

# Assessing the U.S.-Mexico Fight against Human Trafficking and Smuggling: Unintended Results of U.S. Immigration Policy

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## I. INTRODUCTION

¶1 Over the last decade, the issue of human trafficking has become a global phenomenon of unforeseeable proportions. Every year, millions of people throughout the world migrate from their homelands into countries offering more attractive prospects for employment. Some seek family reunification and others search for a better life in countries with higher economic growth, hoping for better opportunities for their children. Migratory workers and their families, many of whom are undocumented, are systematic targets of discrimination, racism and xenophobia. They are often exploited, many times as victims of trafficking.

¶2 In the American hemisphere, these vulnerable groups, many of whom are comprised of women and children, are easy targets for organized crime running smuggling and trafficking rings across the United States-Mexico border. Since the adoption of more stringent immigration rules in the United States which focus on criminal deportation, the Mexico-United States border region has become the stage of increased criminal activity of this sort.

¶3 As a result of the unilateral deportation policies and the lack of preparation on the part of the receiving nations, Mexico and the Central American countries have experienced an unexpected influx of U.S.-trained criminals who, lacking programs to help them cope with their new environments, have continued their criminal activities, often engaging in human trafficking.

¶4 Although there has been increased activism on the part of the Mexican authorities to address the issues of trafficking and smuggling, the Mexican legal framework remains largely untouched and hence limited in its crime-fighting scope and effectiveness. Despite the recent adoption of international protocols to fight human trafficking and increased law enforcement cooperation between the United States and Mexico, the perennial lack of economic growth in the Latin American region, coupled with historical migration patterns, have boosted an already booming industry for the illegal smuggling and trafficking of people.

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¶5 Civil society on both sides of the border remains largely uninvested in the issue and tends to confuse undocumented immigration, smuggling of immigrants and trafficking in human beings as a single issue.

¶6 This article analyzes the issue of human trafficking and its connection with the issue of smuggling of migrants. The focus is to discuss how trafficking affects the U.S.-Mexico relationship when this cross-boundary transfer occurs and how current state practices address issues surrounding the phenomenon. It explores the existing legal framework in Mexico and analyzes U.S. reports regarding state practices to combat the trafficking of people. It discusses a variety of policies on both sides of the U.S.-Mexico border, such as the deportation of former criminals from the U.S., as well as their impact on the U.S.-Mexico human trafficking and migrant smuggling phenomenon. The paper reviews some positive developments and proposes a series of social and policy measures (primarily non-law enforcement oriented), to address the situation.

## II. WHAT IS TRAFFICKING?

### A. Definition

¶7 The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime,<sup>1</sup> (Trafficking Protocol) defines trafficking in persons as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”<sup>2</sup>

¶8 For these purposes, exploitation includes, “at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”<sup>3</sup> Further, and

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<sup>1</sup> See Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Nov. 15, 2000, Consolidated Treaties and International Agreements [hereinafter C.T.I.A.], No. 10318.001 (supplementing the United Nations Convention Against Transnational Organized Crime) [hereinafter Trafficking Protocol].

<sup>2</sup> *Id.* The full text of Article 3 reads:

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;

(d) “Child” shall mean any person under eighteen years of age.

<sup>3</sup> *Id.* at 2.

of special note for purposes of trafficking, the consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of Article 3 of the Trafficking Protocol is irrelevant. Lastly, “the recruitment, transportation, transfer, harbour or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth” in the Trafficking Protocol.<sup>4</sup>

¶9 These definitions do not require that a trafficking victim be physically transported from one location to another. They plainly apply to the recruitment, harboring, provision, or obtaining of a person for the above enumerated exploitative purposes.

*B. The difference between “trafficking in human beings” and “smuggling of migrants”*

¶10 Although trafficking in human beings many times resembles the smuggling of migrants (which is the subject of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime),<sup>5</sup> there are several important differences.

¶11 Article 3 of the Trafficking Protocol (Protocol)<sup>6</sup> defines trafficking in human beings. Also, the Protocol Against the Smuggling of Migrants by Land, Sea and Air (Protocol Against the Smuggling of Migrants)<sup>7</sup> defines smuggling and other related terms in Article 3 as:

(a) “Smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;

(b) “Illegal entry” shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State.

These definitions, while supplementing each other, clearly differentiate the criminal conducts of smuggling and trafficking.

¶12 The smuggling of migrants, while often undertaken in degrading and/or dangerous conditions, involves migrants who have consented to the smuggling. On the other hand, trafficking victims have “either never consented or, if they initially consented, that consent has been rendered meaningless by the coercive, deceptive or abusive actions of the traffickers.”<sup>8</sup> Further, “smuggling ends with the arrival of the migrants at their destination,” whereas trafficking involves the ongoing exploitation of the victims in some manner to generate illicit profits for the traffickers.”<sup>9</sup>

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<sup>4</sup> *Id.*

<sup>5</sup> See Protocol Against the Smuggling of Migrants by Land, Sea and Air, Nov. 15, 2000, C.T.I.A. No. 10318.002 (supplementing the United Nations Convention against Transnational Organized Crime) [hereinafter Protocol Against the Smuggling of Migrants].

<sup>6</sup> See Article 3 of the Trafficking Protocol, *supra* note 2.

<sup>7</sup> See Protocol Against the Smuggling of Migrants, *supra* note 5.

<sup>8</sup> United Nations Office on Drugs and Crime, *What if the victim consents?*, available at [http://www.unodc.org/unodc/en/trafficking\\_victim\\_consent.html](http://www.unodc.org/unodc/en/trafficking_victim_consent.html).

<sup>9</sup> *Id.*

¶13 According to the United Nations Office on Drugs and Crime, “[t]rafficking is almost always a form of organized crime and should be dealt with using criminal powers to investigate and prosecute offenders for trafficking and any other criminal activities in which they engage.”<sup>10</sup> In addition, and as a practical matter, victims of trafficking tend to be “more severely affected and in greater need of protection from re-victimization and other forms of further abuse than are smuggled migrants.”<sup>11</sup> Finally, smuggling is by definition always transnational, whereas trafficking may occur within national boundaries or when victims are taken from one country to another.

### C. *Trafficking in human beings as a global issue*

¶14 Using the attractive prospects of well-paying jobs as domestic servants, factory workers, or waitresses, traffickers often recruit their victims (especially women and girls) through fake advertisements, mail-order bride catalogues, and casual acquaintances.<sup>12</sup> Promises of family reunification, cheap tourism, modeling careers, and academic studies are other recruitment tools used by traffickers.<sup>13</sup> By some accounts, the illegal practice of trafficking in people is often “tied with illegal arms sales [and is] second only to drug trafficking as criminal enterprises.”<sup>14</sup>

¶15 According to the Organization of American States,<sup>15</sup> some of the individual factors motivating this phenomenon include:

- Poverty and lack of economic opportunities
- Economic dependants and children
- Low education levels or an inability to read and write
- Physical and sexual abuse
- Lack of adequate housing
- Lack of information regarding safe and/or legal immigration

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> United Nations Office on Drugs and Crime, *Trafficking in Human Beings*, available at [http://www.unodc.org/unodc/en/trafficking\\_human\\_beings.html](http://www.unodc.org/unodc/en/trafficking_human_beings.html).

<sup>13</sup> See *infra* note 15 at 25-26, CIM/OAS Project data.

<sup>14</sup> Shelia M. Poole, “Feds to ID, aid area victims of traffic in humans: Promise of jobs a lure that puts many in bondage,” ATLANTA JOURNAL-CONSTITUTION, April 22, 2004 (quoting officials of the U.S. Department of Health and Human Services), available at [http://www.ajc.com/news/content/news/atlanta\\_world/0404/21trafficking.html](http://www.ajc.com/news/content/news/atlanta_world/0404/21trafficking.html).

<sup>15</sup> Data provided by Laura Langberg, Regional Coordinator of the CIM/OAS Project and Specialist on Trafficking of the Inter-American Commission of Women of the OAS [hereinafter CIM/OAS Project data], during the presentation of the Project “Combate a la Trata de Mujeres, Adolescentes, Niños y Niñas en México” [Combating the Trafficking of Women, Adolescents and Children in Mexico], Ministry of the Interior, México City, Oct. 14, 2004 [hereinafter OAS-Mexico Project to Combat Trafficking], citing data contained in “*Trafficking In Women And Children: Research Findings and Follow-Up*,” Inter-American Commission of Women and Inter-American Children’s Institute, in association with DePaul University, CIM/doc.9/02, Aug. 27, 2002, at 22-25, [hereinafter CIM/doc.9/02], presented before the XXXI Assembly of Delegates of the OAS, Oct. 29-31, 2002, Punta Cana, Dominican Republic, and commenting on Elías Carranza and Ronald Woodbridge, “*Trata de Seres Humanos Especialmente Mujeres, Niñas y Niños*,” [hereinafter *Trafficking in Human Beings Especially Women and Children*], United Nations Latin American Institute for the Prevention of Crime and the Treatment of Delinquents (ILANUD, for its initials in Spanish) during the presentation during the XII Session of the UN Commission on the Prevention of Crime and Penal Justice, Vienna, Austria, May 13-22, 2003.

- Discrimination based on the age and gender of the person
- Social conflicts
- Historical practices of the sale of women and children

Similarly, some of the external factors<sup>16</sup> that lead to the phenomenon are:

- Abuse of minors and widespread gender discrimination
- Ease of emigration and weak border controls
- Absence of adequate legislation to deal with immigration and trafficking
- Government corruption
- Existence of trafficking and smuggling networks
- Demand for cheaper labor in the receiving countries
- Demand for sexual services in the sending and receiving countries
- Restrictive immigration laws

¶16 Once recruited and under the control of the smuggler and/or trafficker, the victims undergo the exploitation process during movement and transit, as they experience coercion from their captors.<sup>17</sup> When the victims arrive at their destination, they are often placed in conditions controlled by the traffickers. They are exploited to earn illicit revenues and many are physically confined; their travel or identity documents are taken away and they or their families are threatened if they do not cooperate. Women and girls are typically forced to work as prostitutes and subsequently blackmailed by traffickers threatening to tell their families.<sup>18</sup> Children in this situation depend on their captors for food, shelter, and other basic needs. Traffickers also instill a fear in victims that authorities in a foreign country will prosecute or deport them if they request assistance.<sup>19</sup>

¶17 In addition to drug smuggling and prostitution, victims of trafficking are also used in forced labor, domestic servitude, beggary, and the extraction of human organs.<sup>20</sup>

¶18 Although trafficking in human beings is a global concern, there is an unfortunate lack of systematic research and reliable data on the trafficking of human beings.<sup>21</sup> Therefore, there are no resources which would allow effective comparative analysis and the design of effective countermeasures. In addition, there is a need to strengthen the criminal justice response to trafficking through legislative reform, awareness-raising and training, as well as through national and international cooperation. Finally, supporting and protecting victims who give evidence is a key element to prosecuting those responsible for these crimes.<sup>22</sup>

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<sup>16</sup> CIM/OAS Project Data. *See also* CIM/doc.9/02, *supra* note 15, at 24-29.

<sup>17</sup> CIM/OAS Project Data. *See also* CIM/doc.9/02, *supra* note 15, at 33-36.

<sup>18</sup> *See Trafficking in Human Beings, supra* note 12.

<sup>19</sup> *Id.*

<sup>20</sup> *See* CIM/OAS Project data, *supra* note 15.

<sup>21</sup> *See Trafficking in Human Beings, supra* note 12. *See also* CIM/doc.9/02, *supra* note 15, at 5-11.

<sup>22</sup> *See Trafficking in Human Beings, supra* note 12. *See also* CIM/doc.9/02, *supra* note 15, at 5-11.

### III. THE TRAFFICKING ISSUE WITHIN THE LEGAL FRAMEWORK OF MEXICO

#### A. *International law in Mexico: the Convention and Protocols*

¶19 The primary international law instrument dealing with organized crime and subset issues, such as smuggling and trafficking in human beings, is the United Nations Convention Against Transnational Organized Crime.<sup>23</sup> The Palermo Convention (as the UN Convention Against Transnational Organized Crime is commonly known) has three accompanying Protocols: the ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime;’<sup>24</sup> the ‘Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime;’<sup>25</sup> and the ‘Protocol Against the Illicit Manufacturing, and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention Against Transnational Organized Crime.’<sup>26</sup>

¶20 Mexico signed the Convention in 2000 and ratified it on April 11, 2003.<sup>27</sup> It also ratified all three of its accompanying protocols that same year.<sup>28</sup> According to the Mexican Constitution,<sup>29</sup> the treaties made by the President and ratified by the Senate are the Supreme law of the land.<sup>30</sup> Hence, once the Convention and its Protocols were ratified, the Mexican government became bound to take appropriate steps to harmonize its internal legislation with the Convention. The Palermo Convention is not a ‘self-executing treaty.’<sup>31</sup> As such, the Convention requires an act of the federal Congress to

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<sup>23</sup> See United Nations Convention against Transnational Organized Crime, Nov. 15, 2000, C.T.I.A. No. 10318.000 [hereinafter Palermo Convention].

<sup>24</sup> See Trafficking Protocol, *supra* note 1.

<sup>25</sup> See Protocol Against the Smuggling of Migrants, *supra* note 5.

<sup>26</sup> See Protocol Against the Illicit Manufacturing, and Trafficking in Firearms, Their Parts and Components and Ammunition, May 31, 2001, C.T.I.A. No. 10318.003 (supplementing the United Nations Convention against Transnational Organized Crime) [hereinafter Protocol on Firearms and Ammunition].

<sup>27</sup> See Diario Oficial de la Federación [D.O.], Apr. 11, 2003 (Mex.). México signed the Convention and the first two Protocols in December of 2000. The third protocol was signed in 2001. All cites to the D.O. are also available at <http://www.gobernacion.gob.mx/dof/pop.php>.

<sup>28</sup> The Trafficking and Smuggling of Migrants Protocols’ ratification was published in the D.O., Apr. 10, 2003. The protocol entered into force on September 29, 2003, 90 days after publication, as prescribed by the Convention. The Protocol on Firearms and Ammunition’s ratification was published in the D.O., Feb. 21, 2003. It entered into force on May 22, 2003, 90 days after publication, as prescribed by the Convention.

<sup>29</sup> See Constitución Política de los Estados Unidos Mexicanos [Const.]. All cites to Mexican law are available at <http://www.cddhcu.gob.mx/>.

<sup>30</sup> *Id.* at Ch. VII, Art. 133, which in its text in Spanish reads:

Artículo 133. Esta Constitución, las leyes del Congreso de la Unión que emanen de ella y todos los Tratados que estén de acuerdo con la misma, celebrados y que se celebren por el Presidente de la República, con aprobación del Senado, serán la Ley Suprema de toda la Unión. Los jueces de cada Estado se arreglarán a dicha Constitución, leyes y tratados, a pesar de las disposiciones en contrario que pueda haber en las Constituciones o leyes de los Estados.

(emphasis added).

<sup>31</sup> Article 133 is similar to Article 6, clause 2 of the United States Constitution, commonly referred to as the ‘Supremacy Clause,’ which also establishes federal law as ‘the supreme law of the land.’ To understand the basic legal principle herein involved, it is important to explain that the Supremacy Clause includes treaties signed by the executive and ratified by the senate, therefore superseding state law. See *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924). However, as in Mexico, the U.S. Constitution is

become effective and thus new legislation is needed, not only because there is no federal law or code instructing local and state authorities to observe the provisions contained in the treaty, but also because it creates new categories of crimes currently absent in the national legislation. The state of Mexican law is discussed further below.

¶21 As stated above, the definition established in Article 3 of the Trafficking Protocol<sup>32</sup> intends to give the victims of trafficking the most protection possible, as well as to avoid their characterization as criminals or as accomplices in the crime. In other words, the consent of the victim of trafficking is irrelevant throughout the commission of the crime, and it must not be taken into account by the authorities as a part of the criminal proceedings against those culpable of trafficking or for purposes of victim assistance.<sup>33</sup> It establishes that the consent by the victim may be irrelevant because it can be the result of coercion or fraud.

¶22 The Protocol also intends to eliminate the double vulnerability to which victims of trafficking are exposed. Victims usually do not receive assistance when they first encounter authorities. Often, they are deported back to their countries of origin as soon as they admit their participation in—and consent to—trafficking. Hence, many victims are blamed for their prior consent or for having entered the country illegally. This barrier has historically hindered an effective solution to the issue by persecuting the victim and questioning the blamelessness of a person who has participated in the process of trafficking. The Protocol proposes a new approach, aimed at disposing of these preconceived notions and attempting to create effective judicial mechanisms to diminish (and eventually eradicate) the phenomenon of trafficking.

### B. Brief analysis of Mexican legislation

¶23 Mexican legislation does not include a specific definition of trafficking (*trata de personas*). The only judicial instrument that includes such is the Federal Penal Code (*Código Penal Federal*),<sup>34</sup> which in Chapter III,<sup>35</sup> Articles 206 and 207, defines and

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silent on the issue of self-execution. Rather, the “self-executing” or “non-self-executing” nature of a treaty is more a question of interpretation for a court. By definition, a “self-executing treaty” is one that does not require specific implementing legislation by Congress and that may create rights flowing directly to litigants. The most important U. S. Constitutional law decision concerning the relationship between international law and municipal law is *Foster & Elam v. Neilson*. 27 U.S. 253, 259-260 (1829). In *Foster & Elam*, Chief Justice Marshall introduces the concept of “self-executing treaties.” While it may be argued that the Palermo Convention contains provisions that are self-executing, the fact that most of its provisions – and those contained in the Protocols – call for harmonization of internal law with international standards, would make it a non-self-executing treaty.

<sup>32</sup> See Trafficking Protocol, *supra* note 1.

<sup>33</sup> See Article 3(b) of the Trafficking Protocol, *supra* note 1.

<sup>34</sup> See generally Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, D.O. June 12, 2003 [hereinafter Criminal Code]. For purposes of this discussion, although acknowledging that there are other important legal tools available in the Mexican legislation to fight organized crime (e.g., the Federal Law Against Organized Crime, or the provisions contained in the General Population Law regarding the smuggling of migrants), this essay only addresses the Mexican law as it refers specifically to trafficking in people and efforts to harmonize local legislation with the Palermo Convention.

<sup>35</sup> *Id.* at Arts. 206-07. The text in Spanish for the entire Chapter entitled “Trata de personas y lenocinio” reads:

Artículo 206. El lenocinio se sancionará con prisión de dos a nueve años y de cincuenta a quinientos días multa.

Artículo 207. Comete el delito de lenocinio:

punishes this crime under the name of “*Trata de Personas y Lenocinio*” (Trafficking in People and Sexual Pandering or “Pimping”) in the following manner:

The crime of sexual pandering is committed by:

I.- Any person that habitually or accidentally exploits the body of another through carnal commerce, sustains himself from this commerce or profits in any way from it;

II.- Whomever introduces or solicits a person so that with another may engage in sexual commerce with their body or facilitates the means for engaging in prostitution;

III.- Any person that directs, administers or sustains directly or indirectly any prostitutes, meeting houses or places to concur exclusively with the intent of exploiting prostitution or obtains any benefit with its products.<sup>36</sup>

¶24 However, none of the articles makes a clear distinction between both crimes. They only define sexual procurement, which can lead to two interpretations: first, that both crimes have the same nature and therefore are punished in the same way, or second, that both crimes coincide only in as much as sexual exploitation is involved and therefore they are “typified” (classified) in the law, without any distinction.

¶25 By not having a separate definition for each criminal conduct (smuggling vs. trafficking), and restricting said definition to sexual exploitation, Articles 206 and 207 do not acknowledge that trafficking may lead to other types of exploitation, such as slavery or forced labor, among others. Hence, a person can only be considered a victim of trafficking and sexual procurement when a case of sexual exploitation exists, independent of any other condition, as defined in the Protocol, that has been met.

¶26 To sustain the current penal definition means to ignore new types of trafficking recognized internationally and to limit the effectiveness of the national law to punish and eradicate the phenomenon. In addition, in Mexico there is still a marked confusion between the terms trafficking (*trata*) and smuggling (*tráfico*). Furthermore, the confusion intensifies within the context of U.S.-Mexico discourse because the word “traffic,” when translated literally into Spanish, actually means smuggling. The appropriate term in Spanish for trafficking in human beings is “*trata de personas*.” This confusion affects not only intra-governmental discourse, but also the perception of the general public.

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I.- Toda persona que habitual o accidentalmente explote el cuerpo de otra por medio del comercio carnal, se mantenga de este comercio u obtenga de él un lucro cualquiera;

II.- Al que induzca o solicite a una persona para que con otra, comercie sexualmente con su cuerpo o le facilite los medios para que se entregue a la prostitución;

III.- Al que regentee, administre o sostenga directa o indirectamente, prostíbulos, casas de cita o lugares de concurrencia expresamente dedicados a explotar la prostitución, u obtenga cualquier beneficio con sus productos.

Artículo 208. Al que promueva, encubra, concierte o permita el comercio carnal de un menor de dieciocho años se le aplicará pena de ocho a doce años de prisión y de cien a mil días multa.

<sup>36</sup> See Criminal Code, *supra* note 34, Art. 207.

¶27 Further, as has been explained above, the definition of trafficking includes two fundamental elements: coercion (through fraud, violence or similar means) and the subsequent exploitation of the victim. Smuggling, on the other hand, is characterized by the transport of a person illegally into the territory of another State, with or without the intent to exploit them upon arrival. Additional confusion may arise because trafficking may include the crime of smuggling, although the latter does not automatically imply trafficking.

¶28 This differentiation is important because in the Mexican legislation, Article 2 of the Federal Law Against Organized Crime (*Ley Federal contra la Delincuencia Organizada*)<sup>37</sup> establishes “trafficking with undocumented people” (smuggling) as a federal offense, while the Code of Criminal Procedure (*Código de Procedimientos Penales*),<sup>38</sup> in Article 194,<sup>39</sup> indicates trafficking of undocumented people as a felony or “serious crime”<sup>40</sup> (*delito grave*). However, none of the aforementioned instruments

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<sup>37</sup> See generally *Ley Federal Contra la Delincuencia Organizada* [Federal Law Against Organized Crime], as amended, D.O. May 11, 2004 (Mex.) [hereinafter FLAOC]. The entire text of Article 2, in Spanish reads:

Artículo 2. Cuando tres o más personas acuerden organizarse o se organicen para realizar, en forma permanente o reiterada, conductas que por sí o unidas a otras, tienen como fin o resultado cometer alguno o algunos de los delitos siguientes, serán sancionadas por ese solo hecho, como miembros de la delincuencia organizada:

I. Terrorismo, previsto en el artículo 139, párrafo primero; contra la salud, previsto en los artículos 194 y 195, párrafo primero; falsificación o alteración de moneda, previstos en los artículos 234, 236 y 237; operaciones con recursos de procedencia ilícita, previsto en el artículo 400 bis, todos del Código Penal para el Distrito Federal en Materia de Fuero Común, y para toda la República en Materia de Fuero Federal;

II. Acopio y tráfico de armas, previstos en los artículos 83 bis y 84 de la Ley Federal de Armas de Fuego y Explosivos;

III. Tráfico de indocumentados, previsto en el artículo 138 de la Ley General de Población;

IV. Tráfico de órganos, previsto en los artículos 461, 462 y 462 bis de la Ley General de Salud; y

V. Asalto, previsto en los artículos 286 y 287; secuestro, previsto en el artículo 366; tráfico de menores, previsto en el artículo 366 ter, y robo de vehículos, previsto en el artículo 381 bis del Código Penal para el Distrito Federal en Materia de Fuero Común, y para toda la República en Materia de Fuero Federal, o en las disposiciones correspondientes de las legislaciones penales estatales.

(emphasis added).

<sup>38</sup> See generally *Código Federal de Procedimientos Penales* [C.F.P.P.] [Code of Criminal Procedure], as amended, D.O. 19 de diciembre de 2002 (Mex.).

<sup>39</sup> The text in Spanish reads:

Artículo 194. Se califican como delitos graves, para todos los efectos legales, por afectar de manera importante valores fundamentales de la sociedad, los previstos en los ordenamientos legales siguientes:

I. Del Código Penal Federal, los delitos siguientes:

...

II. De la Ley Federal contra la Delincuencia Organizada, el previsto en el artículo 2.

...

XIV. De la Ley de Quiebras y Suspensión de Pagos, los previstos en el artículo 96.

(emphasis added).

<sup>40</sup> Palermo Convention, *supra* note 23, Art. 2(b). Also, it is worth special mention that, up until fairly recently, the crime of trafficking in minors was only contemplated as a state crime. However in the D.O. of June 12, 2000, a decree was published reforming several Federal Statutes (“Código Penal Federal,”

defines or addresses the trafficking of human beings as a crime in and of itself. Therefore, one is forced to seek similar criminal conduct—such as sexual tourism or prostitution—in order to prosecute these criminal acts. Currently, several proposals are pending before the Mexican Congress, but none of them fully addresses the issue of trafficking with a global strategy for its eradication in Mexico.<sup>41</sup>

#### IV. U.S. GOVERNMENT EVALUATIONS OF THE TRAFFICKING SITUATION IN MEXICO

¶29 As expressed above, while there is some data available, there is no up-to-date statistical information on the phenomenon of trafficking, especially as it occurs within Mexico, and its effects on the U.S.-Mexico relationship. However, in analyzing U.S.-Mexico trafficking issues and governmental interaction in response, one should consider reports prepared by the U.S. Department of State.

¶30 The primary authority mandating the evaluation of foreign governments' anti-trafficking efforts is the U.S. Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA),<sup>42</sup> which amends the Trafficking Victims Protection Act of 2000 (TVPA).<sup>43</sup> The TVPRA is intended to strengthen the tools that U.S. law enforcement authorities use to prosecute traffickers and enhances assistance to victims of trafficking. It also requires the U.S. Department of State to scrutinize more closely the efforts of governments to prosecute traffickers, and to evaluate whether its international partners have achieved appreciable yearly progress in eliminating trafficking in persons.<sup>44</sup> In doing so, the State Department publishes the Trafficking in Persons Report (the Report), an annual evaluation of how countries comply with the TVPRA's minimum standards. The U.S.

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"Código Federal de Procedimientos Penales" and "Ley Orgánica del Poder Judicial de la Federación"), making the trafficking of minors a federal offense. Henceforth, on November 7th of that same year, the Ministry of Justice created a specialized unit to combat the trafficking of Minors (formerly "Fiscalía Especial de Tráfico de Menores," now called "Unidad Especializada en Investigación").

<sup>41</sup> Many of these proposals focus exclusively in creating new criminal categories for traffickers, but do not include forfeiture of their profits or prevention and protection of victims. Some minor legislative advances are discussed below.

<sup>42</sup> U.S. Trafficking Victims Protection Reauthorization Act of 2003 Pub. L. No. 108-193 (2003). [hereinafter TVPRA].

<sup>43</sup> Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § \_\_, 114 Stat. 1466 \_\_ (codified as amended at 22 U.S.C. § 7101 (2000)) [hereinafter TVPA]. The TVPA was preceded by legislation to prohibit commercial sexual exploitation of women and children, such as the White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2421 (Supp. 1994); Protection of Children against Sexual Exploitation Act of 1977, Pub. L. No. 95-225 § 2(a), 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. § 2251 (2003)); Child Pornography Prevention Act (CPPA) of 1996, Pub. L. No. 104-208, Div. A, Title I, §101(a) [title I, §121], 110 Stat. 3009, 3009-26, (1996) (codified as amended at 18 U.S.C. § 2251 (1996)); Communications Decency Act of 1996, Pub. L. No. 104-104, title V, 110 Stat. 133, (1996), (codified as amended at 47 U.S.C. § 609 (1996)); Children's Online Privacy Protection Act of 1998, Pub. L. No. 105-277, Div. C, Title XIII, § 1302 112 Stat. 2681, 2681-728 (1998) (codified as amended 15 U.S.C. §§ 6501 - \_\_\_\_ (1998)); and INS section 652 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. §1101-\_\_\_\_ (1996), regarding the mail-order bride business. However, the TVPA is the first comprehensive law to "penalize the range of offenses involved in the trafficking scheme." See § 102(b)(14) of the TVPA. This legislation is the first comprehensive law in the United States to address the various aspects of both domestic and international trafficking of human beings. For further information on the TVPA, see also The Protection Project, "The U.S. Trafficking Victims Protection Act of 2000: An Explanatory Note," The Johns Hopkins University School of Advanced International Studies (SAIS), available at [http://www.protectionproject.org/traffic\\_in\\_us/traffic\\_in\\_us.html](http://www.protectionproject.org/traffic_in_us/traffic_in_us.html).

<sup>44</sup> U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REP. 1 (2004) [hereinafter DOS TRAFFICKING REPORT 2004].

Department of State (DOS) obtains information for the report from U.S. embassies and consulates around the world, foreign embassies in Washington, and non-governmental and international organizations working on human rights and trafficking issues.<sup>45</sup>

¶31 The Report is divided into three tiers. Tier One is comprised of countries that are fully compliant with the Act's minimum standards.<sup>46</sup> Tier Two is made up of those

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<sup>45</sup> *Id.* at 29.

<sup>46</sup> See TVPA, *supra* note 43, § 108 (full text available at [http://www.ojp.usdoj.gov/vawo/laws/vawo2000/stitle\\_a.htm#elimination](http://www.ojp.usdoj.gov/vawo/laws/vawo2000/stitle_a.htm#elimination)). Section 108 of the TVPA sets out the minimum standards for the elimination of trafficking as:

(a) MINIMUM STANDARDS.—For purposes of this division, the minimum standards for the elimination of trafficking applicable to the government of a country of origin, transit, or destination for a significant number of victims of severe forms of trafficking are the following:

- (1) The government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking.
- (2) For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault.
- (3) For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense.

(4) The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.

(b) CRITERIA.—In determinations under subsection (a)(4), the following factors should be considered as indicia of serious and sustained efforts to eliminate severe forms of trafficking in persons:

- (1) Whether the government of the country vigorously investigates and prosecutes acts of severe forms of trafficking in persons that take place wholly or partly within the territory of the country.
- (2) Whether the government of the country protects victims of severe forms of trafficking in persons and encourages their assistance in the investigation and prosecution of such trafficking, including provisions for legal alternatives to their removal to countries in which they would face retribution or hardship, and ensures that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked.
- (3) Whether the government of the country has adopted measures to prevent severe forms of trafficking in persons, such as measures to inform and educate the public, including potential victims, about the causes and consequences of severe forms of trafficking in persons.
- (4) Whether the government of the country cooperates with other governments in the investigation and prosecution of severe forms of trafficking in persons.
- (5) Whether the government of the country extradites persons charged with acts of severe forms of trafficking in persons on substantially the same terms and to substantially the same extent as persons charged with other serious crimes (or, to the extent such extradition would be inconsistent with the laws of such country or with international agreements to which the country is a party, whether the government is taking all appropriate measures to modify or replace such laws and treaties so as to permit such extradition).
- (6) Whether the government of the country monitors immigration and emigration patterns for evidence of severe forms of trafficking in persons and whether law enforcement agencies of the country respond to any such evidence in a manner that is consistent with the vigorous investigation and prosecution of acts of such trafficking, as well as with the protection of human rights of victims and the internationally recognized human right to leave any country, including one's own, and to return to one's own country.
- (7) Whether the government of the country vigorously investigates and prosecutes public officials who participate in or facilitate severe forms of trafficking in persons, and takes all appropriate measures against officials who condone such trafficking.

countries that do not fully comply, but that are making significant efforts to bring themselves into compliance. There is a subsection to this tier called “Tier Two Watch List.” This Watch List considers situations in these countries where, in addition to making significant efforts:

- a) The absolute number of victims of severe forms of trafficking is very significant or is significantly increasing; or
- b) There is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year; or
- c) The determination that a country is making significant efforts to bring themselves into compliance with minimum standards was based on commitments by the country to take additional future steps over the next year.<sup>47</sup>

Lastly, Tier Three consists of those countries whose governments do not fully comply with the minimum standards and are not making significant efforts to do so.<sup>48</sup>

¶32 Mexico is classified as a Tier Two Watch List country. The Report indicates that Mexico is a source, transit, and destination country for persons trafficked for sexual exploitation and labor.<sup>49</sup>

¶33 Over the last two years, the Report has labeled trafficking patterns in Mexico as “diverse and complicated.”<sup>50</sup> Many victims are Mexican children internally trafficked for commercial sexual exploitation. According to the Report, 16,000-20,000 Mexican and Central American children are estimated to be sex victims in Mexico, and to be located primarily in border, urban, and tourist areas. Women, a significant number of whom are ultimately sent to the United States, are also trafficked into the Mexican sex trade. Although most victims are Mexican and Central American, many also originate from the Caribbean, South America, Asia, and Eastern Europe.<sup>51</sup> Mexican and Central American agricultural workers are also victims of forced labor trafficking from Mexico to the U.S., but unfortunately there are no official figures on such trafficking victims or exploited laborers.<sup>52</sup>

¶34 In the years 2004 and 2005, while acknowledging the Mexican government’s efforts against trafficking, the Report indicated that Mexico does not fully comply with the minimum standards for the elimination of trafficking, that Mexico needs national-level commitment to fight trafficking, and that Mexico needs a national anti-trafficking

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<sup>47</sup> See DOS TRAFFICKING REPORT 2004, *supra* note 44, at 28.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 241.

<sup>50</sup> *Id.* See also U.S. DEP’T OF STATE’S, TRAFFICKING IN PERSONS REP. 156 (2005) [hereinafter DOS TRAFFICKING REPORT 2005] (discussing the “complexities” of the phenomenon).

<sup>51</sup> See DOS TRAFFICKING REPORT 2004, *supra* note 44, at 241.

<sup>52</sup> *Id.* See also DOS TRAFFICKING REPORT 2005, *supra* note 50, at 156. Although it is obvious that Mexico is a major transit country for illegal migration into the U.S., many cross-border trafficking victims are very difficult to identify due to the clandestine nature of their transnational movement.

law.<sup>53</sup> The Mexican-Guatemalan March 2004 Memorandum of Understanding on trafficking—which has yet to come into effect—was noted as a good start.<sup>54</sup>

¶35 In the arena of prosecution, as explained above, the Report has consistently reflected the fact that Mexico does not have a comprehensive anti-trafficking law. The Report has also indicated that Mexico does not have a national law enforcement strategy to address human trafficking and that scattered criminal cases have been brought against traffickers. Although no prosecutions of convictions were reported in either report, an increased awareness and interest on the part of Mexican authorities is noted.<sup>55</sup>

¶36 On the other hand, according to the Report, more arrests and prosecutions were carried out against criminal migrant smugglers, including eighty-five convictions, but there was no indication as to whether or not any of these cases involved trafficking.<sup>56</sup> Official corruption was reflected in the Report as a continued “significant concern,” although Mexico has made efforts to investigate and prosecute corrupt officials.<sup>57</sup>

¶37 The Report indicates that Mexico lacks a universal strategy to protect trafficking victims, and that, although uncoordinated, some policies do assist Mexican victims, primarily minors.<sup>58</sup> However, while foreign minors may get some assistance, the DOS expresses that generally, undocumented foreigners, including those who may be potential trafficking victims, can face extended detention and deportation.<sup>59</sup>

¶38 In regard to prevention efforts, the Report labels the Mexican strategies as arising in an *ad hoc* fashion.<sup>60</sup> Even though successes were catalogued as “isolated,” and other efforts as “meager in response to the scope of the problem”<sup>61</sup> in 2004, by 2005 the Report acknowledged that Mexico has called more attention to the phenomenon.<sup>62</sup>

¶39 The Report did make specific reference to the Department for Integral Family Development (*Desarrollo Integral de la Familia* or DIF) as the government’s social welfare agency which implements a national plan to stop child sexual exploitation. It

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<sup>53</sup> DOS TRAFFICKING REPORT 2005, *supra* note 50, at 156. *See also generally* DOS TRAFFICKING REPORT 2004, *supra* note 44, at 241. The Report states:

As with other significant transit countries, Mexico is severely challenged to identify and rescue potential trafficking victims who are in transit. The government needs to expand cooperation on both of its land borders with Guatemala and the United States to identify trafficking cases that occur as part of cross-border illegal migration.

<sup>54</sup> The Mexico-Guatemala MOU was signed by both governments on March 23, 2004, but it has not been entered into force yet, as some final revisions must be made to assure compliance with Guatemalan law.

<sup>55</sup> *See* DOS TRAFFICKING REPORT 2004, *supra* note 44, at 241. *See also* DOS TRAFFICKING REPORT 2005, *supra* note 50, at 155.

<sup>56</sup> DOS TRAFFICKING REPORT 2005, *supra* note 50, at 241. In reference to child related crime, the Report indicates that “Mexico’s cyber-crimes unit eliminated 200 Internet sites dedicated to child pornography that exploited child trafficking victims. Mexico has also taken steps to investigate and prosecute individuals facilitating child prostitution.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 241 (“For example, the government funds NGOs and runs shelters that offer basic services to Mexicans in need, including those who may have been trafficked.”).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 242.

<sup>61</sup> *Id.*

<sup>62</sup> *See* DOS TRAFFICKING REPORT 2005, *supra* note 50, at 157.

acknowledges that DIF carries out awareness campaigns and runs a hotline that assists exploited minors.<sup>63</sup>

¶40 The Report indicates that while Mexico's National Immigration Institute (*Instituto Nacional de Migración* or INM) provides information on the human rights of foreign migrants and attempts to coordinate policies with Mexico's neighbors to deter illegal migration, it is overwhelmed by the number of illegal migrants in its territory. It labels the government's policy of immediate deportation as a limit to its ability to investigate and prevent trafficking schemes.<sup>64</sup>

¶41 The Report recognized that Mexico has supported anti-trafficking policies in international forums, such as the UN Commission on Human Rights,<sup>65</sup> and supported efforts by the National Human Rights Commission.<sup>66</sup> Because of the commitment of Mexican officials to "do more to fight trafficking in the face of a significant problem," the country has remained on the Tier 2 Watch List.<sup>67</sup> Lastly, in 2005, the Report acknowledged for the first time the impact of gangs in the trafficking phenomenon.<sup>68</sup>

¶42 Another set of U.S. government resources containing information related to smuggling and trafficking are the Country Reports on Human Rights Practices 2004 (HRR).<sup>69</sup> The HRR was released by the Bureau of Democracy, Human Rights, and Labor on February 28, 2005, and is also prepared pursuant to a legislative mandate, namely Sections 116(d) and 502B(b) of the Foreign Assistance Act of 1961 (FAA),<sup>70</sup> as amended.

¶43 The HRR indicates that corrupt police sometimes violated the rights of undocumented immigrants, stating: "[t]here also were credible reports that police, immigration, and customs officials were involved in the trafficking of illegal migrants."<sup>71</sup> Furthermore, migrants who transited southern Chiapas complained of the double dangers of extortion by the authorities and robbery and killings by organized gangs (*Maras Salvatruchas*). According to the Report, undocumented immigrants rarely filed charges in cases of crimes committed against them because authorities generally deport such persons. As a result, the cases brought by undocumented immigrants were subject to dismissal because the complainant was no longer in Mexican territory.

¶44 The HRR echoed the February 2003 Mexican National Human Rights Commission's (CNDH for its initials in Spanish) annual report to Congress,<sup>72</sup> which

<sup>63</sup> See DOS TRAFFICKING REPORT 2004, *supra* note 44, at 242.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See DOS TRAFFICKING REPORT 2005, *supra* note 50, at 157.

<sup>67</sup> See DOS TRAFFICKING REPORT 2004, *supra* note 44, at 241.

<sup>68</sup> DOS Trafficking Report 2005, *supra* note 50, at 156 ("The trafficking phenomenon in Mexico is complex and has strong links to organized transnational criminal networks and gangs.").

<sup>69</sup> See U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, MEXICO, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES (2005) [hereinafter HRR], *available at* <http://www.state.gov/g/drl/rls/hrrpt/2004/41767.htm>

<sup>70</sup> See 22 U.S.C. §§ 2151n(d), 2304(b). The law provides that the Secretary of State shall transmit to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate by February 25 "a full and complete report regarding the status of internationally recognized human rights, within the meaning of subsection (A) in countries that receive assistance under this part, and (B) in all other foreign countries which are members of the United Nations and which are not otherwise the subject of a human rights report under this Act." The Report also includes reports on several countries that do not fall into the categories established by these statutes.

<sup>71</sup> See HRR, *supra* note 69, § (d).

<sup>72</sup> Comisiones Nacional de los Derechos Humanos, Informe de Actividades [National Commission of

criticized the Mexican government's lack of protection for migrants. According to the HRR, the CNDH found problems "at all levels of government, including corruption, impunity, and the complicity of immigration officials and local, state, and federal officials."<sup>73</sup>

¶45 The HRR also cites the March 2003 statement by Gabriela Rodríguez Pizarro, U.N. Special Rapporteur on Human Rights of Migrants, indicating that she found apparent complicity among traffickers, delinquents who prey on migrants, and the authorities who extort migrants. The HRR cites the Rapporteur's criticism of the lack of facilities at immigration detention centers in the south of the country, including the use of local jails, and noted the precarious medical attention at migrant stations and the humiliating treatment of migrants by Mexican officials.

¶46 The Country Reports on Human Rights Practices 2004 does not cite specific sources for its assertions, nor does it provide a country-specific description of the types of organizations and governmental institutions consulted for its production. Because these reports are limited in their scope and publishing deadlines, additional information on positive developments related to the U.S.-Mexico trafficking issue is detailed below.

#### V. LACK OF GOVERNMENTAL COOPERATION: THE IMPACT OF CRIMINAL DEPORTEES ON THE SMUGGLING AND TRAFFICKING PHENOMENA

¶47 One of the problems not discussed above in the U.S. DOS Report is that U.S.-Mexico law enforcement efforts have proven insufficient. Although law enforcement cooperation efforts between the Mexican and U.S. governments have increasingly improved in the last years, there is a remarkable lack of cooperation when it comes to sharing certain types of information (like, for example, information related to criminal deportees). As a result, with the combination of new laws requiring and expanding the deportation of criminal aliens<sup>74</sup> and the toughening of border security, the border has become an increasingly unsafe region for both countries.<sup>75</sup>

¶48 About ten years ago, with the introduction of Operation Gatekeeper, a highly controversial increase in border enforcement, the Clinton administration intended to reduce the trafficking and smuggling mayhem that took place along the 14-mile stretch of the international boundary of the U.S.-Mexico California-Baja Border. At that time, the U.S. border with Mexico at San Diego was one of the primary entryways for hundreds of thousands of undocumented immigrants.<sup>76</sup> Other operations similar in scope took place in other areas along the border (*e.g.*, Operation Blockade and Operation Hold the Line).<sup>77</sup>

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Human Rights, Activity Report], Feb. 2004 (Mex.), *available at* [http://www.cndh.org.mx/Principal/document/la\\_cndh/activid/2003/informe2003.pdf](http://www.cndh.org.mx/Principal/document/la_cndh/activid/2003/informe2003.pdf).

<sup>73</sup> *Id.*

<sup>74</sup> *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. §§ 1101 et seq. (1996) [hereinafter IIRAIRA]; Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1101 et seq. (1986) [hereinafter IRCA]; Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. 107-56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT ACT].

<sup>75</sup> *See* Diagnóstico Integral de la Frontera Norte: Una perspectiva regional, microregional y temática [Integral Diagnosis of the Northern Border: A Regional, Micro-regional and Thematic Perspective], El Colegio de la Frontera Norte, Tijuana, Baja California, Mexico [hereinafter "COLEF Border Report"].

<sup>76</sup> *See* Edward Sifuentes, *Advocates Criticize "Gatekeeper" at 10th anniversary*, North County Times, Oct. 3, 2004 [hereinafter *Advocates Criticize Gatekeeper*] (discussing the effects of Gatekeeper in the San

¶49 The Gatekeeper and accompanying strategies pushed people trying to cross the border illegally to the more dangerous mountains and deserts east of San Diego, where “more than 3,000 human remains have since been found.”<sup>78</sup>

¶50 Despite these deterrence efforts, according to government data,<sup>79</sup> the flow of undocumented Mexico-U.S. migration has continued to grow at a steady, and sometimes increasing, pace. The strategy is also believed to have contributed to the increasing market for smugglers and human traffickers.

¶51 The increased enforcement presence on the border was reinforced after the events of September 11, 2001.<sup>80</sup> This initiative has pushed smugglers and traffickers to take more daring approaches to introduce people into American territory, often with disastrous effects, resulting in the loss of life of the victims of smuggling and trafficking.<sup>81</sup>

¶52 Among the problems faced in Mexican border towns assisting the thriving businesses of organized crime is the inefficiency of the police services in the three levels of government.<sup>82</sup> Although there is little statistical information that is serious and verifiable on the subject of rule of law in Mexico, there are a few resources that can guide us through this discussion. For example, in the period of 1997-2000, there was a declining tendency to report crimes in the border region.<sup>83</sup> This trend reflects a clear lack of trust in the efficiency of governmental authorities.

¶53 Another issue that remains largely unaddressed is the impact of criminal deportees from the United States into Mexico, particularly in the border region. According to

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Diego region), available at

[http://www.nctimes.com/articles/2004/10/03/news/top\\_stories/17\\_25\\_4010\\_2\\_04.txt](http://www.nctimes.com/articles/2004/10/03/news/top_stories/17_25_4010_2_04.txt).

<sup>77</sup> See Francisco Alba and Paula Leite, *Políticas Migratorias: TLCAN y UE* [Migration Policies: NAFTA & European Union], MIGRACIÓN Y DESARROLLO, Apr. 2004, at 12 [hereinafter Migration Policies].

<sup>78</sup> See “*Advocates Criticize Gatekeeper*,” *supra* note 76.

<sup>79</sup> See, e.g., *Versión estenográfica del discurso del subsecretario para América del Norte, Gerónimo Gutiérrez, durante el panel foro “La propuesta migratoria del presidente Bush: naturaleza, viabilidad y pertinencia”* [Data on the steady growth of emigration to the U.S. cited by Mexican Undersecretary for North American Affairs, Gerónimo Gutiérrez, in his participation on the forum President Bush’s Immigration Proposal: Nature, Viability and Pertinence], Colegio de México, Mexico City, Mexico, Jan. 21, 2004 (Mex.) (indicating that since the 70s the Mexican population in the U.S. has grown steadily until reaching about 25.5 million people in 2002: approximately 15.9 million Mexican-Americans, 9.5 million born in Mexico, of which 4.8 are suspected to be undocumented migrants), available in Spanish at [http://www.sre.gob.mx/comunicados/discursos/disc\\_2004/ene/d-03-01.htm](http://www.sre.gob.mx/comunicados/discursos/disc_2004/ene/d-03-01.htm); see also Directorio Estadístico de Mexicanos Residentes en el Exterior [Statistical Directory of Mexicans Resident Abroad], SRE-PCME [Program for Mexican Communities Abroad, Ministry of Foreign Affairs, Mexico] (2000); see also Rafael López Vega, *La Población Mexicana en Estados Unidos*, [The Mexican Population in the United States] Consejo Nacional de Población, 26 de Junio de 2003, available at <http://portal.sre.gob.mx/ime/pdf/mexicanoseneua.pdf>. Data from the U.S. Census Bureau available at [http://www.census.gov/mso/www/pres\\_lib/hisorig/index.htm](http://www.census.gov/mso/www/pres_lib/hisorig/index.htm).

<sup>80</sup> See Migration Policies, *supra* note 77, at 14-16 (briefly discussing the national security and border policies undertaken by the U.S. government after September 11, 2001).

<sup>81</sup> See, e.g., Onell R. Soto, *4 killed when SUV rolled over in desert*, THE UNION-TRIBUNE, Oct. 2, 2004 (reporting that a smuggler of immigrants who lost control of a sport utility vehicle while fleeing Border Patrol agents and crashed, killing four passengers, was sentenced to five years in federal prison), available at <http://www.signonsandiego.com/news/mexico/tijuana/20041002-9999-2m2roll.html>. The article recounts that “[a] Border Patrol agent wrote in a report filed in court that the survivors said they paid \$1,500 to \$1,800 to be smuggled from Tijuana and Mexicali. They said they walked in the desert until they got into two Suburbans on the Mexican side of the border.”

<sup>82</sup> See COLEF Border Report, *supra* note 75.

<sup>83</sup> *Id.*

information gathered by the *Los Angeles Times*, roughly 13,350 Mexican nationals are serving time in California state prisons.<sup>84</sup> Under the laws discussed above, all of these Mexican nationals will be subject to deportation upon completion of their sentences. Approximately 20,000 Mexicans are serving time in the federal penitentiary system, all of whom will face a similar fate upon finishing their sentences.<sup>85</sup>

¶54 Other sources indicate that as many as 250,000 aliens serving time in U.S. prisons, on probation, or on parole have been marked for deportation, according to the U.S. Bureau of Justice Statistics. The number of deportable criminal aliens among the estimated 11.8 million non-citizens living in the United States is unknown.<sup>86</sup>

¶55 Although the deportation program gained momentum as early as 1998, the Mexican authorities, which for several years now have been negotiating that a reasonable notice be given, still do not have a reasonable warning time for arrival of these former convicts.<sup>87</sup> As can be expected, many of these criminal deportees came to the United States as children or young adolescents. They attended school in the U.S. and most of them came of age on city streets in the big urban areas of the country (Los Angeles, Chicago, New York, etc.).<sup>88</sup>

¶56 Since 1996, when Congress implemented the aforementioned immigration laws, more than 500,000 people have been rounded up and deported to more than 160 countries around the world.<sup>89</sup> Under these laws, every non-citizen sentenced to a year or more in prison is subject to deportation, even if the sentence is suspended; deportable crimes can be anything from murder to petty theft. Furthermore, the law, which is retroactive, eliminated nearly all grounds for appeal.<sup>90</sup>

¶57 One thing the American government did not take into account in enacting this legislation and, more importantly, by not holding bilateral talks with the countries of origin (many of which already had structural problems in their systems of justice), is that the American criminal “culture of drugs and guns [that many carried] back to their native lands [would wreak] havoc in nations that receive them in substantial numbers.”<sup>91</sup> In 2003, the Associated Press (AP) carried out a six-month investigation into the impact of

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<sup>84</sup> See Anna Gorman, *Warnings Sought on Deporting of Ex-Cons*, L.A. TIMES, Oct. 7, 2003, at B1 [hereinafter *Warnings Sought*].

<sup>85</sup> *Id.*

<sup>86</sup> See Randall Richard, *AP Investigation: 500,000 criminal deportees from America wreak havoc in many nations*, Associated Press Report, Oct. 26, 2003 [hereinafter *500K Criminal Deportees*], available at <http://www.azcentral.com/news/articles/1026exports26.html> and [http://www.threestrikes.org/ap\\_12.html](http://www.threestrikes.org/ap_12.html).

<sup>87</sup> See *Warnings Sought*, *supra* note 84. In addition, Mexican Consular officials often have similar problems in the interior of the country to gain access to these nationals and determine whether the deportees are in fact Mexican nationals. It must be pointed out that in cases where some of these Mexicans are also sought for charges in Mexico, the Mexican authorities have been hindered from effecting arrests upon the arrival of some of these individuals to Mexican territory.

<sup>88</sup> See *500K Criminal Deportees*, *supra* note 86; see also Ginger Thompson, *Latino Gangs Without Borders*, N.Y. TIMES, Interactive Feature, Sep. 9, 2004, available at [http://www.nytimes.com/packages/khtml/2004/09/25/international/20040926\\_HONDURAS\\_FEATURE.html](http://www.nytimes.com/packages/khtml/2004/09/25/international/20040926_HONDURAS_FEATURE.html), (discussing thoroughly the gang related problem spurred by U.S. deportations to Mexico and Central America).

<sup>89</sup> See *500K Criminal Deportees*, *supra* note 86.

<sup>90</sup> *Id.* See also HIRAIRA, *supra* note 74.

<sup>91</sup> See *500K Criminal Deportees*, *supra* note 86.

criminal deportees upon arrival in their home countries, finding that in some instances, the crime waves are overwhelming police.<sup>92</sup>

¶58 According to the AP report, eighty percent of the deportees are being sent to seven Caribbean and Latin American countries: Jamaica, Honduras, El Salvador, Colombia, Mexico, Guatemala and the Dominican Republic. In these nations jobs are scarce and police resources limited. The AP report indicates, citing U.S. Bureau of Immigration and Customs Enforcement sources, that Mexico has absorbed 340,000 of these deportees.<sup>93</sup>

¶59 Given this reality, the Mexican government needs to focus on the social development side of the equation. When, for example, formerly imprisoned Mexicans return to Mexico, they are virtually unemployable. In many instances they are sent to towns with which they are completely unfamiliar, and without money they are unable to make it home and are forced to find whatever jobs they can until they gather enough money to either return to the U.S. and risk jail, or decide what new lives they will have. In El Salvador and Mexico, for example, criminal deportees are greeted by charity workers (often belonging to Roman Catholic affiliated NGOs), given a sandwich and bus fare, and sent on their way.<sup>94</sup>

¶60 The report substantiates what many had suspected: that in order to “survive in what for most of them are unfamiliar surroundings, many [former inmates] turn to crime.”<sup>95</sup> Currently, the types of criminal deportees who most worry receiving countries are gang members. In Honduras and El Salvador, for example, Los Angeles street gangs with names like *Mara Dieciocho* (the 18th Street Gang) and *Mara Salvatrucha* (the 13th Street Gang) are competing for the drug trade, warring both with indigenous thugs and with one another.<sup>96</sup> These sophisticated criminals are being sent to unsophisticated, unindustrialized societies where they overwhelm local authorities.<sup>97</sup> Furthermore, over the last few years, gangs in general have more often engaged in trafficking activities, such as prostitution of minors, to supplement their income.<sup>98</sup>

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<sup>92</sup> *Id.* The investigation included interviews with more than 300 police, deportees, church leaders, social scientists and government officials in the United States and abroad. The report indicates that, for example:

In Jamaica, one out of every 106 males older than 15 is a criminal deportee from the United States. About ten thousand strong, most live in the capital, Kingston . . . Jamaican police say they have been involved in hundreds of murders . . . . In Honduras . . . Interpol figures show murders increased from 1,615 in 1995, to 9,241 in 1998, after the first wave of what is now 7,000 criminal deportees. Honduran police say the guns, drugs and gangs they brought with them are largely responsible.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* See also Louie Gilot, “Juárez Center Offers Migrants Direction,” THE EL PASO (TX) TIMES, June 6, 2004, available at <http://www.elpasotimes.com/stories/borderland/20040606-127371.shtml>, which indicates that charitable organizations in El Paso and Juárez decided to provide just that an average of 200 to 300 men, women and children are deported each day from the United States at El Paso’s international bridges and that charitable organizations in El Paso and Juárez decided to provide support to these people by opening an orientation center for migrants in Downtown Juárez, on the other side of the Stanton Street bridge. The center is named “Coalición Pro-Migrante.”

<sup>95</sup> See 500K *Criminal Deportees*, *supra* note 86.

<sup>96</sup> *Id.* In Central American Countries like El Salvador and Honduras, many deportees “become victims before they can become victimizers.” “Regarded as pariahs in their native lands, they are hunted by vigilante squads.” For example, “Hugo Omar Barahona, who was 4 when he immigrated to Los Angeles with his parents and 21 when he was deported to El Salvador for robbery in 1999, was shot in the leg and back on April 28. The two gunmen, he said, apparently spotted his American gang tattoos.”

<sup>97</sup> *Id.* (quoting Al Valdez, an Orange County, California, assistant district attorney and gang expert).

<sup>98</sup> See, e.g., Kit. R. Roane, *Gangs Turn to New Trade: Young Prostitutes*, N.Y. TIMES, July 11, 1999,

¶61 Although the 1996 law was intended to reduce crime in the United States by deporting some of the people who commit it, large-scale deportations are a relatively new crime-prevention strategy.<sup>99</sup> Nevertheless, officials in many of the receiving countries, considering that perhaps most criminal deportees were children when they first arrived in the U.S. and have no real connections to the countries of their birth, insist that “home” is not where the criminal aliens are going.”<sup>100</sup>

¶62 A big problem with the law, as acknowledged by Rep. Lamar Smith, R-Texas, a primary author of the 1996 legislation, is that “too many eventually make their way back through America’s porous borders.”<sup>101</sup> In Mexico, criminal deportees tend to remain in border towns where U.S. immigration agents drop them off. There, they await their chance to slip back into the United States. In the meantime, Mexican police say, some traffic in drugs and commit other crimes.<sup>102</sup>

¶63 In addition, the problem of returning former U.S. inmates has spread all the way from the tip of Central America to central Mexico. In 2004, police sources in Mexico City indicated that the Central American crime group known as Maras Salvatruchas (Maras) had grown and invaded Mexican territory. These gangs are integrated by young

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available at <http://psych.colorado.edu/~blechman/Th3-6.html>; see also *Crack blamed for rise in Central American child prostitution*, THE MIAMI HERALD, Nov. 22, 1999, available at <http://www.latinamericanstudies.org/guatemala/crack.htm>.

<sup>99</sup> See *500K Criminal Deportees*, *supra* note 86.

<sup>100</sup> *Id.* See also Arian Campo-Flores, *The Most Dangerous Gang in America: They’re a Violent Force in 33 States and Counting*, NEWSWEEK, Mar. 28, 2005, available at: <http://www.msnbc.msn.com/id/7244879/site/newsweek/>. The article explains:

MS-13 got started in Los Angeles in the 1980s by Salvadorans fleeing a civil war. Many of the kids grew up surrounded by violence. . . . When [they] reached the mean streets of the L.A. ghetto, Mexican gangs preyed on them. The newcomers’ response: to band together in a mara, or ‘posse,’ composed of salvatruchas, or ‘street-tough Salvadorans’ (the ‘13’ is a gang number associated with southern California). Over time, the gang’s ranks grew, adding former paramilitaries with weapons training and a taste for atrocity. MS-13 eventually adopted a variety of rackets, from extortion to drug trafficking. When law enforcement cracked down and deported planeloads of members, the deportees quickly created MS-13 outposts in El Salvador and neighboring countries like Honduras and Guatemala.

<sup>101</sup> *500K Criminal Deportees*, *supra* note 86. See also *Delitos de Exportación: “Numerosos criminales deportados regresan a EE.UU.* [Exporting Crime: Large Numbers of Deported Criminals Return to the U.S.], available at <http://www.terra.com/actualidad/articulo/html/act165717.htm> (indicating that between 40% and 60% of those deported had returned and that 75% of those foreign delinquents had, not only re-entered the United States, but also returned to jail after committing other offenses); Bill Wallace, *Deported Criminals Stream Back Into the U.S. by the Thousands*, SAN FRANCISCO CHRONICLE, May 11, 1998, at A11 (indicating that “these revolving-door deportation cases pose a serious challenge to law enforcement agencies and cost taxpayers millions of dollars each year” and that “Federal officials call them ‘1326’ cases, referring to the criminal code section the illegal immigrants are charged with violating.”); Michael Marizco, *Border Patrol catching more felons*, THE ARIZONA DAILY STAR (TUCSON), July 22, 2004, available at <http://www.dailystar.com/dailystar/allheadlines/30853.php>. The report indicates that a “fingerprint system in place for a year at some Border Patrol stations in the Tucson Sector has helped agents catch more than 8,000 illegal entrants with criminal records or who are wanted for crimes.” Further, the report indicates that “[t]hose arrested since Oct. 1 include people convicted of felonies and deported, or wanted on charges, including murder, in the United States . . . . Those criminals and criminal suspects comprise about 2 percent of the nearly 399,000 illegal entrants apprehended by agents in the Tucson Sector from Oct. 1 to July 15 [2004].” See also Arian Campo-Flores, *supra* note 100 (“Flush with new recruits from Central America, whether fleeing the law or accompanying parents seeking work along the immigrant trail, MS-13 members have set up cliques—geographically defined subgroups—in such remote redoubts as Boise, Idaho, and Omaha, [Nebraska].”).

<sup>102</sup> See *500K Criminal Deportees*, *supra* note 86.

people, including adolescents from El Salvador, Honduras and Guatemala, who, in their efforts to reach the United States, have remained in the Valley of Mexico due to lack of monetary resources.<sup>103</sup> These young men are considered very dangerous and have engaged in many types of crime, including kidnappings and robberies in the Federal District and State of Mexico, with extreme violence as their trademark.<sup>104</sup>

¶64 Because of this circularity in migration of former deportees, earlier this year a pilot immigrant-return plan (with an estimated initial cost of \$13 million dollars), as expressed by Homeland Security Undersecretary Asa Hutchinson, intends to keep migrants away from smugglers by sending them all the way to their communities of origin.<sup>105</sup> However, the concept of interior repatriation is highly controversial. While Mexican officials have insisted that the repatriation be voluntary (accomplished by ensuring that Mexican consular officials interview the migrants to ensure their decision to fly home is voluntary) and that detainees not be handcuffed, many civil organizations remain skeptical of the plan.<sup>106</sup>

¶65 The idea is that by returning the migrants to southern Mexico, which is the departure point for an estimated 70 percent of all would-be crossers, U.S. officials hope to save lives by making it harder for migrants to return and by breaking their relationships with the smuggling rings that “have become an essential means of getting across the border.”<sup>107</sup> However, as proposed below, absent any accompanying social programs, it is unlikely that the programs’ ultimate goal, the forestalling of more undocumented migration to the U.S., will be accomplished.

¶66 While a more focused examination of the impact of criminal deportees at the border is required, the information available leads us to conclude that the unilateral actions of the United States requiring massive deportations of former inmates, coupled with a lack of resources on the Mexican side, have provided incentives for human trafficking and undocumented smuggling in the region. Former inmates have increasingly turned to criminal activities, more often engaging in smuggling and trafficking endeavors in their return paths to the U.S.

## VI. POSITIVE DEVELOPMENTS

¶67 Despite the little progress made in the development of much needed strategies to combat human trafficking, it would be false to say that there are no important government (and civil society) initiatives on both sides of the border to prevent the smuggling and trafficking of people. In the case of Mexico, while serving as a good source of general information, the DOS Reports unfortunately fall short of making a

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<sup>103</sup> See Icela Lagunas & Claudia Bolaños, “*Rastrear a ‘maras’ en DF; los busca policía especial*”, [Mara-salvatrucha gang members are tracked by Federal District’s Special Police], *El Universal*, Feb. 12, 2004.

<sup>104</sup> *Id.*

<sup>105</sup> *Immigrant-return plan to cost \$13M*, THE ARIZONA DAILY STAR (TUCSON), July 1, 2004, available at <http://www.dailystar.com/dailystar/allheadlines/28088.php>.

<sup>106</sup> *Id.* See also Jorge Alberto Cornejo, *Criticar activistas plan para repatriar connacionales hasta su lugar de origen* [Activists Criticize Repatriation Plan], *La Jornada*, México D.F., Mar. 4, 2004, available at <http://www.jornada.unam.mx/023n3pol.php?printver=1&fly=1>.

<sup>107</sup> *Immigrant-return plan to cost \$13M*, *supra* note 105.

complete assessment of the situation.<sup>108</sup> Some important developments for consideration are absent in the reports, but they are discussed below in Parts A-D.

#### A. Legislative branch

¶68 As expressed above, the Trafficking Protocol was ratified by the Mexican Senate and published in the Official Federal Register Apr. 10, 2003. It entered into force soon after. The Trafficking Protocol's primary aim is to prevent and combat the trafficking of people; to protect and help the victims and to promote international cooperation.

¶69 With the ratification of this instrument, the State Parties (such as Mexico) are bound to enact legislation in order to classify said criminal conduct. The Trafficking Protocol provides guidance for this purpose in the form of a new definition of trafficking in human beings, expanding its scope to include prostitution, sexual exploitation, forced labor, slavery, servitude or extraction of organs, through threats or the use of force, kidnapping, fraud or misleading practices. In addition, it contemplates the protection of the victim's identity and privacy, legal assistance, as well as physical and psychological therapy and support. It also protects those people who are at risk for continued exploitation, and provides for the implementation of prevention programs.

¶70 All these concepts are included in several pending legislative proposals, which although in the initial stages, merit not only mention, but also some degree of analysis regarding their viability. The delays lay not necessarily in a lack of political will, but rather in finding the best formula for implementation. As has been the case in other Civil Law system countries, two separate legislative bills may be needed to harmonize internal legislation to international standards for trafficking in persons. The first would need to amend the Penal and Criminal Procedures Codes. The second would necessarily have to include the protection of victims and prevention issues. This must be done because the Criminal and Criminal Procedure Codes focus exclusively on terms and conditions of punishment. Therefore, a separate bill focusing on the prevention of trafficking and the protection of victims would be necessary for legislation that fully complies with the Protocol.<sup>109</sup>

#### B. Executive branch

¶71 One of the Mexican federal government's first official responses to the trafficking issue was the creation of the "Specialized Unit to Investigate the Trafficking of Minors, Undocumented People and Organs" (*Unidad Especializada en Investigación de Tráfico de Menores, Indocumentados y Órganos*), within the Ministry of Justice (*Procuraduría General de la República* or PGR). This Unit is a branch of the Deputy Attorney

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<sup>108</sup> Although previous reports failed to note legislative efforts, in 2005 the report stated that "[l]egal reforms are pending in the Mexican Congress which, if passed, may aid with trafficking-related prosecutions and convictions." DOS TRAFFICKING REPORT 2005, *supra* note 50, at 156. However, these reports, because of their limited scope and nature, fail to provide in depth analysis of legislation or provide propositive alternatives.

<sup>109</sup> Such has been the strategy proposed for other countries with similar civil law systems (e.g. Ecuador). The Mexican Senate's Jackson-Mota-Sánchez draft law (version as of 21-November-2005) is currently the most viable proposal and, if approved, it would incorporate anti-trafficking prosecution, protection and prevention strategies into the Mexican legal framework.

General's Office for Specialized Investigation in Organized Crime (*Subprocuraduría en Investigación Especializada Delincuencia Organizada*).<sup>110</sup>

¶72 Earlier this year, the Mexican Foreign Ministry, in combination with the Mexican Education Ministry's at-a-distance education programs, carried out a pilot program for continuing education for adults detained in Albuquerque, New Mexico. The program, which graduated over 700 Mexican inmates in elementary and secondary education as well as conferring General Equivalency Degrees (GED), benefits these adults, all of whom will be deported back to Mexico upon completion of their sentences.<sup>111</sup>

¶73 On October 14, 2004, the National Migration Institute (INM), an entity of the Department of the Interior (*Secretaría de Gobernación*), announced the Project entitled "Combating the Trafficking of Women, Adolescents and Children in Mexico" (*Combate a la Trata de Mujeres, Adolescentes, Niños y Niñas en México*),<sup>112</sup> undertaken in cooperation with the International Migration Organization and the Organization of American States through the Inter-American Commission of Women of the OAS (CIM, for its initials in Spanish). This project, which is the second phase of an Inter-American program,<sup>113</sup> will generate much needed data to fill the gaps in information, allowing the Mexican government to create appropriate legislation and a concise and overreaching public policy to deal with the phenomena of trafficking and smuggling.<sup>114</sup>

¶74 The Mexican government organized an international conference on November 23 and 24, 2004, held in Tlatelolco, D.F., on the issue of trafficking in Mexico. The participants included the first lady Martha Sahagún de Fox, Foreign Secretary Luis Ernesto Derbez, high level public officials from the Ministries of Government, Justice and Foreign Affairs, as well as representatives from several countries and international organizations, including the United States Department of State's Office on Trafficking, the Canadian Foreign Ministry, the United Kingdom's Scotland Yard, the European Union, the Organization of American States, the United Nations' Office on Drugs and Crime and the Organization for International Migration.<sup>115</sup> Mexican and international civil society organizations and academics were also present. Undersecretary for Human Rights Patricia Olamendi, joined by Assistant Attorney General Ramos Flores,

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<sup>110</sup> See Informe de Gestión 2003 de la Procuraduría de la Republica [Ministry of Justice Report of Activities 2003].

<sup>111</sup> See "Se Gradúan Más de 700 Internos Mexicanos del Centro Penitenciario, Cibola County Corrections Center," [Over 700 Mexican Inmates Graduate from the Cibola County Corrections Center], LAZOS (On-line Report of the Institute for Mexicans Abroad, Mexican Ministry of Foreign Affairs), No. 150, México, D.F., Aug. 18, 2004, available at <http://www.sre.gob.mx/ime>. The program, proposed by the Consulate of Mexico in Albuquerque, New Mexico, also involved the Mexican Ministry of Education (SEP, for its initials in Spanish), the Mexican Institute for Adult Education (INEA), the "Colegio de Bachilleres" (COBACH) [the "Mexican College of Bachelors" is in charge of high school-level education in Mexico], and the New Mexico Department of Education.

<sup>112</sup> See OAS-Mexico Project to Combat Trafficking, *supra* note 15.

<sup>113</sup> The first phase made an assessment for Belize, Brazil, Costa Rica, Dominican Republic, Guatemala, Honduras, Nicaragua, Panama and El Salvador, and it was conducted by the CIM and DePaul University. In addition to Mexico, the second phase of the study will include Bolivia and seven Caribbean nations.

<sup>114</sup> The findings of the OAS study are expected to be released toward the end of September, 2005.

<sup>115</sup> Concluding, among several things, that the problem of trafficking in Mexico requires urgent study, as there are no reliable statistics; that greater emphasis should be placed on victims and their issues; acknowledging the need for better international cooperation; identifying key differences between trafficking and smuggling; acknowledging the need for harmonization of the internal legislation; acknowledging the need for greater participation of civil society; and, calling for the naming of a National Commission on Trafficking to issue a report on the advances over the next six months.

Immigration Commissioner Magdalena Carral and the President of the Women's Institute, Patricia Espinosa, called for the creation of a National Commission on Trafficking.

¶75 Although the Commission is yet to be appointed, the Foreign Ministry kicked off 2005 activities to combat the trafficking of people with a conference in San Luis Potosí, including the participation of high migration states like Guanajuato and Zacatecas. The hopes are to complete a series of seven regional conferences within Mexico to address the issue and build grass-roots support.<sup>116</sup>

### C. Civil society

¶76 In Mexico, non-governmental organizations like *Sin Fronteras* and the network of immigrant related NGOs known as *Foro Migraciones* have increasingly advocated for the inclusion of migrant related issues, such as smuggling and trafficking, in the Executive's Commission on Human Rights. The Commission recently included a subcommittee on immigration related topics. The work of these organizations in the subcommittee has succeeded in putting the issue of trafficking in the government's human rights agenda.

¶77 Another noteworthy NGO that is actively working on trafficking issues on both sides of the U.S.-Mexico border is the Bilateral Safety Corridor Coalition, which focuses on trafficking and sexual commercial exploitation of women and children. It includes sub-groups of almost 90 NGO's in San Diego, California and Tijuana, Baja California that have recently secured funding to expand their activities to the entire border region.<sup>117</sup>

¶78 On the academic side, the Latin American Faculty of Social Sciences<sup>118</sup> has conducted the first thorough research of trafficking on women and children on the southern border in Mexico, entitled "Trafficking of Migrant Women and Minors in Mexico's Southern Border: An Exploratory Immersion into an Unknown Reality."<sup>119</sup> The study is the first major field research conducted in Mexico on this subject and its publication is expected in late 2005.

### D. Other Mexico-related initiatives in the U.S.

¶79 In addition to the DOS and congressional anti-trafficking initiatives, other state and federal actions to combat U.S.-Mexico trafficking have been undertaken. For example, organizations operating in Arizona that smuggle people into the U.S. can have their assets seized by the government under a law signed by Governor Janet Napolitano earlier this year. Under the new law, which allows civil racketeering actions to be brought against

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<sup>116</sup> These conferences also include information about the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, commonly known as the "Convention Of Belem Do Para" (adopted in Belém do Pará, Brasil, on June 9, 1994) and other related topics.

<sup>117</sup> Information provided by Marisa Ugarte, Executive Director of the Bilateral Safety Corridor Coalition. The border-wide Project is entitled "Closing the Border to Human Trafficking."

<sup>118</sup> *Facultad Latinoamericana de Ciencias Sociales* or FLACSO.

<sup>119</sup> Dr. Rodolfo Casillas, *La Trata de Mujeres y Menores Migrantes en la Frontera Sur de México : Una Inmersión Exploratoria a una Realidad Desconocida* [Trafficking of Migrant Women and Minors in Mexico's Southern Border: An Exploratory Immersion into an Unknown Reality].:

any group that makes more than \$5,000 a month from running people-smuggling or “coyote” operations, the state is enabled to track and seize the financial gains.<sup>120</sup>

¶80 In other governmental initiatives, the nexus between smuggling and trafficking in the U.S.-Mexico relationship continues to evidence itself through a series of recent developments. Over the last year, at least ten criminal groups who traffic Mexican women have been disbanded in the U.S.<sup>121</sup> According to a report issued by the former Attorney General, John Ashcroft, Mexican women fooled by employment and marriage promises were exploited in places of prostitution and massage parlors in Texas, California, Georgia, New Jersey, New York and North Carolina.<sup>122</sup>

¶81 Similarly, the DOJ Civil Rights Division’s Trafficking in Persons and Worker Exploitation Task Force has identified situations where the traffickers have recruited Mexican girls between the ages of 14 and 16 years of age and forced them into prostitution.<sup>123</sup>

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<sup>120</sup> Howard Fischer, “Smuggling groups’ assets can be seized,” ARIZONA DAILY STAR, June 2, 2004, available at <http://www.azstarnet.com/dailystar/printDS/24421.php>.

<sup>121</sup> See Nota de la Redacción, “Explotan en EU a niñas mexicanas: Caen en un año 10 bandas de traficantes,” [Mexican Girls are exploited in U.S.: 10 trafficking bands fall], Periódico Reforma (Mexico City), October 19, 2004, available at <http://www.reforma.com/edicionimpresa/notas/041019/nacional/551060.htm> (by subscription only). On March 27, 2001, the DOJ announced a comprehensive anti-trafficking initiative focused on three key areas: 1) protecting the victims; 2) prosecuting the perpetrators; and 3) partnership-building that addresses, attacks and prevents human trafficking. See also John Ashcroft, U.S. Att’y Gen., Prepared Remarks to National Conference on Human Trafficking, July 16, 2004, Tampa, Fla., available at <http://www.usdoj.gov/ag/speeches/2004/71604humantraffickingagfinal.htm>

<sup>122</sup> Ashcroft, *supra* note 121. According to DOJ figures, over the last three fiscal years the DOJ has charged 111 traffickers, nearly a three-fold increase over the previous three years. Of these, 79 included sex-trafficking allegations; the DOJ has achieved convictions or obtained guilty pleas from 77 defendants, an increase of more than 50 percent over the previous three years. Of these, 59 defendants were found guilty of sex-trafficking charges; the DOJ has opened 210 new investigations, more than double the number opened in the previous three years. As of January 28, 2004, the Criminal Section of the Civil Rights Division has 142 open trafficking investigations – more than twice the number open in January 2001. The U.S. Department of Justice announced on May 18, 2004 the first annual Report to Congress on U.S. Government Efforts to Combat Trafficking in Persons. A copy of the Report to Congress on U.S. Government Efforts to Combat Trafficking in Persons can be found on the Justice Department’s web page at: <http://www.usdoj.gov/ag/speeches/2004/050104agreporttocongresstprav10.pdf>. Other Department of Justice’s efforts to combat trafficking in the United States may be found at the Department’s Web site: [www.usdoj.gov/trafficking.htm](http://www.usdoj.gov/trafficking.htm)

<sup>123</sup> In February 2002, Plainfield, New Jersey police raided a home where it was believed undocumented aliens were engaged in prostitution. In that home, police discovered four young girls from Mexico. According to the DOJ:

[t]he girls, from extremely remote parts of Mexico, were between the ages of 14 to 16. They were lured to the United States by the promise of a better life. Instead, they were imprisoned by two women who guarded them constantly, abused them physically, and denied them the most basic necessities of daily life. In the two years of their captivity, the girls were never allowed to leave the house or to even speak. They suffered in silence as they were forced to have sex with 12 to 14 men a day. Authorities in New Jersey sent the girls to one of the many organizations that provide services to victims of human trafficking. There, the girls received medical care, therapy, tutoring, and legal assistance. All four girls were provided with T-visas and were involved actively in the Justice Department prosecution of their traffickers . . . . With their help, the girls’ two captors were each sentenced to more than 17 years in prison.

Two years later, the four of them remain in the U.S.: one in a foster home, another in a group home for independent living and the other two (now 18) are working at full-time jobs and supporting themselves. Ashcroft, *supra* note 121.

¶82 Another agency working on human trafficking, which has identified Mexican women in bondage in United States territory, is the U.S Department of Health and Human Services (DHHS).<sup>124</sup> For example, in Georgia, people involved with the DHHS consider trafficking to be a big problem in the state.<sup>125</sup> In this state, trafficking remains a hidden phenomenon, so the Rescue & Restore Victims of Human Trafficking Campaign, a pilot program unveiled last April by the DHHS, is designed to fight the problem by strengthening and building coalitions among nonprofit groups, churches, health care providers and law enforcement.<sup>126</sup>

## VII. PROPOSALS

¶83 Despite this overwhelming data showing the defects of United States and Mexican governmental responses to the dangerous environment of the border and the expansion of trafficking rings operating all the way from Central and South America through Mexican territory, no concrete proposal on cooperation has been put forward by either government.

¶84 The issue of criminal deportees, as a contributing factor of important consequences in the smuggling and trafficking of people from Mexico to the U.S., remains largely ignored in policy planning efforts. The Mexican government must design policies to assist these deportees to integrate into Mexican society and find jobs. Otherwise it will continue to suffer the consequences of having unemployable, U.S.-trained delinquents, participating in the growing human trafficking and smuggling operations at the northern and southern borders of Mexico.

¶85 Although some positive developments have occurred over the last year,<sup>127</sup> it is essential that the U.S. and Mexican governments hold a bilateral conference to discuss the issue, not only from a law enforcement perspective, but also including the health, education and social service authorities (such as SEP, DIF, IMSS, etc., and their U.S. counterparts) as well as civil society at large. A bi-national task force, which includes civil society and academics, could study the best means of cooperation.

¶86 Programs with proven success, such as the Cibola County Corrections Center's pilot adult education program, must be replicated at both the federal and local level elsewhere in the United States. For this process to succeed there must be not only a firm commitment of both governments to the issue of cooperation and communication, but a political willingness to invest economic and academic resources in the education of incarcerated Mexicans.

¶87 The U.S government must quickly re-evaluate the appropriateness of its massive deportation program, including a cost-benefit analysis of expelling fast-returning criminals into U.S. territory and their negative impact in receiving-sending nations, with little infrastructure and/or notice to deal with these individuals. The U.S. Congress

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<sup>124</sup> Poole, *supra* note 14.

<sup>125</sup> *Id.* (quoting Kristi Graunke, a staff attorney and Equal Justice Works fellow with the farmworker division of the Georgia Legal Services Program).

<sup>126</sup> *Id.* Atlanta is among three cities tapped for the DHHS pilot project to identify and assist victims of human trafficking. The other cities are Philadelphia and Phoenix.

<sup>127</sup> See DOS TIP Report 2005, *supra* note 50, at 156. The latest report indicated that "Mexico has actively cooperated with the United States on a few specific trafficking cases and also worked with the United States through bilateral law enforcement channels."

should appoint a commission to evaluate the phenomenon and its impact in immigration, smuggling and trafficking of people.

¶88 American authorities should also review the scope, format, and extent of trafficking and other human rights reports. Non-governmental efforts ought to be included as a category, as well as a discussion of how academia is approaching these issues. Legislative efforts and initiatives also need to be addressed. The U.S. government should also seek a more diplomatic way of complying with its congressionally mandated reporting duties in order to avoid recurring conflicts with the Mexican government.<sup>128</sup> These reports have historically been misunderstood as an intrusive means of legislating extraterritorially by the U.S., and yet the same reporting trend has continued year after year, administration after administration.

¶89 Another area that remains neglected is that of civic education. Although an increasing number of citizens are affected by the growing crime rates in Mexico's border region, there has not been a significant surge in NGOs dedicated to fight crime.<sup>129</sup> Needless to say, human trafficking as a social phenomenon only begins to be discussed and, as shown above, there are no programs available yet to combat this phenomenon specifically. Unilaterally, the Mexican government must destine more resources to propel programs with state governments that build coalitions among nonprofit groups, churches and health care providers. The United States, which has already destined funds for precisely these kinds of programs in human trafficking, can assist in the process.

¶90 Additionally, the Mexican executive branch must work with the Congress to quickly enact new laws to combat trafficking, adopting the international standards herein mentioned. Special emphasis also ought to be placed on legislative progress by U.S. authorities' efforts to assist Mexico.

¶91 Capitalizing on the increased involvement in the subject of civil society organizations like *Sin Fronteras*, the *Foro Migraciones* and the Bilateral Safety Corridor Coalition, the U.S. and Mexican governments should redouble their efforts to work with these and other organizations on both sides of the border. Stakeholder building efforts ought to be a priority because anti-trafficking programs can only be successful if civil society is invested in them and the public perceives trafficking as a major problem.

¶92 With all this in mind, it becomes obvious that reaching a U.S.-Mexico migratory agreement is a necessary part of the equation.<sup>130</sup> In late 2004, the Mexican government

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<sup>128</sup> See, e.g., Chris Hawley, *Attorney general's visit to Mexico a subdued one*, THE ARIZONA REPUBLIC (PHOENIX), Mar. 31, 2005, available at <http://www.azcentral.com/arizonarepublic/news/articles/0331alberto31.html>. For instance, U.S. Att'y Gen. Alberto Gonzales' first visit to Mexico followed a number of State Department reports criticizing Mexico's law enforcement system (one of them saying police lacked training and calling the Mexican judicial system 'weak, overworked and inefficient'). The criticism angered Mexican prosecutors and the newspapers quoted Mexican Att'y Gen. Rafael Macedo as saying: "It irritates me when there are unilateral evaluations." The Att'y Gen. was in Mexico to discuss the Security and Prosperity Partnership. The accord calls for better intelligence-sharing, more careful screening of people entering North America and tougher port security, among other goals.

<sup>129</sup> See COLEF Border Report, *supra* note 75.

<sup>130</sup> See Hernán Rozemberg, *Diplomat calls for improved immigration policy*, THE EXPRESS-NEWS (SAN ANTONIO, TX), Oct. 22, 2004, available at <http://www.mysanantonio.com/news/metro/stories/MYSA102204.1B.tonygarza.fed6b89.html>. The article quotes U.S. Ambassador to Mexico, Antonio "Tony" Garza: "[t]he United States and Mexico benefit from an established trade partnership, but their next goal should be a comprehensive immigration accord as a step toward expanded bilateral relations."

announced that it would abandon a bilateral-only approach to reaching a migratory agreement with the United States. Rather, it would join forces with other Latin American nations in a concerted effort to lobby the American Congress to approve immigration reform to resolve or at least temporarily alleviate the current problem.<sup>131</sup> However, no concrete proposal has yet arisen.

¶93 While some remain skeptical that such an approach will lead to a successful accord, without such an agreement, or absent new legislative efforts to correct the migratory situation of millions of people living illegally and traveling underground to the United States, it is likely that the current environment fostering smuggling and trafficking of people, not to mention firearms and drugs, will continue to prosper. This would only spur the traffickers and smugglers to attempt even riskier avenues of entry into the U.S.

### VIII. CONCLUSION

¶94 The United States and Mexico must approach the issue of trafficking in human beings and associated phenomena, like smuggling of migrants, with an honest dialogue between both nations. It is clear that the phenomena herein discussed is affected by many external factors like globalization, economic growth, social development, education, historical migration patterns and organized crime, among others. It is obvious that a law enforcement-only approach may ameliorate the situation, but will not resolve it at its root.

¶95 The impact of each country's policies on its neighbor must be taken into account, if any effort is to be successful. One of the comparative advantages that organized crime has historically had over national governments is that it coordinates its actions irrespective of national boundaries to accomplish its mission. While acknowledging that every country has a duty to protect its territorial integrity and borders, in doing so each country must decide how much authority to make decisions it is willing to share with its neighbors in order to accomplish joint regional security. Without this kind of open dialogue, cooperation efforts are likely to have little success.

¶96 In the meantime, it is important that both countries implement measures that are within their unilateral control. Both Mexico and the United States have already taken positive steps in acknowledging that trafficking in human beings is an issue which must be dealt with in the short and median terms. Therefore, the implementation of public policies to address the issue must take into account all the external factors aforementioned. Civil society must play an integral role in the development of these policies. Without their help it is likely that they will not reach their maximum potential.

¶97 Rating countries according to their anti-trafficking efforts may prove a useful exercise for congressional oversight and for prioritizing cooperative efforts for the U.S, but prior, similar experiences with negative results—such as the drug trafficking issue—must be taken into account. The current rating system may prove to be one of the primary barriers for building a true partnership in the fight to eradicate human trafficking.

¶98 For both countries, it is essential that the executive, legislative and judicial branches interact efficiently, creating the essential avenues of communication to arrive to

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<sup>131</sup> See Francisco Robles Nava, "El canciller Derbez afirma que adoptará una estrategia conjunta con los países latinoamericanos," [Mexican Chancellor Derbez will adopt joint strategy with Latin American Countries], LA OPINIÓN (L.A., CAL.), Oct. 19, 2004, available at <http://www.laopinion.com/latinoamerica/?rkey=00041018173601247002>.

much needed coordination. Unfortunately, in recent years both nations have experienced great political gridlock and executive-legislative relations have suffered as a result. Mexico currently experiences a serious problem in this regard, lacking national consensus on many issues. Nevertheless, the political atmosphere in both Mexico and the U.S. still favors efforts toward reducing the trafficking of human beings and the international smuggling of people.

¶99 Both nations must capitalize on the current momentum and jointly resolve this important human rights issue, which affects both societies equally. Their destinies have long been linked by much more than a free-trade partnership. As economic and social integration continue to advance, so must government policies, allowing efficient cooperation and achieving palpable results that benefit the American and Mexican people. Only then can we hope to achieve solid footing in the fight against organized crime and the eradication of the practice of trafficking in human beings.