.com/article/tracking-mexicos-cartels-2019> [http://perma.cc/QU2E-9G3Q].

181. For example, Los Zetas use extreme violence to intimidate rival cartels, law enforcement, and civilians. BEITTEL, *supra* note 153, at 23.

182. See, e.g., *Border Security Overview*, HOMELAND SEC. (Nov. 22, 2019), <https://www.dhs.gov/border-security-overview> [https://perma.cc/7FNF-TW86] (explaining that the U.S. Department of Homeland Security is responsible for ensuring national security and safe travel into and out of the United States).

183. See Amy Tikkanen, *Pablo Escobar Colombian Criminal*, BRITANNICA, <https://www.britannica.com/biography/Pablo-Escobar> [http://perma.cc/2Z37-JTX7].

184. Amanda Macias, *10 Facts Reveal the Absurdity of Pablo Escobar's Wealth*, BUS. INSIDER (Sept. 21, 2015, 8:43 AM), <https://www.businessinsider.com/10-facts-that-prove-the-absurdity-of-pablo-escobars-wealth-2015-9> [http://perma.cc/TT6D-ZUHV].

185. *Id.*

186. See Christopher Wood et al., *'El Chapo' Guzman's Reign Is Finally at an End – Here's How He Compares to Colombian Kingpin Pablo Escobar*, BUS. INSIDER (Mar.

Accordingly, the argument that cartels are similar to governments fails; cartels are more similar to al-Qaeda than the Taliban in the War on Drugs. Therefore, LADCs are non-state actors and would be protected under Common Article 3 and Additional Protocol II Article I if the Geneva Conventions are found to apply.

Next, it must be determined whether there is a sufficient minimum level of violence that rises beyond the standard “sporadic acts of violence.”<sup>187</sup> The minimum level of hostilities is easily satisfied because drug cartels use violence as a way to settle disputes and instill fear into the surrounding population.<sup>188</sup> Mexican drug cartel violence is displayed in “beheadings, public hanging of corpses, and murders of dozens of journalists and officials.”<sup>189</sup>

Third, drug cartels must essentially possess organized armed forces to have control over an area.<sup>190</sup> As discussed above, the cartels do not have typical governmental control over a geographic area because they are functioning under an established Latin American government.<sup>191</sup> However, this does not mean the cartels lack organized armed forces that essentially control areas of countries, as seen by Guzman’s escape.<sup>192</sup> Cartels are all structured differently, but one common thread of truth is that their success depends on orders being followed promptly and accurately.<sup>193</sup> Although traditional drug kingpins and their hierarchical armies are less common in modern cartels, smaller fragmented groups are more common and equally as, if not more, violent.<sup>194</sup> The violence created by either type of cartels is difficult

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21, 2019, 2:00 PM), <https://www.businessinsider.com/how-pablo-escobar-and-el-chapo-guzman-compare-2019-3> [<https://perma.cc/B283-CA82>].

187. Additional Protocol II, *supra* note 125.

188. BEITTEL, *supra* note 153, at 2.

189. *Id.* at 1.

190. *See Armed Conflict Defined*, *supra* note 125.

191. *See infra* note 196.

192. BEITTEL, *supra* note 153, at 11–12.

193. Tarry Gross, ‘Narconomics’: How The Drug Cartels Operate Like Wal-Mart and McDonald’s, NAT’L PUB. RADIO (Feb. 15, 2016, 1:05 PM), <https://www.npr.org/2016/02/15/466491812/narconomics-how-the-drug-cartels-operate-like-wal-mart-and-mcdonalds> [<https://perma.cc/WDR5-KJZP>] (explaining that cartels operate similarly to big-box stores and franchises); Douglas Johnson, *The Latin American Drug Syndicates*, E. SIDE UNION HIGH SCH. DIST., <http://staff.esuhsd.org/balochic/studentprojects/drugsyndicates/index.html> [<http://perma.cc/5Z9C-SRVR>] (showing the hierarchical structure of the Cali Cartel); Gisela Bichler et al., *Drug Supply Networks: A Systematic Review of the Organizational Structure of Illicit Drug Trade*, BMC (Jan. 31, 2017), <https://crimesciencejournal.biomedcentral.com/articles/10.1186/s40163-017-0063-3> [<https://perma.cc/N25L-5PX7>] (explaining that modern cartels have various forms and are more decentralized than cartels from the 1980s to the 1990s); *see generally* BEITTEL, *supra* note 153 (explaining the various structural forms which allows cartels to stay in power).

194. BEITTEL, *supra* note 153, at 11.

to measure because of restricted governmental reporting.<sup>195</sup> Despite the difficulty in determining the specific cartel that may be causing the violence, it is known that the increase in violence discussed above is done by one of the cartels as a means to control their region.<sup>196</sup>

Accordingly, LADCs should be covered by the Geneva Conventions under Common Article 3 and Additional Protocol II Article I. However, similar to how President George W. Bush categorized al-Qaeda,<sup>197</sup> if LADCs were recategorized, they would not fall under the protections of the Geneva Conventions. The Geneva Conventions do not govern because LADCs are not states, but rather terrorist organizations and, therefore, are not covered as NIACs or IACs of Common Article 3.<sup>198</sup> Since the *Hamdan* ruling, this area of law remains unsettled.<sup>199</sup>

Nonetheless, even individual terrorists and terrorist organizations are protected under IHRL found in the ICCPR. Thus, even though some may feel that alleged terrorists deserve no rights, the U.S. government must ensure basic human rights under the ICCPR.<sup>200</sup>

### C. Legal Benefits & Consequences of Recategorization

#### 1. Legal Benefits of Recategorization

##### a. Increased Funding for the War on Drugs

If LADCs are recategorized as FTOs, the military would likely receive an increase in funding. Since the War on Terror's commencement in 2001, the military budget has fluctuated in response to international tensions, terrorism incidents, and developing goals.<sup>201</sup> For instance, when the War on Terror began in 2001, Congress appropriated approximately \$22.9 billion.<sup>202</sup> As violence escalated and U.S. forces stood their ground, the military budget increased with a record high of \$186.9 billion appropriated for the

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195. *Id.* at 12.

196. *See id.* at 16, 23.

197. *See* Aldrich, *supra* note 87, at 203.

198. *See Armed Conflict Defined*, *supra* note 125.

199. *Hamdan*, 548 U.S. at 570–71.

200. ICCPR, *supra* note 144, at 179; *FAQ: ICCPR*, *supra* note 145.

201. *See generally* Kimberly Amadeo, *War on Terror Facts, Costs, and Timeline*, BALANCE (July 23, 2020), <https://www.thebalance.com/war-on-terror-facts-costs-timeline-3306300> [<http://perma.cc/9Y6E-X3MN>] (explaining the fluctuation of the military budget throughout the War on Terror in response to events during respective years).

202. *Id.*

War on Terror in 2008.<sup>203</sup> There was a decline in appropriations for the War on Terror from 2009 until 2016—with Congress appropriating \$58.9 billion in 2016.<sup>204</sup> Since then, Congress has increased the appropriated funds for the War on Terror to \$164.6 billion in 2020.<sup>205</sup> If LADCs are recategorized as FTOs, the budget would likely increase to account for a more expansive War on “Narco-terrorism.”

*b. Increased Military Presence in Foreign Countries*

With increased funding for the War on Narco-terrorism, the United States would be able to expand military bases in Latin America. This would, in turn, increase the number of military personnel throughout Latin America to combat the new War on Narco-terrorism. If this new war follows a similar history to the War on Terror, increased U.S. military presence would likely lead to the capturing and trying of high-ranking cartel members. LADCs would likely be unable to function properly if high-ranking cartel members were captured,<sup>206</sup> as shown by the decreased stability of al-Qaeda and the Taliban when Osama bin Laden and Saddam Hussein were captured and killed.<sup>207</sup>

*c. Drone Strikes*

Starting with the Obama administration, drone strikes have become the predominant method of fighting the War on Terror.<sup>208</sup> One explanation for the increased use of drone strikes in the War on Terror is that “they have made attacks more precise . . . [resulting] in fewer casualties and less destruction.”<sup>209</sup> It is also important to note that the Geneva Conventions and other international treaties allow the use of drones for both combating

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203. *Id.*

204. *Id.*

205. *Id.*

206. This argument has some problems. Namely, unlike the ideologically driven terrorist organizations, cartels are run more like a business where the leader can change without the organization collapsing. For example, El Chapo was captured and tried but the Sinaloa cartel survived with El Chapo’s son taking his place. BEITTEL, *supra* note 153, at 16–17 (“Sinaloa survived the arrest of its billionaire founder El Chapo Guzmán in 2014.”). This ability to change high-ranking members makes LADCs more likely to survive.

207. See Meghan Keneally, *The War in Afghanistan Started 18 Years Ago to Fight Terrorism After 9/11. Is the US Safer*, ABC NEWS (Oct. 7, 2019, 2:02 AM), <https://abcnews.go.com/International/war-afghanistan-started-18-years-ago-fight-terrorism/story?id=65981061> [<http://perma.cc/54AE-AP5H>].

208. See Müller, *supra* note 73.

209. *The Use of Armed Drones Must Comply with Laws*, INT’L COMM. OF THE RED CROSS (Oct. 5, 2013), <https://www.icrc.org/en/doc/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm> [<http://perma.cc/7GXN-CR2P>].

and gathering intelligence.<sup>210</sup> The use of drones is subject to IHL, meaning the military must use the utmost care to ensure civilians are not harmed during drone missions.<sup>211</sup>

If LADCs are recategorized as FTOs, the U.S. military would be able to use drone strikes on the new terrorists provided the military takes “all feasible precautions in order to spare the civilian population and infrastructure.”<sup>212</sup> The military would have to “suspend or cancel an attack if the expected incidental harm or damage to civilians or civilian objects would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>213</sup>

It is foreseeable that foreign countries would resist the U.S. military using ordinances in their country. To avoid such tension, the United States and respective Latin American countries would need to work out an agreement regarding the scope of authority for the U.S. military, the scope of joint operations, the requirements for engaging LADCs, and the parameters of other military action.

#### *d. Use of the PATRIOT Act*

If LADCs are recategorized as FTOs in the War on Narco-terrorism, the U.S. government would be allowed to use the full force of the PATRIOT Act. This would allow police and other agents within U.S. borders to use increased surveillance on individuals who are suspected of involvement in the illicit drug trade regardless of their rank. Agents would also be allowed to take advantage of delaying when they inform suspects that a warrant was issued to search their private effects.

These additional benefits from the PATRIOT Act would allow agents to follow leads and connections up the chain of the cartels to find high-ranking members more efficiently. During this process, agents would also remove illicit drugs from the reach of consumers and decrease the profits of LADCs.

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210. *See id.*

211. *See id.*

212. *Id.*

213. *Id.*

*e. Increased Border Security & Ability to Bar Access into the United States and Freeze Assets*

If LADCs are recategorized as FTOs, it would allow the United States to freeze assets and deny known cartel members and suspected affiliates entry into the United States.<sup>214</sup> Prosecutors would also be able to charge low-level dealers with assisting an FTO under 21 U.S.C. § 2339A.<sup>215</sup> With these increased capabilities and funding, border security could be expanded to ensure that cartel members and individuals working for cartels are kept out of the United States or are severely monitored.

*2. Legal Consequences of Recategorization*

*a. A High Number of Arrests Does Not Correlate with a Successful War*

A consequence of the War on Terror is the inability of law enforcement agencies to capture high-ranking members of terrorist organizations. Instead, low-ranking members are predominately apprehended since it often takes many years, countless hours of planning, and thousands of dollars to apprehend high-ranking targets.<sup>216</sup> Even when high-ranking members are captured, imprisoned, or killed, the war continues. For example, it took the United States nearly ten years to capture and kill Osama bin Laden, and although the capture of Saddam Hussein amounted to less than one year of work, it required three additional years for trial and execution.<sup>217</sup> Within the approximately seven years it took to capture these two high-ranking targets the United States spent over a trillion dollars on the Iraq and Afghanistan wars.<sup>218</sup> It is estimated that by the end of 2020 the War on Terror will have cost the United States \$7 trillion in military spending alone.<sup>219</sup>

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214. 8 U.S.C. § 1189(a)(2)(C); Jonathan Landay et al., *Exclusive: After Cabinet Opposed Mexican Cartel Policy, Trump Forged Ahead*, REUTERS (Dec. 26, 2019, 8:07 AM), <https://www.reuters.com/article/us-usa-mexico-cartels-exclusive/exclusive-after-cabinet-opposed-mexican-cartel-policy-trump-forged-ahead-idUSKBN1YU0XQ> [<http://perma.cc/KKS9-8WSF>]; Curran, *supra* note 155.

215. 21 U.S.C. § 2339A (2009).

216. *See generally* Daniel L. Byman, *Are We Winning the War on Terrorism?*, BROOKINGS (May 23, 2003), <https://www.brookings.edu/research/are-we-winning-the-war-on-terrorism/> [<https://perma.cc/MWE6-5UXQ>] (explaining that in 2003 the United States arrested, captured, or killed over 3,000 al-Qaeda members and charged over 200 of them as terrorists—a majority of al-Qaeda leadership remained alive and free to rebuild and expand al-Qaeda).

217. *See U.S.-led War on Terror*, *supra* note 49.

218. *See Amadeo*, *supra* note 201; *see also U.S.-led War on Terror*, *supra* note 49.

219. Leo Sahne III, *Price Tag of the 'War on Terror' Will Top \$6 Trillion Soon*, MILITARY TIMES (Nov. 14, 2018), <https://www.militarytimes.com/news/pentagon-congress/2018/11/14/price-tag-of-the-war-on-terror-will-top-6-trillion-soon/> [<http://perma.cc/W256-FTC6>].

In the time it took to capture and kill Saddam Hussein and Osama bin Laden many low-level terrorists were arrested. By March 21, 2019, 178 individuals were charged as terrorists.<sup>220</sup> Yet, of the total detainees imprisoned at GTMO, 92% of them were not, in the government's opinion, al-Qaeda fighters and did not fit the enemy combatant status.<sup>221</sup> As of 2014, there were still 149 men detained at GTMO.<sup>222</sup> Of these men, forty-six are subject to indefinite detention because they cannot be prosecuted but are "too dangerous" to be released, while eighty-six were cleared for release but were not released.<sup>223</sup> Although the United States captured and killed two high-profile terrorists, its efforts in doing so resulted in great injustices to humankind and did not end the War on Terror.<sup>224</sup>

A similar comparison can be drawn to the current War on Drugs. In 2017, there were 1,632,921 arrests for drug-related offenses in the United States.<sup>225</sup> Of these arrests, only 238,406 (approximately 14.6%) were for the sale or manufacturing of drugs, while the remaining 1,394,515 (approximately 85.4%) were for drug possession.<sup>226</sup> Simply because 1.6 million drug-related arrests were made in 2017 does not mean the United States is safer or has less drugs on the streets. Not only has law enforcement arrested a shockingly few number of manufacturers and dealers for the amount of money being spent, but individuals who are arrested are unlikely to be high-ranking members of a cartel.<sup>227</sup>

A historical example of this problem comes from the aforementioned Pablo Escobar. Escobar rose to power as a high-profile cartel member in the 1980s but was not killed until 1993.<sup>228</sup> During this time, Escobar

220. Emma Broches & Julia Solomon-Strauss, *International Terrorism Prosecutions During Winter 2019*, LAWFARE (Mar. 21, 2019), <https://www.lawfareblog.com/international-terrorism-prosecutions-during-winter-2019> [http://perma.cc/K8MG-EEAS].

221. DUFFY, *supra* note 106, at 672.

222. *Id.*

223. *Id.* at 672–73.

224. Besides the great deal of injustice at GTMO, in 2005 there were approximately 3,000 non-combatant civilian deaths from the War on Terror in Afghanistan and almost 25,000 in Iraq. Girardeau A. Spann, *Terror and Race*, 45 WASHBURN L.J. 89, 94 (2005).

225. *Estimated Annual Number of Arrests for Drug Offenses in the US by Type of Offense*, DRUG WAR FACTS, <https://www.drugwarfacts.org/table/annual-drug-arrests> [http://perma.cc/5RZM-P2WB].

226. *Id.*

227. Over \$47 billion is spent annually in the United States on the War on Drugs. *Drug War Statistics*, DRUG POL'Y ALL., <http://www.drugpolicy.org/issues/drug-war-statistics> [http://perma.cc/THC6-TGRG].

228. Tikkanen, *supra* note 183.

supplied 80% of the world's cocaine and imported fifteen tons of cocaine into the United States every day.<sup>229</sup> This means that Escobar supplied four out of every five lines snorted in the United States.<sup>230</sup> It did not matter how much money was spent trying to bring down the Medellín Cartel or the fact that Escobar was eventually imprisoned, the Medellín Cartel continued.<sup>231</sup>

The War on Terror and the War on Drugs share many common themes, the most prevalent of which proves that law enforcement agencies are not effectively fighting either war simply because arrest numbers are high. Terrorist organizations have not ceased terrorizing the world when their leaders are captured or killed. Similarly, drugs have not stopped flowing into the United States despite high arrest and incarceration numbers. If LADCs are recategorized as FTOs, it is unlikely, based on the history of the War on Terror, that the War on Narco-terrorism would have greater success in capturing high-ranking officials or bringing down LADCs as a whole.

#### *b. Strains on International Relations*

U.S. officials, such as former President Trump, may be genuinely trying to help Latin American countries and protect U.S. national security by recategorizing LADCs. However, Mexico has explicitly declined this “help” because the United States’ unilateral advancements against LADCs makes some countries nervous.<sup>232</sup>

Additionally, with the United States’ brutal and bloody history in the Middle East, it is worrisome to know the War on Terror could spread closer to U.S. borders. If LADCs are recategorized, the United States would likely increase the amount of military personnel in Latin America. This increased presence, coupled with the known violence of LADCs, is likely to strain foreign relations.

A major reason the United States is able to occupy countries in the name of fighting terror is because the occupied country is either complicit and welcomes intervention or has a weak government as be to nonexistent and

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229. Macias, *supra* note 184.

230. *Id.*

231. Tikkanen, *supra* note 183.

232. Mexican President Andres Manuel Lopez Obrador specifically requested the recategorization not be made. *Trump Says He Will Hold Off Designating Mexican Drug Cartels as Terrorist Groups*, REUTERS (Dec. 6, 2019), <https://www.reuters.com/article/us-usa-mexico-cartels/trump-says-he-will-hold-off-designating-mexican-drug-cartels-as-terrorist-groups-idUSKBN1YA2MB> [<http://perma.cc/P4PH-MCEG>].

unable to stop the United States' occupation.<sup>233</sup> However, once a government is strong enough to resist the U.S. military or the looming threat has receded sufficiently, the United States can be expelled from that country.<sup>234</sup> If countries are resisting the recategorization before it happens, it seems unlikely that they would allow their countries to be occupied by the U.S. military or bombed by drone strikes.

*c. Asylum Seekers*

If the United States recategorized LADCs to FTOs, thus beginning a War on Narco-terrorism, migrants fleeing the occupied countries would be more likely “to win asylum charges by claiming they were fleeing terrorism.”<sup>235</sup> This claim of fleeing terrorism could extend beyond Latin America, because “while Mexican cartels’ territorial stronghold is within their own country, they have representatives on every continent except Antarctica.”<sup>236</sup>

Finally, some are worried that the United States’ expansion of FTO designation would not logically stop at cartels, but rather could expand to various foreign gangs and other criminal organizations.<sup>237</sup> This could lead to an expansion of claims by other asylum seekers outside of Latin America which “would weaken [former President] Trump’s immigration policies.”<sup>238</sup>

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233. For example, after the fall of Saddam Hussein, Iraq was complicit in the U.S. occupation because there was an insufficient foundation for a functioning democratic government. Kyle Crichton et al., *Timeline of Major Events in the Iraq War*, N.Y. TIMES, [https://archive.nytimes.com/www.nytimes.com/interactive/2010/08/31/world/middleeast/20100831-Iraq-Timeline.html?src=tptw##/time111\\_3263](https://archive.nytimes.com/www.nytimes.com/interactive/2010/08/31/world/middleeast/20100831-Iraq-Timeline.html?src=tptw##/time111_3263) [<http://perma.cc/RU38-H3B5>]. Syria, during their civil war during the aftermath of the Arab Spring, for example, had little to no government to oppose the U.S. occupation of their country. Not only was there no strong government, but the people of Syria called for Democracy as terrorist groups caused chaos and terror throughout the country. *Arab Spring*, HISTORY (Jan. 10, 2018), <https://www.history.com/topics/middle-east/arab-spring> [<http://perma.cc/7ZUB-36VY>].

234. Iraq, for example, decided to expel U.S. military forces once terrorist threats decreased and the government was stable enough to not need constant U.S. support. See Steve Inskeep, *Why U.S. Troops Should Stay Even Though Iraq’s Parliament Voted Them Out*, NAT’L PUB. RADIO (Jan. 7, 2020), <https://www.npr.org/2020/01/07/794163542/why-u-s-troops-should-stay-even-though-iraqs-parliament-voted-them-out> [<http://perma.cc/F9PB-N29E>].

235. Landay et al., *supra* note 214.

236. *Id.*

237. *Id.*

238. *Id.*

#### *d. Diverting Funds*

If LADCs are recategorized as FTOs to fight a War on Narco-terrorism, then funding for the military and other national defense would almost certainly increase because of the expansion of U.S. military operations. This means, however, that money would be diverted from other sources.<sup>239</sup> Since the United States only has a finite amount of money in the national budget, the more money the United States spends on the military means less funds are available for other institutions, such as education, Social Security, or Medicare.<sup>240</sup>

#### *e. Draining the U.S. Justice System*

Drug offenders, including mules, low-level dealers, or suppliers, within the United States could be charged with assisting an FTO under 18 U.S.C. § 2339B(b)(1) and 18 U.S.C. § 2339A if LADCs are recategorized to FTOs. For example, a low-level drug dealer caught selling drugs that had been smuggled for a Mexican drug cartel could be charged with assisting an FTO. In order to prove this charge, law enforcement would need to spend extra time and resources searching for any connection between the low-level dealer and the Mexican cartel. The lower down the drug cartel's hierarchy the accused dealer is, the less likely they are to have *actual knowledge* of the source of the drugs or that they are providing material assistance to LADCs by selling its product. Still, the government could argue that even low-level drug dealers should *reasonably know* that illicit drugs often come from foreign cartels and that selling these illegal drugs provides material support by completing the final step of the supply chain—selling to drug users.

Assuming that law enforcement is able to provide sufficient evidence to prosecute and convict the low-level drug dealer for the drug offenses *and* the charge for providing material support to an FTO, the low-level drug dealer would then be in prison for longer than previously possible. The government would then need to feed, clothe, and shelter the low-level drug dealer. Because the low-level drug dealer was likely unaware, but still maintain the requisite *mens rea*, they assisted an FTO in selling its drugs, precious government resources are wasted imprisoning the low-level drug dealer. Not to mention the fact that the low-level drug dealer likely had no way of knowing the source of the drugs, whether that source

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239. See Jeff Stein & Aaron Gregg, *U.S. Military Spending Set to Increase for Fifth Consecutive Year, Nearing Levels during Height of Iraq War*, WASH. POST (Apr. 18, 2019), <https://www.washingtonpost.com/us-policy/2019/04/18/us-military-spending-set-increase-fifth-consecutive-year-nearing-levels-during-height-iraq-war/> [http://perma.cc/TCA3-4JE2].

240. *Id.*

be the United States, LADCs, or any other supplier in the world. Therefore, charging low-level drug dealers with assisting an FTO is ineffective at fighting the War on Narco-terrorism and only wastes U.S. resources.

*f. Due Process & Court Jurisdiction*

The War on Terror also resulted in a surplus of due process and jurisdictional issues. Once suspected terrorists were arrested, constitutional due process violations and lack of judicial oversight became a prominent issue. The main reason for the lack of judicial oversight originated from attempts by Congress and the President to keep detainee cases from being heard in civilian federal courts.<sup>241</sup> As discussed in the next section, detainees faced immense hardship and were not entitled to have their cases heard by U.S. courts until the U.S. Supreme Court granted review.<sup>242</sup> Eventually, in several landmark cases the United States Supreme Court held that the Judiciary could hear habeas corpus cases from prisoners in military bases outside the United States,<sup>243</sup> U.S. courts did not have to defer to the Executive Branch for determinations of “enemy combatant” status,<sup>244</sup> and all detained persons were protected by the Geneva Conventions.<sup>245</sup>

Although the War on Terror shifted away from the imprisonment of detainees under the Obama administration, it seems unlikely that capturing and detaining suspects will stop completely.<sup>246</sup> Capturing suspects for information and inside intelligence is a historically common and widely accepted method of waging warfare.<sup>247</sup> The third Geneva Convention was specifically written to protect prisoners of war while detained by enemy armies.<sup>248</sup>

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241. DUFFY, *supra* note 106, at 669–70.

242. *See, e.g.*, Rasul v. Bush, 542 U.S. 466, 466 (2004); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 507 (2004); *see also* Boumediene v. Bush, 553 U.S. 723, 724 (2008).

243. Rasul, 542 U.S. at 466.

244. Hamdi, 542 U.S. at 507–08.

245. Hamdan, 548 U.S. at 563–64.

246. Denise A. Cardman, *Enemy Combatants*, AM. BAR ASS'N, [https://www.americanbar.org/advocacy/governmental\\_legislative\\_work/priorities\\_policy/civil\\_liberties/enemy\\_combatants/](https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/civil_liberties/enemy_combatants/) [<https://perma.cc/43KC-3JRW>]; *see* Carol Rosenberg et al., ‘In Bad Shape and Getting Worse,’ *Guantanamo Poses Headaches for Biden*, N.Y. TIMES (Dec. 15, 2020), <https://www.nytimes.com/2020/12/15/us/politics/guantanamo-biden.html?searchResultPosition=5> [<https://perma.cc/N6Z8-YASU>].

247. *Prisoner of War: International Law*, BRITANNICA, <https://www.britannica.com/topic/prisoner-of-war> [<https://perma.cc/DNX4-PBNT>].

248. *The Geneva Conventions*, *supra* note 120.

If LADCs are recategorized as FTOs, cartel members would be entitled to these protections as well as those laid out in the ICCPR. The U.S. government would not be able to hide LADC members in a faraway military base with no hope for a trial, as was attempted in the War on Terror. The U.S. government would be unable to infringe on detainee's bare minimum rights guaranteed by IHRL, the Geneva Conventions, and the U.S. Constitution, even if an infringement would be more expedient for the military or national security.<sup>249</sup>

*g. Detainee Imprisonment & Abuse*

After September 2001 terrorist attacks, when the War on Terror began, there was substantial support, internationally and domestically, for a strong show of force in response.<sup>250</sup> The first year of the U.S.-led War on Terror was a success as showcased by the arrests of hundreds of suspected terrorists around the world, the prevention of more attacks in the United States, the overthrow of the Taliban regime in Afghanistan, and the closure of terrorist training camps.<sup>251</sup> This success led to increased international cooperation in the global War on Terror.<sup>252</sup>

However, as time progressed, overwhelming evidence of detainee abuse, torture, and harsh living conditions created inescapable criticisms. Military personnel in Abu Ghraib Prison in Iraq “[f]orcibly arrang[ed] detainees in various sexually explicit positions for photographing . . . [p]osition[ed] a naked detainee on a box, with a sandbag on his head, and attach[ed] wires to his fingers, toes, and penis to simulate electric torture,” raped, humiliated,

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249. Although these bare minimum rights can be understood to be an excessive burden on achieving safety and health within the United States as well as ending the War on Terror, War on Drugs, or War on Narco-terrorism, individual rights protect every person from the government. See Linda R. Monk, *Rights*, PUB. BROAD. SERV., <https://www.pbs.org/tpt/constitution-usa-peter-sagal/rights/#.YA9QDehKg2w> [<https://perma.cc/RUP2-E9YT>]. It is unwise to do away with basic individual rights because, without them, there would be no protection against the government accusing anyone it wanted of being involved in a war it created with little to no evidence, as was done during the War on Terror. See *Hamdi*, 542 U.S. at 519–20, 528–29.

250. Richard Jackson, *War on Terrorism United States History*, BRITANNICA, <https://www.britannica.com/topic/war-on-terrorism> [<http://perma.cc/CDW8-WW5C>].

251. *Id.*

252. *Id.*

and tortured detainees.<sup>253</sup> Similarly, in GTMO, the ICRC found evidence of torture.<sup>254</sup>

Although this scale of detainee abuse and harsh living conditions from the War on Terror under the Bush administration are potentially outdated, as long as militaries are allowed to capture prisoners of war and hold them for questioning, abuse of detainees is always possible. If LADCs are recategorized as FTOs and the United States begins a War on Narco-terrorism, it would simply allow the U.S. military to capture and detain more individuals in order to gather intelligence against LADCs. Detainees from the War on Narco-terrorism could face similar abuses and humanitarian issues as those from the War on Terror.

#### *h. Increased Racial Profiling*

The War on Terror has undeniable ties to racial bias and racial profiling. Since the September 2001 terrorist attacks, the American people continue to be barraged with pictures and news articles of terrorists from the Middle East threatening the United States. The government and media indoctrinated U.S. citizens to fear people from a certain part of the world and those who adhere to certain religions.<sup>255</sup>

Despite the rampant xenophobia and fear of foreign-grown terrorism in the United States today, approximately “73% of extremist-related murders in the past decade were committed by right-wing extremists, including white supremacists.”<sup>256</sup> Michael McGarty, head of the FBI Counterterrorism division, told reporters that “there have been more arrests and deaths in the United States caused by domestic terrorists than international terrorists in recent years. . . . Racially-motivated violent extremists are responsible for the majority of lethal attacks and fatalities perpetrated by domestic

253. *Iraq Prison Abuse Scandal Fast Facts*, CNN (Mar. 22, 2020), <https://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts/index.html> [http://perma.cc/R7YC-FFDB].

254. Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantanamo – Correction Appended*, N.Y. TIMES (Nov. 30, 2004), <https://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in-guantanamo.html> [https://perma.cc/GUU6-W3S9].

255. *Why Do Americans Still Fear Muslim Terrorists More Than White-Supremacist Terrorists? Revisit these MEF Videos for Some Clues*, MEDIA EDUC. FOUND. (Apr. 2, 2019), <https://www.mediaed.org/christchurch/> [https://perma.cc/Q3HU-K6E4] [hereinafter *Americans Still Fear Muslim Terrorists*].

256. Jennifer Rubin, *Just How Bad Is the White Nationalist Terrorism Problem*, WASH. POST (Aug. 6, 2019), <https://www.washingtonpost.com/opinions/2019/08/06/just-how-bad-is-white-nationalist-terror-problem/> [http://perma.cc/7NUR-RW8C].

terrorists since 2000.”<sup>257</sup> At the time of this interview there were 850 domestic terrorism cases open with the FBI.<sup>258</sup> Despite this high number, only about 20% of the FBI counterterrorism agents were assigned to domestic terrorism cases.<sup>259</sup> This is likely because most terrorist attacks occur in other countries, such as Iraq, Afghanistan, India, Pakistan, Philippines, Nigeria, Somalia, Nepal, Egypt, and Syria.<sup>260</sup>

In 2017, there was a total of 8,584 terrorist attacks worldwide with a total of 18,753 deaths.<sup>261</sup> The 23% decline from 2016 is “largely due to dramatically fewer attacks and deaths in Iraq.”<sup>262</sup> In 2016, only 61 terrorist attacks took place within U.S. borders compared to the 11,072 worldwide attacks.<sup>263</sup> The international nature of terrorism and the mass media coverage of terrorist attacks in the Middle East likely caused an increase in fear amongst the American populous.<sup>264</sup>

The United States’ historical struggle with racism greatly influenced the domestic War on Drugs.<sup>265</sup> Former White House aide, John Erlichman, admitted that the Nixon administration’s War on Drugs was a battle against the “antiwar left and black people.”<sup>266</sup> Since then, black communities continue to suffer from racial discrimination. In Florida, police officers “target poor black neighborhoods” for drug offenses and black defendants “spend two-thirds more time behind bars than white people.”<sup>267</sup>

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257. Mike Levin, *7 Key Questions About the Threat of Domestic Terrorism in America*, ABC NEWS (Aug. 6, 2019), <https://abcnews.go.com/Politics/key-questions-threat-domestic-terrorism-america/story?id=64811291> [<https://perma.cc/KG7P-J5RX>].

258. Domestic terrorism has nothing to do with the international community and is motivated by domestic influences. Conversely, homegrown terrorism is considered international terrorism because these terrorists are often radicalized by overseas terrorist groups, such as ISIL and al-Qaeda. *Id.*

259. *Id.*

260. NAT’L CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM, ANNEX OF STATISTICAL INFORMATION: COUNTRY REPORTS ON TERRORISM 2017, at 3 (Sept. 2018), [https://www.state.gov/wp-content/uploads/2019/04/crt\\_national\\_consortium.pdf](https://www.state.gov/wp-content/uploads/2019/04/crt_national_consortium.pdf) [<https://perma.cc/KB7R-EZZB>].

261. *Id.* at 4.

262. *Id.* at 3.

263. NAT’L CONSORTIUM FOR STUDY OF TERRORISM AND RESPONSES TO TERRORISM, AMERICAN DEATHS IN TERRORIST ATTACKS 1995–2016: FACT SHEET 1, 4 (Nov. 2017), [https://www.start.umd.edu/pubs/START\\_AmericanTerrorismDeaths\\_FactSheet\\_Nov2017.pdf](https://www.start.umd.edu/pubs/START_AmericanTerrorismDeaths_FactSheet_Nov2017.pdf) [<http://perma.cc/E87P-9UWR>].

264. *Americans Still Fear Muslim Terrorists*, *supra* note 255.

265. *See* Coyne & Hall, *supra* note 13, at 11.

266. *Id.* at 11–12.

267. Josh Salman et al., *Florida’s Broken Sentencing System Designed for Fairness, it Fails to Account for Prejudice*, HERALD TRIB. (Dec. 12, 2016), <http://projects.heraldtribune.com/bias/sentencing/> [<http://perma.cc/N3VU-HDMK>]; Ezekiel Edwards, *In Florida, the Racist War on Drugs Rages On*, AM. C.L. UNION (Dec. 15, 2017, 2:00 PM), <https://www.aclu.org/blog/criminal-law-reform/drug-law-reform/florida-racist-war-drugs-rages> [<https://perma.cc/G76X-QUDL>].

Throughout the country, this disparity is obvious. As recently as 2018, “[T]he imprisonment rate of black males was 5.8 times that of white males . . . .”<sup>268</sup> Since the War on Drugs began in the 1980s, over 25.4 million people have been arrested for drug offenses, about one-third of them were Black.<sup>269</sup>

It seems logical that if LADCs are recategorized as FTOs and the United States declares a War on Narco-terrorism, racial profiling would likely become significantly more widespread. Government officials would be able to better hide racial profiling under the guise of fighting a War on Narco-terrorism. Similar to the misconstrued facts and opinions plastered throughout the media, racial profiling would continue to have a disparate impact on minority communities throughout the United States.

*i. Socioeconomics*

When governments wage a war in an attempt to better society, such as the War on Drugs and War on Terror, the social burden typically falls on poor communities. Policymakers throughout the United States have often intertwined the War on Terror with poverty.<sup>270</sup> For example, in 2014, Senator John Kerry stated that poverty “in many cases, is the root cause of terrorism.”<sup>271</sup> However, academics have found no direct link to show that poverty is the only path to terrorism.<sup>272</sup> Rather, poverty may be one of many reasons one becomes a terrorist.<sup>273</sup>

Furthermore, the negative economic impact from terrorism is well-documented. The economic hardship caused by terrorist attacks since the War on Terror began has caused a decrease in foreign investments, and thus economic hardship throughout various countries.<sup>274</sup> In 2014, the global economy

268. E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, PRISONERS IN 2018 1 (Apr. 2020), <https://www.bjs.gov/content/pub/pdf/p18.pdf> [<https://perma.cc/Z22E-4CWD>].

269. HUMAN RIGHTS WATCH, DECADES OF DISPARITY DRUG ARRESTS AND RACE IN THE UNITED STATES 4 (2009), [https://www.hrw.org/sites/default/files/reports/us0309web\\_1.pdf](https://www.hrw.org/sites/default/files/reports/us0309web_1.pdf) [<https://perma.cc/VPP4-77GG>].

270. See David Sterman, *Don't Dismiss Poverty's Role in Terrorism Yet*, TIME (Feb. 4, 2015, 4:28 PM), <https://time.com/3694305/poverty-terrorism/> [<http://perma.cc/93MQ-FC3E>].

271. *Id.*

272. *See id.*

273. Mental illness is also commonly attributed to people becoming terrorists. *Id.*

274. Ethan Bueno de Mesquita, *The Political Economy of Terrorism: A Selective Overview of Recent Work*, 10 POL. ECONOMIST 1, 4 (2008).

suffered \$104 billion in losses.<sup>275</sup> Besides the direct effect of a terrorist attacks, such as rebuilding infrastructure, emergency response costs, and medical costs, a country is significantly less likely to receive investments when terrorist attacks are more likely to occur.<sup>276</sup>

The War on Drugs frequently burdens the poor more than the rich. One of the difficulties and frustrations about the War on Drugs is that cartel leaders are often viewed as untouchable while the poor population in the cartels' operational country is harassed and arrested.<sup>277</sup> In fact, "[I]nvolvement in drug markets is more often a sign of poverty than wealth."<sup>278</sup> For example, wealthy cartel members take advantage of farmers who are unable to farm enough food to survive on and cannot cultivate legal cash crops.<sup>279</sup> In an attempt to survive, these poor farmers farm drug crops, which can provide a "decent income, even in small amounts."<sup>280</sup>

President Duterte of the Philippines took the War on Drugs to the farthest extreme yet, and the poor in his country are still at high risk of being harassed, imprisoned, or killed.<sup>281</sup> As of 2017, there have been over 7,000 deaths of the urban poor in the Philippines under the guise of the War on Drugs.<sup>282</sup> With increasing frequency, police officers kill unarmed people who beg for their lives in their own homes.<sup>283</sup> If they are not killed, they are forced to leave their homes under threat of death, at which point the police steal whatever they like.<sup>284</sup> Police admitted to being paid under the table for killing people who are only *suspected* of drug use.<sup>285</sup> Although the Philippines is not in Latin America, this country is a great example of how the War on Drugs can escalate to extreme levels. Accordingly, there is value in taking notice of such detrimental outcomes.

If LADCs are recategorized as FTOs and the United States declares a War on Narco-terrorism, countries with drug cartels would likely feel a

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275. Niall McCarthy, *The Global Economic Impact of Terrorism [Infographic]*, FORBES (Nov. 16, 2017, 8:08 AM), <https://www.forbes.com/sites/niallmccarthy/2017/11/16/the-global-economic-impact-of-terrorism-infographic/#2a9f7e21d0f5> [<http://perma.cc/YYR3-6G5X>].

276. Bueno de Mesquita, *supra* note 274, at 4.

277. CATHERINE MARTIN, CASUALTIES OF WAR: HOW THE WAR ON DRUGS IS HARMING THE WORLD'S POOREST 6 (2015), <https://www.healthpovertyaction.org/wp-content/uploads/2018/12/Casualties-of-war-report-web.pdf> [<http://perma.cc/E384-33QG>].

278. *Id.* at 9.

279. *Id.*

280. *Id.*

281. See Matt Wells, *Philippines: Duterte's 'War on Drugs' Is a War on the Poor*, AMNESTY INT'L (Feb. 4, 2017), <https://www.amnesty.org/en/latest/news/2017/02/war-on-drugs-war-on-poor/> [<https://perma.cc/PYS4-KZYD>].

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

major negative impact on their economy because of the ongoing terrorism in their country. As seen in countries with terrorist activity during the War on Terror, investments would likely decrease.

Thus, similar to the War on Terror, the War on Narco-terrorism would likely impact impoverished communities. If the hardships from the regular War on Drugs fell primarily on poor communities, as seen in the United States, Latin America, and the Philippines, then allowing more power and discretion to the U.S. military and other federal agencies would not suggest decreased hardship in impoverished areas. Similar to racial profiling under the guise of the War on Narco-terrorism, current problems from the War on Drugs will only be exacerbated when terrorism is added to the mix.

*j. No End in Sight for the War on Drugs*

By recategorizing LADCs as FTOs, the United States would only be replicating the War on Drugs. As history shows, simply because the United States spends more money and increases military presence in an attempt to defeat drug cartels, does not mean the efforts will prevail. As a matter of fact, it seems like it would make the situation worse for those involved. The War on Drugs has only increased in violence with no real results. Drug cartels have not disappeared, illicit drug use has not decreased, and incarceration rates have increased.

The lack of results is shown in both the War on Drugs and the War on Terror. After El Chapo was tried and convicted, his son took his place and the Sinaloa cartel is still thriving.<sup>286</sup> After terrorist organizations were defeated, new terrorist organizations, such as ISIL, developed to fill the void of power.<sup>287</sup>

#### IV. PROPOSED SOLUTION

Although the U.S. government may enjoy some increased benefits for fighting the War on Drugs, the problems associated with the recategorization outweighs the perceived benefits. Accordingly, the United States should not recategorize LADCs as FTOs. Instead, the United States should change its domestic drug laws. Specifically, the United States should declassify all drugs and allow citizens to recreationally consume any drugs they want for the following reasons: (1) bodily autonomy is a fundamental right, (2)

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286. Gallón, *supra* note 1.

287. See *Rise and Fall of ISIL*, *supra* note 65.

legalization of illicit drugs would have a surplus of societal benefits, and (3) legalizing drugs legitimizes the cartels' business and forces them to follow laws of commerce.

#### A. Bodily Autonomy

Bodily autonomy is a relatively new recognized fundamental right. The history of the right to privacy and bodily autonomy, however, is rich and deep in U.S. history. In *Griswold v. Connecticut*, plaintiffs filed suit claiming a violation of their right to privacy as a married couple because a state law banned the use of contraceptives.<sup>288</sup> The U.S. Supreme Court held that the Constitution requires a “zone of privacy created by several fundamental constitutional guarantees.”<sup>289</sup> The court struck down the state law and held that,

[F]orbidding the use of contraceptives rather than *regulating* their manufacture or sale, seeks to achieve its goals by means having a *maximum destructive impact* upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. (emphasis added).<sup>290</sup>

This general right to privacy expanded over time through the landmark case of *Roe v. Wade*.<sup>291</sup> *Roe* upheld the constitutional right to privacy and bodily autonomy under the Due Process Clause of the Fourteenth Amendment and, therefore, allowed for the mere regulation of abortion facilities and practices.<sup>292</sup>

Despite historic governmental encroachments on the rights to privacy and bodily autonomy, citizens have ultimately prevailed. For example, when alcohol prohibition began in the 1920s, U.S. citizens did not stop buying or consuming alcohol.<sup>293</sup> Instead, alcohol was bought and sold on the black market free of regulations and taxes.<sup>294</sup> Corruption became a problem as people opened speakeasies and bribed police officers to leave bars open.<sup>295</sup> Violence also increased as moonshiners and other illegal

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288. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

289. *Id.* at 485.

290. *Id.*

291. *Roe v. Wade*, 410 U.S. 113 (1973).

292. *Id.* at 153–54.

293. See Michael Lerner, *Prohibition: Unintended Consequences*, PUB. BROAD. SERV., <https://www.pbs.org/kenburns/prohibition/unintended-consequences/> [<https://perma.cc/VH25-4GM6>].

294. During the prohibition, the federal government lost \$11 billion in tax revenue. New York suffered because 75% of the state's revenue was from liquor taxes. *Id.*

295. *Id.*

manufacturers protected their product and sales.<sup>296</sup> Finally, in 1933, the government admitted defeat by signing the Twenty-First Amendment, which ended Prohibition.<sup>297</sup>

The right to bodily autonomy is fundamental to a free society. Bodily autonomy means the right to choose what we do with our bodies. These choices include a person's right to decide whether to consume certain foods and drinks, whether to exercise, whether to undergo body modifications, whether to have sexual relations with or marry certain persons, and other decisions related to a person's desire to participate in particular activities during their limited time in this world. The government does not have the right to tell individuals what they can and cannot do with their own bodies or lives as long as it does not interfere with others in society. The federal government was never meant to be a nanny state.

### B. Societal Benefits of Regulation Over Prohibition

Portugal was the first country to decriminalize the recreational use of all drugs and has benefitted by a decrease in drug-related deaths and illnesses.<sup>298</sup> Portugal also saw an increase in people voluntarily seeking drug addiction treatment.<sup>299</sup>

There are two main benefits for U.S. citizens and foreign nations if the U.S. government switched from outright prohibition to regulation. First, by legalizing drugs, the Food and Drug Administration (FDA) would be able to regulate the drug's purity and potency.<sup>300</sup> This would decrease the number of deaths caused by drug poisoning because drugs would not be cut or laced with deadly toxins that could kill users. Second, the government would be able to increase revenue by taxing the drugs that were once illegal. Alcohol prohibition cost the federal government \$11 billion in liquor

296. See David Roos, *How Prohibition Put the 'Organized' in Organized Crime*, HISTORY (Feb. 22, 2019), <https://www.history.com/news/prohibition-organized-crime-al-capone> [<http://perma.cc/N2UF-K6XK>].

297. U.S. CONST. amend. XXI.

298. *Drug Decriminalization in Portugal: Learning from a Health and Human-Centered Approach*, DRUG POL'Y ALL. (Feb. 20, 2019), <http://www.drugpolicy.org/resource/drug-decriminalization-portugal-learning-health-and-human-centered-approach> [<http://perma.cc/2KJ8-86G8>] [hereinafter *Drug Decriminalization in Portugal*]; Naina Bajekal, *Want to Win the War on Drugs? Portugal Might Have the Answer*, TIME (Aug. 1, 2018), <https://time.com/longform/portugal-drug-use-decriminalization/> [<https://perma.cc/3NAG-ABWF>].

299. *Id.*

300. See KALEM MURAD, *THE FOOD AND DRUG ADMINISTRATION AND DRUG LEGALIZATION: A BRIEF MODEL OF REGULATION 10* (Harvard Libr. 2002).

revenue.<sup>301</sup> This is indicative of how advantageous legalizing drugs can be since drugs will continue to be purchased regardless of legality, as seen during the prohibition of alcohol.

### C. *Legitimizing Drug Industry Forces the Cartels' Hands*

The United States is the largest consumer of illicit drugs in the world.<sup>302</sup> If the United States follows Portugal's example, then cartels would lose their largest consumer base.<sup>303</sup> LADCs could either continue their illicit drug trade in other countries to make a fraction of their profits or legitimize their business to fit within international and domestic laws of commerce. Economically, LADCs would be more likely to legitimize their business because they have a higher likelihood of making money by continuing to import drugs to the United States despite taxes and regulations. Since Cartels have a monopoly over their product,<sup>304</sup> meaning they control the drug from its raw form until it is made into the drugs ingested by U.S. citizens, they would likely have little problem meeting purity standards set by the FDA. Switching from an illegal to a legitimate business may require restructuring but would ultimately be the most economically sound decision for LADCs.

## V. CONCLUSION

The U.S government has been fighting the War on Drugs since the Nixon administration, but has undeniably failed to stop drug use or reduce the dangers associated with drug trafficking. LADCs have become more violent in order to maintain control of their illegal industry and product. Moreover, violence surrounding illicit drugs has spread worldwide, from the spill over from LADCs into the United States to Philippine President Duterte's "death squads." Furthermore, LADCs continue to prey on impoverished and disenfranchised communities. The U.S. War on Drugs disproportionately impacts poor and minority communities, which increases the likelihood that members of these communities will turn to LADCs and gangs for support, rather than the government. Therefore, the United States must reconsider how it fights the War on Drugs.

Former President Trump and others believe recategorization of LADCs to FTOs and the War on Narco-terrorism is the correct solution to the evolving

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301. Lerner, *supra* note 293.

302. Jennifer Warner, *U.S. Leads the World in Illegal Drug Use*, WEBMD (June 30, 2008), <https://www.webmd.com/mental-health/addiction/news/20080630/us-leads-the-world-in-illegal-drug-use#1> [<https://perma.cc/VE8X-WWJZ>].

303. *See Drug Decriminalization in Portugal*, *supra* note 298.

304. Gross, *supra* note 193.

LADCs problems. Although recategorization would allow for increased funding for the War on Drugs, the use of drone strikes, and the use of national security legislation, such as the PATRIOT Act, this approach is short-sighted.

A War on Narco-terrorism would exacerbate the problems seen in the War on Terror and the War on Drugs, by diverting funding from other necessary areas of government, straining foreign relations, and creating many more problems. Instead, the U.S. government should reconsider domestic drug laws and replace prohibition with the regulation of illicit substances. LADCs must be stopped, and the War on Drugs must be reconsidered. Legalization of recreational drug use would allow citizens to exercise their fundamental right to bodily autonomy, and society would enjoy a surplus of benefits, such as increased tax revenue. Finally, legalization would force LADCs out of an illegal market and into legal commerce.

LADCs cannot be permitted to continue terrorizing Latin American countries and U.S. citizens. It is essential to U.S. national security, public health and safety, and foreign relations, that the United States reevaluate and revise domestic drug laws from prohibition to regulation.

