

## NOTES

### ADDRESSING HUMAN TRAFFICKING ALONG THE UNITED STATES-MEXICO BORDER: THE NEED FOR A BILATERAL PARTNERSHIP

*Rocio Garza\**

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\* Candidate for Juris Doctor, Benjamin N. Cardozo School of Law, May 2011; A.B. (2005) Harvard University. I wish to thank Professor Sheri P. Rosenberg for her thoughtful comments and advice on this note. A special thank you to my family, friends, and Zuriel Chavez for his unwavering support and encouragement. I dedicate this note to the countless victims of human trafficking and the ongoing efforts to eradicate the exploitation of people.

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## I. INTRODUCTION

On any given day, a Mexican woman will be promised a good paying job as a nanny or waitress in the United States. A Mexican man will be promised employment as a waiter or construction worker. They will be told that they will earn enough money to send back to their families in Mexico. Given that, for many years, undocumented immigrants have been working in the United States and sending money to their families in Mexico, this will be an enticing and believable job offer. Having limited economic resources in their home country and perhaps a lack of formal education, they will take the risk and pay a *coyote* to transport them to the United States. They will leave behind their families and all that they know for a chance at the elusive American Dream.

Their immigration stories are all too common. Many people

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will arrive in the United States to find jobs in the agriculture, restaurant, construction, and housekeeping industries, joining countless other undocumented immigrants. They will live in the shadows across the United States. Others, however, will be less fortunate. When they arrive in the United States, many people will be told their transportation fees have increased and will be hard-pressed into forced labor or forced prostitution to repay their debts. They may even be coerced into signing “labor contracts,” stipulating wage deductions for food and shelter. They will likely not know how much they owe and the money they earn will go directly to their captors. What begins as a smuggling operation can quickly turn into the heinous crime of human trafficking.<sup>1</sup>

Human trafficking is the exploitation of people primarily for labor or sex using force, coercion or fraud.<sup>2</sup> It dehumanizes victims by treating them as commodities<sup>3</sup> and by subjecting them to dreadful living conditions.<sup>4</sup> Traffickers may recruit, transport, or harbor victims using force, threat, or fraud for the purpose of sexual exploitation, forced labor, or other similar practices.<sup>5</sup> Men, women, and children can all be victims of human trafficking. Described as “a modern-day form of slavery,”<sup>6</sup> human trafficking manifests itself in a number of forms.<sup>7</sup> As of June 2010, the

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<sup>1</sup> The stories depicted here are common and do not come from any specific source. The following sources provide additional examples. See Dina F. Haynes, *Exploitation Nation: The Thin and Grey Legal Lines between Trafficked Persons and Abused Migrant Laborers*, 23 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 48-49 (2009). See also *United States v. Flores Carreto*, 583 F.3d 152, 154-55 (2d Cir. 2009), for a situation where authorities discovered “a prostitution ring that smuggled Mexican women into the United States and forced them into prostitution.”

<sup>2</sup> *What is Human Trafficking?*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html> (last visited Oct. 5, 2010).

<sup>3</sup> Haynes, *supra* note 1, at 3.

<sup>4</sup> *Id.* at 48-49.

<sup>5</sup> UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 2. A more extensive definition of human trafficking is presented *infra* Part II.

<sup>6</sup> Former Secretary of State, Condoleezza Rice, compared human trafficking to slavery and referred to the efforts to eradicate it as the new abolitionist movement. U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 1 (2007)*, available at <http://www.state.gov/g/tip/rls/tiprpt/2007/> [hereinafter *TIP REPORT 2007*]. See Nicholas D. Kristof, Op-Ed., *If This Isn’t Slavery, What Is?*, N.Y. TIMES, Jan. 4, 2009, available at <http://www.nytimes.com/2009/01/04/opinion/04kristof.html>.

<sup>7</sup> The major forms of trafficking in persons include forced labor, bonded labor, debt bondage among migrant laborers, involuntary domestic servitude, forced child labor, child soldiers, sex trafficking and child sex trafficking and related abuses. U.S. DEP’T OF STATE,

United Nations estimated that “there are at least 12.3 million adults and children in forced labor, bonded labor, and commercial sexual servitude at any given time.”<sup>8</sup> However, due to the clandestine nature of human trafficking,<sup>9</sup> the exact number of victims is unknown with estimates ranging from four million to twenty-seven million.<sup>10</sup>

Human trafficking is not a new phenomenon,<sup>11</sup> but no one knows how long it has been in existence. In the last decade, since 2000, governments around the world began to acknowledge the prevalence of human trafficking, its destructive impact on victims, and the need to eradicate it.<sup>12</sup> People tend to disassociate themselves from human trafficking, thinking it does not happen within their communities.<sup>13</sup> However, in actuality, trafficking touches almost all countries in one way or another.<sup>14</sup> A combination of internal motivating factors and external factors make the exploitation of people possible.<sup>15</sup> Some of the factors that motivate traffickers to exploit people and make victims vulnerable to exploitation include poverty, lack of economic opportunities, lack of education, lack of information about legal immigration, and social conflicts within countries.<sup>16</sup> Among others, external factors include gender discrimination, weak

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TRAFFICKING IN PERSONS REPORT 6-7 (2009), <http://www.state.gov/documents/organization/123357.pdf> [hereinafter TIP REPORT 2009]. For definitions of the forms of human trafficking see *id.* at 14-25.

<sup>8</sup> These figures were provided by the International Labor Organization (ILO)—the U.N. agency charged with addressing labor standards, employment, and social protection issues. *Id.* at 8. See U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 7* (2010), <http://www.state.gov/documents/organization/142979.pdf> [hereinafter TIP REPORT 2010].

<sup>9</sup> Human trafficking is described as an underground criminal activity whose scope is difficult to accurately measure. U.S. DEP'T OF STATE, *VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000: TRAFFICKING IN PERSONS REPORT 2* (2001), <http://www.state.gov/documents/organization/4107.pdf> [hereinafter TIP REPORT 2001].

<sup>10</sup> TIP REPORT 2007, *supra* note 6, at 8.

<sup>11</sup> TIP REPORT 2001, *supra* note 9, at 2.

<sup>12</sup> *Id.* at 2-3.

<sup>13</sup> Robert W. Dalton, *Human Trafficking: 'A dirty little secret,'* GOUPSTATE.COM-SPARTANBURG HERALD-JOURNAL, Dec. 6, 2009, <http://www.goupstate.com/article/20091206/ARTICLES/912061062/1083/ARTICLES?p=2&tc=pg>.

<sup>14</sup> TIP REPORT 2009, *supra* note 7, at 1.

<sup>15</sup> Salvador A. Cicero-Domínguez, *Assessing the U.S.-Mexico Fight against Human Trafficking and Smuggling: Unintended Results of U.S. Immigration Policy*, 4 *NW. J. INT'L HUM. RTS.* 303, 306 (2005).

<sup>16</sup> *Id.* at 306-07.

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border controls, absence of legislation to address immigration and trafficking, government corruption, and demand for cheap labor and sexual services in receiving countries of human trafficking victims.<sup>17</sup>

Enacting anti-trafficking laws is one of the first steps a country must take to prosecute traffickers, protect victims, and prevent trafficking.<sup>18</sup> To date, more than half of all countries have enacted laws prohibiting human trafficking in all its forms,<sup>19</sup> yet the problem persists. Although outlawing human trafficking is a positive development, prosecution, protection, and prevention do not immediately follow. Given the complex factors under which human trafficking flourishes,<sup>20</sup> more than enacting anti-trafficking legislation is needed to curb these despicable acts.<sup>21</sup>

The United States enacted federal legislation, the Trafficking Victims Protection Act of 2000 (TVPA), criminalizing trafficking in persons.<sup>22</sup> The TVPA may be utilized to protect victims of “severe forms of trafficking” and to prosecute traffickers.<sup>23</sup> A person subjected to forced labor or sexual exploitation, as in the situations described above of the victims who fall into the hands of traffickers, may be able to press charges against their traffickers and get legal protection.<sup>24</sup> However, access to the TVPA is contingent on the victim seeking help or being rescued. Given that victims are usually undocumented, fear being deported, and are intimidated with violence, the chances that the TVPA reaches intended victims is often slim.

Similarly, in 2007, Mexico enacted the Law to Prevent and Punish Trafficking in Persons (Mexican Anti-Trafficking Law).<sup>25</sup> Despite enacting anti-trafficking legislation, Mexico is not yet in

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<sup>17</sup> *Id.* at 307.

<sup>18</sup> TIP REPORT 2009, *supra* note 7, at 9.

<sup>19</sup> Hillary Rodham Clinton, *Partnering Against Trafficking*, WASH. POST, June 17, 2009, [http://www.washingtonpost.com/wp-dyn/content/article/2009/06/16/AR2009061602628\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/06/16/AR2009061602628_pf.html).

<sup>20</sup> Cicero-Domínguez, *supra* note 15, at 306-07.

<sup>21</sup> Clinton, *supra* note 19.

<sup>22</sup> Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

<sup>23</sup> *See* Victims of Trafficking and Violence Protection Act of 2000, 114 Stat. at 1466, 1470; *see also* discussion of the Victims of Trafficking and Violence Protection Act of 2000 *infra* Part III.

<sup>24</sup> Victims of Trafficking and Violence Protection Act of 2000, 114 Stat. at 1469.

<sup>25</sup> Ley Para Prevenir y Sancionar la Trata de Personas [Law to Prevent and Punish Trafficking in Persons], Diario Oficial de la Federación [DO], 27 de Noviembre de 2007 (Mex.), *available at* <http://www.diputados.gob.mx/LeyesBiblio/ref/lpstp.htm>.

compliance with the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (UN Protocol),<sup>26</sup> which sets out the international legal framework to eradicate human trafficking.<sup>27</sup> The UN Protocol is a supplement to the United Nations Convention against Transnational Organized Crime.<sup>28</sup> Although the Mexican Anti-Trafficking Law<sup>29</sup> surpasses the minimum requirements for incarceration of traffickers outlined in the UN Protocol, Mexico has failed to adequately implement the law.<sup>30</sup> As of June 2009, there had been no convictions under this federal law.<sup>31</sup> In December 2009, however, a Mexican federal judge achieved the first conviction under the Mexican Anti-Trafficking Law in a case involving six trafficking offenders.<sup>32</sup> With only one successful prosecution, Mexico continues to be a transit, origin and destination country for human trafficking victims.<sup>33</sup>

The porous United States-Mexico border continues to be a significant point of entry for human trafficking victims<sup>34</sup> that are beyond the reach of the Mexican Anti-Trafficking Law and unlikely to benefit from the TVPA. Along the approximately 2,000-mile division, the challenges of eradicating human trafficking are manifold.<sup>35</sup> One of these challenges is determining whose responsibility it is to remedy the human trafficking situation. Should the United States expend more resources saving victims and incarcerating traffickers within its borders? Is it Mexico's responsibility to warn its citizens and keep them safe from traffickers? Should it matter that what makes victims vulnerable to traffickers is their basic human instinct to do better for

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<sup>26</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (Nov. 15, 2000) [hereinafter UN Protocol].

<sup>27</sup> TIP REPORT 2009, *supra* note 7, at 206.

<sup>28</sup> United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/RES/55/25 (Nov. 15, 2000) [hereinafter Convention].

<sup>29</sup> Ley Para Prevenir y Sancionar la Trata de Personas [Law to Prevent and Punish Trafficking in Persons], Diario Oficial de la Federación [DO], 27 de Noviembre de 2007 (Mex.).

<sup>30</sup> TIP REPORT 2009, *supra* note 7, at 206.

<sup>31</sup> Emilio Godoy, *Rights-Mexico: Slow Progress Against Human Trafficking*, IPS NEWS NET (Aug. 27, 2009), <http://ipsnews.net/news.asp?idnews=48245>.

<sup>32</sup> TIP REPORT 2010, *supra* note 8, at 233.

<sup>33</sup> TIP REPORT 2009, *supra* note 7, at 206.

<sup>34</sup> *Id.* at 57.

<sup>35</sup> Cicero-Domínguez, *supra* note 15, at 303.

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themselves and their progeny by seeking better economic opportunities? Human trafficking transcends boundaries and so must its solution. The United States and Mexico are both deeply affected and inextricably linked by human trafficking due to their history and extensive shared geographic border. Hence, a solution for addressing human trafficking must take into consideration both countries' interests through a bilateral partnership.

This Note proposes that Mexico amend the Mexican Anti-Trafficking Law and makes recommendations for its implementation. However, the Note acknowledges that even if the laws are improved, the solution may not be complete. The Note argues that a more concrete bilateral partnership between the United States and Mexico is necessary in order to prevent human trafficking, prosecute traffickers, and protect victims of human trafficking. Part II presents background information including the definition of human trafficking pursuant to international instruments, the distinguishing factors between human trafficking and smuggling that can blur the line between criminals and victims, and an overview of the circumstances that further complicate anti-trafficking efforts along the extensive shared border. Part III reviews the various interrelated legal frameworks that have been established to combat human trafficking: at the international level by the United Nations, in the United States, and in Mexico. The section discussing the international legal framework includes a summary of the UN Convention Against Transnational Organized Crime, which opened for signature by Member States at a High-level Political Conference convened in Palermo, Italy, and the subsequently adopted UN Protocol that addresses human trafficking. The U.S. legal framework section discusses its intersection with the international legal framework and addresses the TVPA along with its most recent reauthorization. The Mexican legal framework section includes the preexisting laws related to human trafficking, the Mexican Anti-Trafficking Law, and the formation of the Special Prosecution Unit for Crimes against Women and Human Trafficking, (FEVIMTRA).<sup>36</sup> Part IV recommends amending the Mexican Anti-Trafficking Law and

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<sup>36</sup> *Fiscalía Especial para los Delitos de Violencia contra las Mujeres y Trata de Personas*, PROCURADURIA GENERAL DE LA REPUBLICA [OFFICE OF THE ATTORNEY GENERAL], <http://www.pgr.gob.mx/combate%20a%20la%20delincuencia/delitos%20federales/que%20es%20FEVIMTRA.asp> (last visited Jan. 18, 2010) [hereinafter *FEVIMTRA*].

makes suggestions regarding its implementation. It also proposes a bilateral partnership between the United States and Mexico and considers and responds to challenges against the recommendations and the proposal.

## II. BACKGROUND

### A. *Definition of Human Trafficking*

The United Nations was the first to offer a comprehensive definition of human trafficking<sup>37</sup> in the UN Protocol on January 8, 2001.<sup>38</sup> The definition of trafficking in persons in the UN Protocol has three main elements: (1) an act; (2) the means used in the act; and (3) a purpose.<sup>39</sup> First, pursuant to the UN Protocol, the punishable *acts* include the recruitment, transportation, transfer, harboring and receipt of persons.<sup>40</sup> The definition suggests that a number of actors may be involved in the trafficking of people and that each of these actors may be punished. Second, any of the punishable acts must be done through the *means* provided by the UN Protocol definition in order to be punishable as human trafficking.<sup>41</sup> The punishable means used include threat, use of force, coercion, abduction, fraud, deception, or abuse of power or of a position of vulnerability.<sup>42</sup> In addition, “giving or receiving of payments or benefits to achieve the consent of a person having

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<sup>37</sup> Kalen Fredette, *Revisiting the UN Protocol on Human Trafficking: Striking Balances for More Effective Legislation*, 17 *CARDOZO J. INT'L & COMP. L.* 101, 113 (2009).

<sup>38</sup> UN Protocol, *supra* note 26, art. 3(a).

<sup>39</sup> U.N. OFFICE ON DRUGS AND CRIME, TOOLKIT TO COMBAT TRAFFICKING IN PERSONS 2, (2008), [www.unodc.org/documents/human-trafficking/HT\\_Toolkit08\\_English.pdf](http://www.unodc.org/documents/human-trafficking/HT_Toolkit08_English.pdf) [hereinafter TOOLKIT].

<sup>40</sup> UN Protocol, *supra* note 26, art. 3(a). The UN Protocol states:

(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.

*Id.*

<sup>41</sup> TOOLKIT, *supra* note 39, at 3.

<sup>42</sup> UN Protocol, *supra* note 26, art. 3(a).

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control over another person” is also a punishable means.<sup>43</sup> Third, the act and means must be used for the *purpose* of exploiting the person to amount to human trafficking.<sup>44</sup> Exploitation includes but is not limited to sexual exploitation, forced labor or services, slavery or other forms of servitude, and removal of organs.<sup>45</sup>

The UN Protocol provides that the consent of victims of human trafficking is irrelevant where coercive means are used to obtain that consent.<sup>46</sup> In other words, traffickers cannot claim that the victim’s initial consent to work or provide services means that they also consented to their own exploitation.<sup>47</sup> A claim like the one above as a defense would not exempt traffickers from punishment under the UN Protocol because such a defense would require consent at all stages leading up to the victim’s exploitation as well as consent to the exploitation itself.<sup>48</sup> Many countries including the United States and Mexico have used elements of the UN Protocol definition as a foundation for their own laws criminalizing human trafficking.<sup>49</sup> However, neither the United States nor Mexico mirror the consent provision of the UN Protocol in their anti-trafficking laws<sup>50</sup> because the UN Protocol does not require that anti-trafficking legislation follow its language precisely.<sup>51</sup> In practice, factoring in victim’s consent in anti-trafficking legislation, instead of making consent irrelevant like the UN Protocol does, results in traffickers claiming that the victim’s consent exempts the traffickers from punishment.<sup>52</sup> In a trial, the defendant’s counsel may raise the victim’s consent as an affirmative defense while the prosecutor, representing the human trafficking victim, offers proof that improper means used by the trafficker nullified that consent.<sup>53</sup> A court would be left to assess the conflicting claims,<sup>54</sup> which results in prosecutors being less

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<sup>43</sup> *Id.* art. 3(a).

<sup>44</sup> TOOLKIT, *supra* note 39, at 3.

<sup>45</sup> UN Protocol, *supra* note 26, art. 3(a).

<sup>46</sup> *See id.* art. 3(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.”

<sup>47</sup> TOOLKIT, *supra* note 39, at 6.

<sup>48</sup> *Id.* at 6.

<sup>49</sup> The United States and Mexico have both used the UN Protocol definition as a foundation to outlaw human trafficking. *See* discussion of relevant laws *infra* Part III.

<sup>50</sup> *Id.*

<sup>51</sup> TOOLKIT, *supra* note 39, at 3.

<sup>52</sup> *Id.* at 6.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

effective in prosecuting traffickers.<sup>55</sup> The exclusion of a consent provision in anti-trafficking legislation is especially problematic in a border region such as the United States-Mexico boundary where undocumented immigration is rampant.<sup>56</sup> Victims of human trafficking may not be recognized as victims, but rather criminals, if they are confused with undocumented immigrants who consented to being smuggled.<sup>57</sup> Hence, it is essential to understand the distinction between human trafficking and smuggling<sup>58</sup> and to ensure that the distinction is represented in anti-trafficking legislation and taken into consideration in its implementation. For this reason, a bilateral partnership is necessary in which both the United States and Mexico can commit to distinguishing between human trafficking and smuggling by making irrelevant a victim's consent to being trafficked. This would more often lead to protection of victims and prosecution of traffickers as established under the UN Protocol.

### *B. Distinguishing Between Human Trafficking and Smuggling*

Smuggling is procuring the illegal entry of a person into another country for the purpose of financial gain.<sup>59</sup> Illegal entry of

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<sup>55</sup> See Rosy Kandathil, *Global Sex Trafficking and the Trafficking Victims Protection Act of 2000: Legislative Responses to the Problem of Modern Slavery*, 12 MICH. J. GENDER & L. 87, 89-90 (2005).

<sup>56</sup> Although there is evidence that immigration into the United States from Mexico is currently in a decline, there is no evidence that this decline will be sustained. The decline is attributed to the economic crisis so the number of undocumented immigrants will most likely rise again. See Julia Preston, *Mexican Data Show Migration to U.S. in Decline*, N.Y. TIMES, May 14, 2009, available at <http://www.nytimes.com/2009/05/15/us/15immig.html?pagewanted=1&r=1>.

<sup>57</sup> TOOLKIT, *supra* note 39, at 6. See Dina F. Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 354 (2007) [hereinafter *(Not) Found Chained to a Bed in a Brothel*].

<sup>58</sup> TOOLKIT, *supra* note 39, at 4. See *(Not) Found Chained to a Bed in a Brothel*, *supra* note 57.

<sup>59</sup> *Id.* The United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air defines smuggling as follows:

- (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.

Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime, G.A. Res. 55/25, Annex III, U.N. Doc. A/RES/55/25 (Nov. 15, 2000) [hereinafter Protocol Against the Smuggling of

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a person violates the country's laws and is accomplished either clandestinely or by deception using fraudulent documents.<sup>60</sup> The person being smuggled generally consents to the act and in fact pays large amounts of money to the smuggler for aiding him or her in the illegal entry to another country.<sup>61</sup> People may decide to enter countries illegally because of poverty, lack of economic opportunities in their countries of origin, and the desire to improve their livelihoods.<sup>62</sup> Other times, people consent to smuggling to be reunited with family members in that country.<sup>63</sup> Most people who enter the United States illegally are smuggled, but some are actually trafficked.<sup>64</sup> Trafficking, as described above, involves the recruitment, transportation, or transfer of persons using threat, force, fraud or other coercive measures for the purpose of sex, labor, or other forms of exploitation.<sup>65</sup> In smuggling, all parties commit a crime; but in human trafficking, those who are threatened by force or who are deceived are actually victims. The factors that help distinguish between smuggling and trafficking are important because they dictate how authorities treat smuggled people as compared to victims of human trafficking in practice.

### 1. *Consent*

One of the main differences between the definitions of trafficking and smuggling is consent.<sup>66</sup> As described above, smuggling involves a person who consents to illegally enter a country, while trafficking involves a person who either never consented to enter a country or whose consent is invalidated due to the trafficker's use of coercion, deception, or fraud.<sup>67</sup> Hence, undocumented immigrants who consent to being smuggled are treated as criminals because they violate the laws of the country

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Migrants].

<sup>60</sup> THE HUMAN SMUGGLING AND TRAFFICKING CENTER, FACT SHEET: DISTINCTIONS BETWEEN HUMAN SMUGGLING AND HUMAN TRAFFICKING 2, (January 2005), [http://pdba.georgetown.edu/Security/citizenssecurity/eeuu/documents/smuggling\\_trafficking\\_facts.pdf](http://pdba.georgetown.edu/Security/citizenssecurity/eeuu/documents/smuggling_trafficking_facts.pdf) [hereinafter SMUGGLING AND TRAFFICKING FACT SHEET].

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

<sup>62</sup> Haynes, *supra* note 1.

<sup>63</sup> SMUGGLING AND TRAFFICKING FACT SHEET, *supra* note 60, at 2.

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

<sup>65</sup> See UN Protocol, *supra* note 26, at Art. 3(a).

<sup>66</sup> See TOOLKIT, *supra* note 39, at 4.

<sup>67</sup> Cicero-Domínguez, *supra* note 15, at 305.

they enter illegally<sup>68</sup> while people who are trafficked are or should be treated as victims.<sup>69</sup> Consent is a complicated issue because people generally consent to being smuggled but not to being trafficked and what starts out as smuggling can sometimes turn into human trafficking.<sup>70</sup> Therefore, varying degrees of consent are reflected in human trafficking situations because victims may have consented to the initial phase—when they were smuggled—but may not have consented to the conditions to which they were subsequently subjected.<sup>71</sup> Often, victims of human trafficking believe that they are being smuggled and have consented to that, while in fact they are being trafficked because the people illegally transporting them into another country are planning to exploit them.<sup>72</sup> Along the United States-Mexico border, it is important to investigate people apprehended in the process of entering the United States illegally because some of them may have been coerced or tricked and may be deserving of protection instead of deportation. Through more bilateral cooperation, trafficking victims could be identified at the time they attempt to enter the United States instead of being sent back into the hands of traffickers for further exploitation.

## 2. *Transnationality*

Smuggling always involves illegally entering into another country in violation of that country's laws.<sup>73</sup> The crime is transnational by definition.<sup>74</sup> Human trafficking, on the other hand, does not have to involve (legal or illegal) entry into another country or any other physical movement.<sup>75</sup> Although movement of the victim from one location to another is often an element of human trafficking, it is not required in order to amount to human trafficking.<sup>76</sup> Additionally, under the UN Protocol, where crossing a border is involved in human trafficking, the "illegality of the

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<sup>68</sup> SMUGGLING AND TRAFFICKING FACT SHEET, *supra* note 60, at 2.

<sup>69</sup> *Id.* at 2-4.

<sup>70</sup> *Id.* at 2.

<sup>71</sup> *Id.* at 2-3.

<sup>72</sup> *Id.* at 2.

<sup>73</sup> *Id.* at 4. See TOOLKIT, *supra* note 39, at 4.

<sup>74</sup> Cicero-Domínguez, *supra* note 15, at 305.

<sup>75</sup> SMUGGLING AND TRAFFICKING FACT SHEET, *supra* note 60, at 3-4. See TOOLKIT, *supra* note 39, at 4.

<sup>76</sup> SMUGGLING AND TRAFFICKING FACT SHEET, *supra* note 60, at 2-4.

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border crossing [should be] irrelevant.”<sup>77</sup> In trafficking cases along the United States-Mexico border, transnationality is always a factor, which is why bilateral cooperation is needed so that trafficking victims may not be detained or deported, as expressed in the UN Protocol.

### 3. *Exploitation*

Another distinguishing factor between smuggling and trafficking is the relationship between the parties.<sup>78</sup> In smuggling, the relationship between the smuggler and the immigrant ends once the immigrant enters the country illegally and payment is exchanged.<sup>79</sup> The smuggler and the immigrant will usually part ways at this point and the immigrant is on his or her own.<sup>80</sup> In contrast, in human trafficking, the relationship between the trafficker and the victim involves ongoing exploitation of the victim from which the trafficker generates profits.<sup>81</sup>

#### *C. Complexities of Eradicating Human Trafficking Along the United States-Mexico Border*

The issues of consent, transnationality, and exploitation used to distinguish between trafficking and smuggling are further complicated in the United States and Mexico due to their extensive shared border and history. First, human trafficking is often confused with the illegal smuggling of aliens.<sup>82</sup> This results in situations where instead of aiding trafficking victims, immigration officials often deport them and may inadvertently send them back into the hands of traffickers.<sup>83</sup> Second, Mexico is an origin, destination, and transit state, all in one, for human trafficking.<sup>84</sup> The scale of the problem naturally makes it more difficult to prevent human trafficking, prosecute traffickers, and

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<sup>77</sup> TOOLKIT, *supra* note 39, at 4.

<sup>78</sup> *Id.* at 4-5.

<sup>79</sup> *Id.*

<sup>80</sup> SMUGGLING AND TRAFFICKING FACT SHEET, *supra* note 60, at 2.

<sup>81</sup> TOOLKIT, *supra* note 39, at 5. *See also* Cicero-Domínguez, *supra* note 15, at 305. Note that if the trafficker deceives the victim into thinking that he or she is being smuggled, then the trafficker collects two sources of income: smuggling fees the deceived victim pays and the profits the trafficker subsequently generates exploiting the victim.

<sup>82</sup> *See supra* Part II.B.

<sup>83</sup> Kandathil, *supra* note 55, at 98.

<sup>84</sup> TIP REPORT 2009, *supra* note 7, at 206.

protect victims.<sup>85</sup> Lastly, Mexico is a passageway for the three most prevalent and lucrative transnational crimes:<sup>86</sup> drug trafficking,<sup>87</sup> arms trafficking,<sup>88</sup> and human trafficking.<sup>89</sup> The three crimes are intermingled, and create competing priorities for government officials in Mexico.<sup>90</sup> These complexities must be considered when crafting a joint strategy if the United States and Mexico are going to reduce the number of victims that are trafficked across their shared border.

### *1. Illegal Immigration from Mexico into the United States*

Since the early 1900s, the United States has been protecting its southern border from undocumented immigrants.<sup>91</sup> In 1924, Congress officially established the U.S. Border Patrol, and the agency has evolved from patrolling on horseback to using “infrared night-vision scopes, seismic sensors, and a modern computer processing system” to keep the border secure.<sup>92</sup> Since the terrorist attacks of September 11, 2001, national concern over homeland security and efforts to control entry into the country have increased.<sup>93</sup> Despite all these efforts and an estimated forty percent decrease in immigration into the United States from Mexico,<sup>94</sup> approximately 175,000 Mexicans entered the United

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<sup>85</sup> *See id.*

<sup>86</sup> *Slavery Thrives in Australia 200 Years After Abolition*, HUMANTRAFFICKING.ORG (Apr. 5, 2007), <http://www.humantrafficking.org/updates/582> (last visited Oct. 6, 2010). “The United Nations has characterised human trafficking as the third most lucrative transnational crime after drugs and arms smuggling.” *Id.*

<sup>87</sup> U.S. DEP’T OF JUSTICE, NAT’L DRUG INTELLIGENCE CTR., 2009-R0813-031, SOUTH TEXAS HIGH INTENSITY DRUG TRAFFICKING AREA DRUG MARKET ANALYSIS 2009 3 (2009), available at <http://www.justice.gov/ndic/pubs32/32791/index.htm>.

<sup>88</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-709, FIREARMS TRAFFICKING: U.S. EFFORTS TO COMBAT ARMS TRAFFICKING TO MEXICO FACE PLANNING AND COORDINATION CHALLENGES (2009) <http://www.gao.gov/new.items/d09709.pdf>. [hereinafter FIREARMS TRAFFICKING].

<sup>89</sup> TIP REPORT 2009, *supra* note 7, at 206.

<sup>90</sup> *Id.* at 207.

<sup>91</sup> *Border Patrol History*, U.S. CUSTOMS AND BORDER PATROL (July 15, 2003), [http://www.cbp.gov/xp/cgov/border\\_security/border\\_patrol/border\\_patrol\\_ohs/history.xml](http://www.cbp.gov/xp/cgov/border_security/border_patrol/border_patrol_ohs/history.xml) (last visited Oct. 6, 2010).

<sup>92</sup> *Id.*

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

<sup>94</sup> Mariano Castillo, *Mexican Immigration to U.S. Off 40 Percent, Study Finds*, CNN (July 22, 2009), <http://www.cnn.com/2009/WORLD/americas/07/22/mexico.immigrants/index.html>.

“Immigration from Mexico to the United States slowed at least 40 percent between mid-decade and 2008, according to the analysis, based on national population surveys in the

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States illegally between March 2008 and March 2009.<sup>95</sup> The vast majority of undocumented Mexican immigrants entering the United States are smuggled but some are trafficked.<sup>96</sup> The distinction between smuggling and trafficking is important because smuggled individuals may be prosecuted, but trafficked individuals must be protected instead of their actions being criminalized. Due to the large number of undocumented immigrants entering the United States, it is difficult to ascertain who is being smuggled and who is a victim of human trafficking.<sup>97</sup>

Along the United States-Mexico border, human trafficking necessarily begins with the smuggling of the victim into the United States. Given the extent of undocumented immigration into the United States from Mexico, authorities that intercept victims of human trafficking are likely to consider them criminals for having been smuggled, rather than victims for having been trafficked. For this reason, joint efforts to combat human trafficking must recognize and remedy this potential confusion through the additional training of immigration officials and more extensive investigation before a determination of deportation is reached.

## 2. *Source, Transit, and Destination Country for Human Trafficking*

Mexico is a source country for trafficking Mexican immigrants who fall victim at the hands of traffickers and are transported primarily to the United States and, to a lesser degree, Canada and Western Europe.<sup>98</sup> In addition, Mexico is also a transit country because immigrants from Central and South America usually travel through Mexico en route to the United States and then enter the United States via its shared border with Mexico.<sup>99</sup> Mexico is also a destination country for many Central and South

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United States and Mexico, as well as Border Patrol apprehension figures.” *Id.*

<sup>95</sup> Emily Bazar, *Report: Fewer Mexicans Entering U.S.*, USA TODAY (July 21, 2009), [http://www.usatoday.com/news/nation/2009-07-21-mexicans\\_N.htm](http://www.usatoday.com/news/nation/2009-07-21-mexicans_N.htm). “From March 2008 to March 2009, 175,000 Mexicans came to the USA, the lowest point this decade, Census Bureau figures show. In 2006-2007, about 287,000 came.” *Id.* Some have attributed the decrease in undocumented immigrants entering the United States to the economic crisis. *Id.*

<sup>96</sup> SMUGGLING AND TRAFFICKING FACT SHEET, *supra* note 60, at 2-3.

<sup>97</sup> *Id.* at 2-4.

<sup>98</sup> TIP REPORT 2009, *supra* note 7, at 206.

<sup>99</sup> *Id.*

American immigrants who fail to enter the United States<sup>100</sup> and are exploited in Mexico. “The vast majority of foreign victims trafficked into [Mexico] for commercial sexual exploitation are from Central America, particularly Guatemala, Honduras, and El Salvador.”<sup>101</sup> Internal human trafficking within Mexico is also an issue particularly with “Mexican men and boys [who] are trafficked from southern to northern Mexico for forced labor.”<sup>102</sup> Due to the large numbers of peoples that migrate through Mexico by entering its southern border, or leave Mexico by crossing its northern border with the United States, the human trafficking problem is particularly acute because Mexico serves as a source, transit point, and destination for human trafficking. For this reason, a bilateral partnership between the United States and Mexico, or even a multilateral partnership with other nations is necessary to eradicate human trafficking.

### 3. *The Three Most Prevalent and Lucrative Transnational Crimes*

The three most prevalent and lucrative transnational crimes—drug trafficking, gun trafficking, and human trafficking—flourish along the United States-Mexico border.<sup>103</sup> Drug and arms trafficking are closely linked as described below. “In recent years, violence along the Mexico border [with the United States] has escalated dramatically, due largely to the Mexican government’s efforts to disrupt Mexican drug trafficking organizations (DTO).”<sup>104</sup> The problem with illegal drugs and firearms appears to be a vicious cycle in which U.S. firearms trafficked into Mexico fuel drug violence there, while drug operations in Mexico facilitate illegal firearm acquisitions from the United States.<sup>105</sup> Amidst the urgency of curbing drug and arms trafficking—activities that deeply affect people on both sides of the border—efforts to eradicate human trafficking have been overshadowed by these competing priorities.<sup>106</sup>

The lack of attention to anti-human trafficking efforts may be rooted in the fact that these efforts have only been in existence for

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *See supra* notes 87-89.

<sup>104</sup> FIREARMS TRAFFICKING, *supra* note 88.

<sup>105</sup> *Id.* at 3, 14.

<sup>106</sup> TIP REPORT 2009, *supra* note 7, at 207.

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a decade while efforts to combat drugs and arms trafficking have been evolving for a longer period of time. As a result, military and law enforcement officials on both sides of the border may have developed a more extensive infrastructure to combat drugs and arms trafficking than to detect, discourage, and combat human trafficking. In order to adequately address human trafficking along its border, the United States and Mexico must both commit to expanding resources, which may mean reshuffling these priorities.

### III. LEGAL FRAMEWORKS

The international community, as represented by the UN General Assembly, first recognized human trafficking as a worldwide problem in the 1990s.<sup>107</sup> The United States followed suit by passing legislation<sup>108</sup> criminalizing human trafficking and by taking on a policing role against human trafficking in regard to the rest of the world.<sup>109</sup> In annual reports, the United States evaluates other countries' anti-trafficking efforts.<sup>110</sup> Countries then adjust their efforts based on these evaluations in order to retain U.S. non-humanitarian aid.<sup>111</sup>

#### A. *International Legal Framework*

##### 1. *The Palermo Convention*

In the early 1990s, the United Nations recognized the problem of transnational organized crime, and in 1998 an ad hoc committee was established to address the problem by increasing cooperation between nations.<sup>112</sup> To that end, an international instrument was

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<sup>107</sup> ANDREAS SCHLOENHARDT, UNIV. OF QUEENSLAND TC BEIRNE SCHOOL OF LAW/ UNIV. OF BRITISH COLUMBIA CTR. ON INT'L RELATIONS, UNITED NATIONS PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN 2 (2009).

<sup>108</sup> See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

<sup>109</sup> William Finnegan, *The Countertraffickers: Rescuing the victims of the global sex trade*, THE NEW YORKER, May 5, 2008, at 8, available at [http://www.newyorker.com/reporting/2008/05/05/080505fa\\_fact\\_finnegan](http://www.newyorker.com/reporting/2008/05/05/080505fa_fact_finnegan).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Schloenhardt, *supra* note 107, at 2.

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drafted.<sup>113</sup> The international document, the United Nations Convention against Transnational Organized Crime, acknowledged the need for transnational solutions against organized crime.<sup>114</sup> It was adopted on November 15, 2000, by General Assembly resolution 55/25.<sup>115</sup> This document addressed human trafficking more effectively than other international documents in existence at the time.<sup>116</sup> “Among its major accomplishments are: (1) developing a comprehensive trafficking definition, and (2) shedding a strict, traditional law enforcement paradigm to anti-trafficking efforts by setting out a three-pronged approach which takes into account trafficking prevention, punishment of traffickers, and protection of victims.”<sup>117</sup> As opposed to traditional legislation that only seeks to prosecute criminals, the United Nations took a more comprehensive approach to this transnational problem by including in the legislation prosecution of traffickers, protection of victims of human trafficking, and the need to put preventative measures in place.<sup>118</sup>

## 2. *Protocols to the Palermo Convention*

Subsequent to the Palermo Convention, three protocols were adopted in order to supplement the convention: (1) the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children;<sup>119</sup> (2) the Protocol against the Smuggling of Migrants by Land, Sea and Air;<sup>120</sup> and (3) the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.<sup>121</sup> The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN Protocol), as described in the introduction of

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<sup>113</sup> *Id.*

<sup>114</sup> Convention, *supra* note 28.

<sup>115</sup> *Id.*

<sup>116</sup> Fredette, *supra* note 37, at 112. For an overview of the international instruments in existence before the UN Protocol, see Fredette, *supra* note 37, at 108-12.

<sup>117</sup> *Id.* at 112. The document opened for signature from December 12-15, 2000 and entered into force on September 23, 2003. Convention, *supra* note 28.

<sup>118</sup> Fredette, *supra* note 37, at 112.

<sup>119</sup> UN Protocol, *supra* note 26.

<sup>120</sup> Protocol Against the Smuggling of Migrants, *supra* note 59.

<sup>121</sup> Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/255, U.N. Doc. A/RES/55/255 (May 31, 2001).

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this note, entered into force on December 25, 2003, and was the first legally binding instrument with a unified definition of trafficking to encourage international cooperation in apprehending traffickers and protecting victims.<sup>122</sup> The Protocol against the Smuggling of Migrants by Land, Sea and Air was helpful in providing a definition of smuggling in order to distinguish trafficking from smuggling.<sup>123</sup>

The creation of this international legal framework demonstrated that nations acknowledged the gravity of transnational organized crime and the need for international cooperation to eliminate it.<sup>124</sup> The involvement of the United Nations prompted a worldwide response that continues to evolve after more than a decade.<sup>125</sup> More than half of all countries in the world have enacted criminal legislation outlawing human trafficking, and many countries have taken steps to raise awareness of the devastating effects of commercializing human beings.<sup>126</sup> The U.S. response has included federal anti-trafficking legislation in the form of the Trafficking Victims Protection Act<sup>127</sup> as well as coordination with non-governmental organizations in an effort to eradicate human trafficking within the United States and around the world.

## *B. U.S. Legal Framework*

### *1. Trafficking Victims Protection Act*

On October 28, 2000, Congress enacted the Trafficking Victims Protection Act of 2000 (TVPA).<sup>128</sup> The TVPA outlaws “severe forms of trafficking,” which target forced labor and forced

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<sup>122</sup> UN Protocol, *supra* note 26. (In order to be legally bound by the Protocols, the Member States must first agree to be bound by the Convention).

<sup>123</sup> Protocol Against the Smuggling of Migrants, *supra* note 59.

<sup>124</sup> Convention, *supra* note 28.

<sup>125</sup> The Victims of Trafficking and Violence Protection Act of 2000, outlawing human trafficking was passed eleven years ago. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000). Since then, there have been ten TIP reports evaluating the anti-trafficking efforts of countries around the world starting with TIP Report 2001 and up to TIP Report 2010. *See, e.g.*, TIP Report 2001, *supra* note 9; TIP Report 2010, *supra* note 8.

<sup>126</sup> TIP REPORT 2009, *supra* note 7, at 1.

<sup>127</sup> *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

<sup>128</sup> *Id.*

commercial sex acts.<sup>129</sup> Sex trafficking is defined as a commercial sex act that is induced by force, fraud, or coercion.<sup>130</sup> Additionally, a person under the age of eighteen who is induced to perform a commercial sexual act automatically qualifies as a victim of human trafficking.<sup>131</sup> Forced labor is defined as recruiting, harboring, transporting, providing, or obtaining labor or services through the use of force, fraud, or coercion.<sup>132</sup> The purpose of these acts must be to subject individuals to involuntary servitude, peonage, debt bondage, or slavery.<sup>133</sup> Physical transportation of an individual from one location to another is not a requirement to constitute human trafficking.<sup>134</sup> Hence, trafficking in persons applies to individuals within the United States who are victimized as well as those who enter the United States and are subsequently exploited. This implies that smuggling will not always be an element of human trafficking in itself.

The purposes of the TVPA are “to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”<sup>135</sup> The TVPA mandates, that the President of the United States must create an “Interagency Task Force to Monitor and Combat Trafficking,”<sup>136</sup> consisting of the Secretary of State, as chair, the Administrator of the U.S. Agency for International Development, the Attorney General, the Secretary of Labor, the Secretary of Health and Human Services, the Director of Central Intelligence,

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<sup>129</sup> *See id.* § 103(8). The term “severe forms of trafficking in persons” means:

- (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or
- (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery. A victim need not be physically transported from one location to another in order for the crime to fall within these definitions.

*Id.* *See* TIP REPORT 2009, *supra* note 7.

<sup>130</sup> Victims of Trafficking and Violence Protection Act of 2000 § 103(8)(A).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* § 103(8)(B).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* U.S. DEP’T OF HEALTH AND HUMAN SERVICES, STUDY OF HHS PROGRAMS SERVING HUMAN TRAFFICKING VICTIMS, FINAL REPORT 2 (Dec. 2009), *available at* <http://aspe.hhs.gov/hs/p/07/humantrafficking/Final/index.shtml>.

<sup>135</sup> Victims of Trafficking and Violence Protection Act of 2000 § 102(a).

<sup>136</sup> *Id.* § 105(a).

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and any other official selected by the President.<sup>137</sup> Among other activities, the task force must measure and evaluate the progress of the United States and other countries in preventing human trafficking, prosecuting traffickers, and protecting victims of trafficking.<sup>138</sup> In addition, anti-trafficking efforts of countries around the world are measured in annual Trafficking in Persons Reports.<sup>139</sup>

## 2. *Trafficking in Persons Reports (TIP Reports)*

Since 2001, the U.S. Department of State has submitted to Congress annual TIP Reports, which evaluate governments' measures to eliminate human trafficking in their respective countries<sup>140</sup> in accordance with the standards delineated by the TVPA.<sup>141</sup> TIP Reports serve a number of purposes. First, because TIP Reports are not only presented to the U.S. Congress but are widely disseminated through the global media, they help raise global awareness of the magnitude and impact of human trafficking across the world.<sup>142</sup> Second, TIP Reports generally recognize and reward countries that have made progress over the preceding year in addressing the problem of human trafficking.<sup>143</sup> Third, the reports hold accountable countries that have not implemented the suggestions of the previous TIP Report or that generally have failed to adequately comply with the standards set out by the TVPA.<sup>144</sup> Determining that a country is not making significant progress in decreasing human trafficking could lead the United States to withhold "non-humanitarian, non-trade-related foreign assistance."<sup>145</sup>

TIP Reports evaluate countries' attempts to eradicate human trafficking by considering the number of trafficking abuses committed in the country, determining whether the country is in

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<sup>137</sup> *Id.* § 105(b).

<sup>138</sup> *Id.* § 105(d)(2).

<sup>139</sup> TIP REPORT 2009, *supra* note 7, at 5.

<sup>140</sup> *Id.*

<sup>141</sup> See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000). Section 110 of the Victims of Trafficking and Violence Protection Act of 2000 outlines the requirements that annual reports must address in order to be in compliance. See, e.g., TIP REPORT 2009, *supra* note 7, at 5.

<sup>142</sup> See, e.g., TIP REPORT 2009, *supra* note 7, at 5.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 6. See Fredette, *supra* note 37, at 123.

<sup>145</sup> TIP REPORT 2009, *supra* note 7, at 6. See Finnegan, *supra* note 109.

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compliance with the TVPA “minimum standards,”<sup>146</sup> and examining whether that country has the ability to implement changes to address human trafficking.<sup>147</sup> The reports balance these factors, but no one criterion is dispositive.<sup>148</sup> The TVPA “minimum standards” mandate that countries must (1) prohibit and punish severe forms of trafficking; (2) prescribe severe punishment when knowing acts of sex trafficking involve force, fraud, coercion or a child incapable of giving meaningful consent or where rape or kidnapping occur; (3) prescribe sufficiently stringent punishment to deter and adequately reflect the reprehensible nature of the crime; and (4) make serious and sustained efforts to eradicate severe forms of human trafficking.<sup>149</sup> Based on the above criteria and the TVPA minimum standards, the United States evaluates countries and places them on one of the following tiers: Tier 1, Tier 2, Tier 2 Watch List, and Tier 3.<sup>150</sup> Although the number of human trafficking victims is taken into consideration when determining tier placement, greater emphasis is placed on the degree to which a government has implemented changes in order to comply with the TVPA minimum standards.<sup>151</sup>

Tier 1 includes governments that fully comply with the minimum standards.<sup>152</sup> Tier 2 includes governments that are not

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<sup>146</sup> Victims of Trafficking and Violence Protection Act of 2000 § 108.

<sup>147</sup> Fredette, *supra* note 37, at 123.

<sup>148</sup> *Id.*

<sup>149</sup> Victims of Trafficking and Violence Protection Act of 2000 § 108(a). Under the Victims of Trafficking and Violence Protection Act of 2000, the minimum standards upon which countries are evaluated are as follows:

- (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.

*Id.*

<sup>150</sup> TIP REPORT 2009, *supra* note 7, at 9.

<sup>151</sup> *Id.* at 11.

<sup>152</sup> *Id.*

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fully compliant but are making significant efforts to do so.<sup>153</sup> Tier 2 Watch List includes governments where, (1) the number of victims is very significant or increasing, (2) there is no evidence of increasing efforts to combat trafficking as compared to the previous year, or (3) the government commits to take additional steps the next year in order to comply with the minimum standards.<sup>154</sup> Tier 3 includes governments that do not comply with the minimum standards and are simply not making significant efforts to comply.<sup>155</sup>

To determine the placement of a country between Tier 2 (or Tier 2 Watch List) and Tier 3, three factors are considered: (1) the extent to which a country is an origin, transit, or destination of severe forms of trafficking, (2) the extent to which the country's government does not comply with the minimum standards and the extent to which officials or government employees are complicit in severe forms of trafficking, and (3) the government's resources and capabilities to address severe forms of trafficking.<sup>156</sup>

TIP Reports incentivize countries that make strides in decreasing trafficking in persons, by displaying their progress for the rest of the world to admire. Additionally, the United States may chose to provide assistance to countries that prove to be invested in combating human trafficking.<sup>157</sup> U.S. assistance may be offered directly or through the use of nongovernmental organizations in order to help those countries comply with the TVPA minimum standards for the eradication of trafficking in persons.<sup>158</sup> However, the TVPA provides that the United States may also sanction governments that do not comply with the minimum standards.<sup>159</sup> The United States may decide not to provide foreign assistance to any government that "(1) does not

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 12.

<sup>155</sup> TIP REPORT 2009, *supra* note 7, at 11.

<sup>156</sup> *Id.*

<sup>157</sup> Fredette, *supra* note 37, at 123. See Victims of Trafficking and Violence Protection Act of 2000 § 134. The efforts to eradicate human trafficking may include:

- (1) the drafting of laws to prohibit and punish acts of trafficking;
- (2) the investigation and prosecution of traffickers;
- (3) the creation and maintenance of facilities, programs, projects, and activities for the protection of victims; and
- (4) the expansion of exchange programs and international visitor programs for governmental and nongovernmental personnel to combat trafficking.

*Id.*

<sup>158</sup> Fredette, *supra* note 37, at 123.

<sup>159</sup> *Id.*

comply with minimum standards for the elimination of trafficking; and (2) is not making significant efforts to bring itself into compliance with such standards.”<sup>160</sup> Humanitarian and trade-related foreign assistance, however, may not be declined even if countries fail to comply with the TVPA.<sup>161</sup> Having a tarnished human rights record that is displayed for the rest of the world to see in the annual TIP Reports is yet another disincentive for countries to disregard the minimum standards set out by the TVPA.<sup>162</sup> In an effort to show solidarity and commitment to end human trafficking, the 2010 TIP report, which marked the report’s 10<sup>th</sup> anniversary, ranked the United States’ efforts.<sup>163</sup> The anti-trafficking efforts instituted by the United States earned it a Tier 1 ranking in its first year of being included in the TIP Report.<sup>164</sup>

### 3. *Wilberforce Reauthorization Act of 2008*

The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (Wilberforce Act) is the latest amendment to the TVPA.<sup>165</sup> It reauthorized the TVPA, authorized additional funding for fiscal years 2008 through 2011, and sought to enhance the measures used to combat human trafficking.<sup>166</sup> Before the Wilberforce Act was enacted, countries were required to document a “significant number” of trafficking victims in order to be evaluated in the annual TIP Reports.<sup>167</sup> The Wilberforce Act eliminated this requirement so that in the future more countries would be evaluated and ranked in TIP Reports.<sup>168</sup> Hence, the scope of the 2009 report is broader than in previous

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<sup>160</sup> Victims of Trafficking and Violence Protection Act of 2000 § 110(a).

<sup>161</sup> *Id.* §110(d)(1)(B)

<sup>162</sup> Fredette, *supra* note 37, at 123.

<sup>163</sup> TIP REPORT 2010, *supra* note 8, at 1.

<sup>164</sup> *Id.* at 338.

<sup>165</sup> William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 [hereinafter Wilberforce Act]. “The trafficking bill signed today was named after English abolitionist William Wilberforce, who led the Parliamentary movement against the British slave trade in the early 19th century.” See *President Bush Signs William Wilberforce Trafficking Victims Protection Reauthorization Act to Combat Human Trafficking*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, <http://www.ice.gov/pi/nr/0812/081223washington.htm> (last visited Oct. 2, 2010).

<sup>166</sup> Wilberforce Act, *supra* note 165.

<sup>167</sup> TIP REPORT 2009, *supra* note 7, at 9. The “significant number” was defined as 100 or more documented trafficking victims. *Id.*

<sup>168</sup> *Id.* at 10.

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years.<sup>169</sup>

The act also broadened the definition of coercion in the U.S. criminal statute on forced labor (18 U.S.C. § 1589–Forced Labor) to include nonphysical forms of coercion such as traffickers threatening victims with deportation.<sup>170</sup> In addition, the expanded definition of coercion includes the threat of economic harm, such as when a trafficker threatens a victim with significant financial loss in order to compel him or her “to enter into or continue a form of labor or services.”<sup>171</sup> Furthermore, the Wilberforce Act criminalizes knowingly recruiting workers from outside the United States with the intent to defraud them.<sup>172</sup> If proven guilty, employers face imprisonment for up to five years because although fraudulently recruiting workers is not human trafficking *per se*, it is closely related to forced labor.<sup>173</sup> The changes instituted by the reauthorization ensure that more victims are eligible for protection. However, victims who are deported to Mexico or trafficked within Mexico are not eligible for any TVPA benefits and must rely on the Mexican legal framework for any remedy. As a result, the systems of the United States and Mexico do not necessarily complement each other.

### C. Mexican Legal Framework

#### 1. Laws Prior to Enactment of the Mexican Anti-Trafficking Law

Mexico legally bound itself to the United Nations’ legal framework by signing the Palermo Convention in 2000 and then ratifying it on April 11, 2003, along with the three accompanying protocols discussed above.<sup>174</sup> Before Mexico adhered to the international legal framework, there were already several laws that approximated a prohibition of human trafficking, but none of them defined human trafficking as does the TVPA or the UN Protocol.<sup>175</sup> The Mexican Federal Penal Code, Chapter III, Articles 206 and 207, criminalizes “[t]rafficking in [p]ersons and

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<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 26.

<sup>171</sup> *Id.*

<sup>172</sup> TIP REPORT 2009, *supra* note 7, at 26.

<sup>173</sup> *Id.*

<sup>174</sup> Cicero-Domínguez, *supra* note 15, at 308. For a discussion on the United Nations Protocol, see *supra* Part III.A.2.

<sup>175</sup> Cicero-Domínguez, *supra* note 15, at 309-12.

[s]exual [p]andering or ‘[p]imping.’”<sup>176</sup> This law, however, treats the crimes of pandering, the act of providing clients to a prostitute, and human trafficking in the exact same way and focuses only on sexual exploitation instead of addressing all other forms of exploitation.<sup>177</sup> Other types of exploitation include, among others, forced labor, bonded labor, and involuntary servitude.<sup>178</sup> By focusing only on sexual exploitation, the law is under-inclusive and leaves unpunished a wide range of acts that also constitute human trafficking.

The Mexican Federal Penal Code criminalizes acts related to human trafficking such as corruption of minors and prohibits persons under the age of eighteen from working in bars and taverns.<sup>179</sup> In addition, the Mexican Federal Penal Code prohibits child pornography and sex tourism as well as the trafficking of human organs.<sup>180</sup> Furthermore, Mexico has also enacted laws dictating how organized crime should be prosecuted.<sup>181</sup> Although these laws exhibit Mexico’s commitment to protect individuals, they do not fully address the different types of human trafficking that occur within its territory.<sup>182</sup> Mexico needed to enact legislation that defined and outlawed human trafficking to begin complying with the goals established in the UN Protocol.<sup>183</sup>

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<sup>176</sup> *Id.* at 310. According to the statute:

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 place to concur exclusively with the intent of exploiting prostitution or obtains any benefit with its products.

*Id.*

<sup>177</sup> *Id.* at 310-11.

<sup>178</sup> TIP REPORT 2009, *supra* note 7, at 14-25.

<sup>179</sup> *Remarks on the Anti-trafficking Law of Mexico Presented to the Senate of Mexico*, THE PROTECTION PROJECT, <http://www.protectionproject.org/?q=content/remarks-mexico> (last visited Oct. 2, 2010).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

## 2. Mexican Anti-Trafficking Law

Mexico's Anti-Trafficking Law (*Ley Para Prevenir y Sancionar La Trata de Personas*) was enacted on November 27, 2007.<sup>184</sup> Unlike previous laws, the Mexican Anti-Trafficking Law defined human trafficking and applied to all forms of human trafficking recognized under the Palermo Convention and its subsequent protocols.<sup>185</sup> The law is divided into four chapters: Chapter I: General Provisions; Chapter II: About the Crime of Human Trafficking; Chapter III: Policies for Prevention and Punishment of Human Trafficking in Mexico; and Chapter IV: Protection and Assistance to Victims of Human Trafficking.<sup>186</sup>

Chapter I provides that the purpose of the law is to prevent and punish human trafficking, as well as to protect and provide attention and assistance to victims of these crimes.<sup>187</sup> In addition, this Chapter stipulates that the law also extends to traffickers outside of Mexico who cause or intend to cause harm within Mexico.<sup>188</sup> Similarly, the law applies to traffickers within Mexico who cause or intend to cause harm beyond Mexico's borders.<sup>189</sup> Under Chapter 2, an individual is guilty of human trafficking if he or she: "promotes, solicits, offers, facilitates, acquires, transports, obtains for himself or a third party with physical or verbal abuse, fraud, abuse of authority, an individual to submit to sexual exploitation, forced labor, slavery, or other practices analogous to slavery or involuntary servitude or for extraction of organs."<sup>190</sup> Additionally, Chapter 2 provides that when human trafficking is

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<sup>184</sup> Ley Para Prevenir y Sancionar la Trata de Personas [Law to Prevent and Punish Trafficking in Persons], Diario Oficial de la Federación [DO], 27 de Noviembre de 2007 (Mex.). Mexican President Felipe de Jesús Calderón Hinojosa signed the law into effect. *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* ch. 1, art. 1.

<sup>188</sup> *Id.* ch. 1, art. 3.

<sup>189</sup> Ley Para Prevenir y Sancionar la Trata de Personas [Law to Prevent and Punish Trafficking in Persons] ch. 1, art. 3.

<sup>190</sup> *Id.* ch. 2, art. 5. The definition of human trafficking above is the author's translation from the original Spanish text, which is as follows:

Comete el delito de trata de personas quien promueva, solicite, ofrezca, facilite, consiga, traslade, entregue o reciba, para sí o para un tercero, a una persona, por medio de la violencia física o moral, engaño o el abuso de poder para someterla a explotación sexual, trabajos o servicios forzados, esclavitud o prácticas análogas a la esclavitud, servidumbre, o a la extirpación de un órgano, tejido o sus componentes.

*Id.*

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committed against a person under the age of eighteen, or against one who lacks the mental capacity to understand the crime committed against him or her, there will be no need to prove the means used to commit the crime.<sup>191</sup>

Under the Mexican Anti-Trafficking Law, the crime of human trafficking is punishable by a term of imprisonment between six and twelve years, or between nine and eighteen years if the crime is committed against a person under the age of eighteen or one who lacks mental capacity to understand the crime committed against him or her.<sup>192</sup> In addition, the law provides for longer imprisonment when the trafficker is: 1) a public official; 2) the victim's parent or guardian; or 3) a person who commits other crimes in the process of committing human trafficking.<sup>193</sup> Along with the criminal punishment, the Mexican Anti-Trafficking Law imposes damages that the trafficker must pay to the victim including: "medical costs; physical therapy and occupational rehabilitation; travel expenses back to the country of origin; temporary room and board for victims under the age of eighteen, over the age of seventy, or victims who lack or have diminished mental capacity; lost wages; and any other damage or loss incurred as a consequence of the crime."<sup>194</sup> The enactment of the Mexican Anti-Trafficking Law, which includes not only punishment of the crime, but also protection of the victims and even the possibility of obtaining damages, indicates Mexico's commitment to the eradication of human trafficking. Unfortunately, however, the law has not yet been adequately implemented as only one conviction has been achieved to date.<sup>195</sup>

Beyond defining human trafficking and imposing criminal punishment, the Mexican Anti-Trafficking Law stipulated that the federal government create an Inter-Secretarial Commission composed of various governmental agencies and "call[ed] for a

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<sup>191</sup> *Id.* The language used is the author's translation from the original Spanish text, which is as follows:

Cuando este delito sea cometido en contra de personas menores de dieciocho años de edad, o en contra de quien no tenga capacidad para comprender el significado del hecho o capacidad para resistirlo no se requerirá acreditación de los medios comisivos.

*Id.*

<sup>192</sup> *Id.* ch. 2, art. 6.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* ch. 2, art. 9. The language used is the author's translation of the Spanish text.

<sup>195</sup> TIP REPORT 2010, *supra* note 8, at 233. See *infra* Part IV of this note for suggestions for the implementation of the Mexican Anti-Trafficking Law.

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National Program to Prevent and Sanction Trafficking in Persons . . . to address the issue of trafficking through prevention, protection, and prosecution.”<sup>196</sup> This National Anti-Trafficking Program will be charged with developing human trafficking prevention campaigns and promoting interagency agreements to enable governmental agencies across the country to collaborate to protect victims and prosecute traffickers.<sup>197</sup> As of June 2010, the National Anti-Trafficking Program had not yet been created.<sup>198</sup> The program had been scheduled for development by May 2010, according to the regulations that the President of Mexico released in February 2009, to provide more guidance for the implementation of the Mexican Anti-Trafficking Law.<sup>199</sup>

### 3. FEVIMTRA

On January 31, 2008, FEVIMTRA (*Fiscalía Especial para los Delitos de Violencia contra las Mujeres y Trata de Personas*) was created as a division of the Office of the Attorney General.<sup>200</sup> As discussed above, FEVIMTRA is a Special Prosecution Unit for Crimes against Women and Human Trafficking<sup>201</sup> that investigates the federal crimes of human trafficking and violence against women, provides services to victims of these crimes, and searches for missing women and children.<sup>202</sup> Additionally, FEVIMTRA coordinates efforts with other social and academic entities to create programs to strengthen the prevention and investigation of crimes under its jurisdiction and to provide aid to victims.<sup>203</sup>

In its first year, FEVIMTRA investigated one hundred cases of violence against women as well as twenty-four human trafficking cases.<sup>204</sup> The governmental agency has referred several

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<sup>196</sup> AMERICAN BAR ASS’N, HUMAN TRAFFICKING ASSESSMENT TOOL REPORT FOR MEXICO 15 (2009) [hereinafter TOOL REPORT FOR MEXICO].

<sup>197</sup> Ley Para Prevenir y Sancionar la Trata de Personas [Law to Prevent and Punish Trafficking in Persons] ch. 3, art. 12.

<sup>198</sup> TIP REPORT 2010, *supra* note 8, at 234-35.

<sup>199</sup> TOOL REPORT FOR MEXICO, *supra* note 196.

<sup>200</sup> FEVIMTRA, *supra* note 36.

<sup>201</sup> Godoy, *supra* note 31.

<sup>202</sup> FEVIMTRA, *supra* note 36.

<sup>203</sup> *Id.*

<sup>204</sup> FEVIMTRA, FIRST ANNUAL REPORT: FEBRUARY 1, 2008 – FEBRUARY 1, 2009 5 (2009), *available at* <http://www.pgr.gob.mx/Combate%20a%20la%20Delincuencia/Delitos%20Federales/fevimtra/trata%20de%20personas.asp> (click on “Cumplimos un Año” hyperlink on lower right hand corner for PDF document).

cases to other agencies and “has issued [two] formal indictments, declared lack of jurisdiction in [four] cases, and continues to pursue [fifteen] remaining cases,” some of which are national or transnational in nature.<sup>205</sup> Despite this progress, as of June 2010, there had been only one conviction for the crime of human trafficking under the Mexican Anti-Trafficking Law.<sup>206</sup> However, FEVIMTRA is a fairly new governmental agency, and it appears to have potential to be an important player in anti-trafficking efforts based on its first progress report.<sup>207</sup>

#### IV. RECOMMENDATIONS AND THE NEED FOR A BILATERAL PARTNERSHIP

The UN Protocol offers an excellent infrastructure for countries to use as a foundation for their own anti-trafficking laws and strategies. However, the strategies must be put into context within each country’s unique circumstances. In the cases of the United States and Mexico, their anti-trafficking efforts must take into consideration their shared history and geographic border.

##### A. *Amendment to the Mexican Anti-Trafficking Law*

One significant way in which the Mexican Anti-Trafficking Law can be improved is by adding a provision that prevents traffickers from claiming that victims consented to being trafficked.<sup>208</sup> As discussed above in Part II.B.1, victims display varying levels of consent.<sup>209</sup> Victims may have consented to being smuggled into a country but cannot be said to have consented to their exploitation.<sup>210</sup> Given the proximity and allure of the United States, Mexico must be cognizant that many traffickers take advantage of their victims’ desire to improve their economic situations. Consequently, victims often consent to being smuggled.<sup>211</sup> However, since being smuggled is a crime in itself, victims often do not report violations suffered at the hands of traffickers, even if they get the opportunity to do so, because

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<sup>205</sup> TOOL REPORT FOR MEXICO, *supra* note 196 at 55.

<sup>206</sup> TIP REPORT 2010, *supra* note 8, at 233.

<sup>207</sup> FEVIMTRA, FIRST ANNUAL REPORT, *supra* note 204.

<sup>208</sup> TIP REPORT 2010, *supra* note 8, at 233.

<sup>209</sup> *See supra* Part II.B.1.

<sup>210</sup> *See supra* Part II.B.1; SMUGGLING AND TRAFFICKING FACT SHEET, *supra* note 60, at 2-4; *see also* TIP REPORT 2009, *supra* note 7, at 1.

<sup>211</sup> *Id.*

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traffickers may argue that the victims consented.

Currently, the Mexican Anti-Trafficking Law provides that the victim's consent must be determined pursuant to Mexico's Federal Penal Code.<sup>212</sup> Article 15 of Mexico's Federal Penal Code provides that consent exculpates a crime if the following conditions are met:

(a) [T]he legal right is available, (b) the person claiming the legal right has legal capacity to decide for himself, and (c) the consent is express or implied and without undue influence or . . . it can be proven that if requested, consent would have been granted by the person claiming legal rights.<sup>213</sup>

The state of the law regarding consent leaves victims to argue that their consent ended at the point where their exploitation began, while their traffickers may argue that the consent was implied based on their willingness to be smuggled. The trafficker may even offer evidence that the victim paid to be smuggled. Under these circumstances, an argument for implied consent may result in a dismissal of the charges, thus defeating two of the primary purposes of the Mexican Anti-Trafficking Law: the prosecution of traffickers and the protection of victims.

The UN Protocol contains a provision making consent irrelevant where coercive means are used to obtain labor or services.<sup>214</sup> Despite the fact that the international legal framework contains this consent provision, the Mexican Anti-Trafficking Law omitted it.<sup>215</sup> Drawing a bright line between individuals who

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<sup>212</sup> Ley Para Prevenir y Sancionar la Trata de Personas [Law to Prevent and Punish Trafficking in Persons] ch. 2, art. 6. The language used is the author's translation from the Spanish text, which is as follows: "El consentimiento otorgado por la víctima se registrará en términos del artículo 15 fracción III del Código Penal Federal." *Id.*

<sup>213</sup> Código Penal Federal [CPF] [Federal Criminal Code], *as amended*, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.). The language used is the author's translation from the Spanish text, which is as follows:

El delito se excluye cuando . . . III. Se actúe con el consentimiento del titular del bien jurídico afectado, siempre que se llenen los siguientes requisitos: a) Que el bien jurídico sea disponible; b) Que el titular del bien tenga la capacidad jurídica para disponer libremente del mismo; y c) Que el consentimiento sea expreso o tácito y sin que medie algún vicio; o bien, que el hecho se realice en circunstancias tales que permitan fundadamente presumir que, de haberse consultado al titular, éste hubiese otorgado el mismo.

*Id.*

<sup>214</sup> UN Protocol, *supra* note 26, art. 3(b) (stating that, "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.").

<sup>215</sup> See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386,

consent and those who do not consent ignores the fact that there is a spectrum of knowledge and consent across victims of human trafficking, depending on their circumstances.<sup>216</sup> Hence, factoring in a victim's consent in the prosecution of human trafficking cases is tantamount to leaving victims to prove their own innocence and victimization.<sup>217</sup>

Human trafficking is a crime that traumatizes victims and intimidates them into silence.<sup>218</sup> Because human traffickers are usually linked to larger criminal organization, victims may be hesitant and afraid to press charges after being released or escaping the grip of traffickers.<sup>219</sup> It is less likely that victims will come forward with charges even when they are able to if they have to admit wrongdoing that can be interpreted as consent to the crime perpetrated against them. Under Mexican legislation, "the victims themselves must bring charges against the offenders in order for the crime to be considered human trafficking."<sup>220</sup> Requiring the traumatized victim to bring charges against the offender and to prove that he or she did not consent to the crime perpetrated against him or her places an almost insurmountable burden on that victim. Victims of such heinous crimes should not have to prove their lack of consent as a prerequisite to getting justice. To do so is to violate the Mexican Anti-Trafficking Law's core purpose to provide protection to victims of human trafficking.<sup>221</sup>

### *B. Suggestions for the Implementation of the Mexican Anti-*

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114 Stat. 1464 (2000); *see also* Ley Para Prevenir y Sancionar la Trata de Personas [Law to Prevent and Punish Trafficking in Persons], Diario Oficial de la Federación [DO], 27 de Noviembre de 2007 (Mex.).

<sup>216</sup> Fredette, *supra* note 37, at 111-12.

<sup>217</sup> Fredette, *supra* note 37, at 112.

<sup>218</sup> Megan McAdams, *Modern Day Slavery in Mexico and the US*, 'SCOOP' INDEPENDENT NEWS (Dec. 22, 2009, 10:26 AM), <http://www.scoop.co.nz/stories/WO0912/S00575.htm>.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* *See* TOOL REPORT FOR MEXICO, *supra* note 196, at 4-5. This section explains the treatment of consent in human trafficking prosecutions. In the United States, prosecutors are generally able to bring charges against defendants on behalf of the state and without the direct assistance of victims. *See* TOOL REPORT FOR MEXICO, *supra* note 196, at 3.

<sup>221</sup> Consent in human trafficking is a widely debated issue that is not discussed exhaustively in this note. *See* Marisa S. Cianciarulo, *What is Choice? Examining Sex Trafficking Legislation Through Lenses of Rape Law and Prostitution*, 6 U. ST. THOMAS L.J. 54, (2008).

*Trafficking Law*

The Mexican Anti-Trafficking Law was enacted in November 2007, and the legislation provided that regulations for the law had to be issued before May 2008.<sup>222</sup> However, the regulations were not released until February 27, 2009.<sup>223</sup> Some agree that the regulations provide little guidance and that they are mostly repetitive of the text of the Mexican Anti-Trafficking Law.<sup>224</sup> The greatest concerns are that the regulations failed to address two important matters of implementation: (1) the formalization of the Inter-Secretarial Commission, and (2) the creation of a National Anti-Trafficking Program that the Inter-Secretarial Commission is charged with drafting,<sup>225</sup> both of which are mandated under the Mexican Anti-Trafficking Law.<sup>226</sup>

*1. Inter-Secretarial Commission and National Anti-Trafficking Program*

The Mexican Anti-Trafficking Law provides that the Mexican federal government must establish an Inter-Secretarial Commission in order to coordinate efforts among its members to implement the National Anti-Trafficking Program.<sup>227</sup> The Program must address the prosecution of traffickers, the prevention of human trafficking, and the protection of victims.<sup>228</sup> The Inter-Secretarial Commission consists of various federal government agencies such as the Office of Foreign Relations, the Office of Public Security, and the Office of the Attorney General.<sup>229</sup> In addition, the Inter-Secretarial Commission may invite as consultants representatives from autonomous agencies related to human trafficking, three representatives of non-governmental organizations, and three academic experts on issues related to human trafficking.<sup>230</sup> However, a key entity that is missing from the discussion is FEVIMTRA.

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<sup>222</sup> TOOL REPORT FOR MEXICO, *supra* note 196, at 1.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Ley Para Prevenir y Sancionar la Trata de Personas [Law to Prevent and Punish Trafficking in Persons] ch. 3, arts. 10, 13.

<sup>227</sup> *Id.* ch. 3, art. 10.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

The Inter-Secretarial Commission has been meeting informally, but has not received clear, formal instructions from the Mexican President about how to proceed with the creation of the National Anti-Trafficking Program.<sup>231</sup> The President should instruct the Commission to invite FEVIMTRA to join it so that it may assist in the creation of the National Anti-Trafficking Program. Although the Office of the Attorney General is one of the members of the Inter-Secretarial Commission,<sup>232</sup> it is important to explicitly include FEVIMTRA, even though it is effectively a subsection of the Office of the Attorney General. FEVIMTRA was given the task of prosecuting traffickers<sup>233</sup> and as such it should be able to offer its perspective directly to the Inter-Secretarial Commission and opine on its work with the National Anti-Trafficking Program.

Some may argue that FEVIMTRA is not a strong player in the fight against human trafficking in Mexico given that it has not convicted anyone under the Mexican Anti-Trafficking Law. The only conviction under the Mexican Anti-Trafficking Law was the result of an investigation of another government agency.<sup>234</sup> As discussed above,<sup>235</sup> in its first year, FEVIMTRA investigated twenty-four cases but failed to convict anyone under the Mexican Anti-Trafficking Law.<sup>236</sup> Despite the lack of convictions, the Inter-Secretarial Commission would greatly benefit from FEVIMTRA's lessons.<sup>237</sup> FEVIMTRA could offer any of its information and strategies to the Inter-Secretarial Commission so that this information and these strategies could be reflected in the implementation of the National Anti-Trafficking Program. As part of the Inter-Secretarial Commission, FEVIMTRA could also

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<sup>231</sup> TOOL REPORT FOR MEXICO, *supra* note 196, at 1.

<sup>232</sup> Ley Para Prevenir y Sancionar la Trata de Personas [Law to Prevent and Punish Trafficking in Persons] ch. 3, art. 10.

<sup>233</sup> FEVIMTRA, *supra* note 36.

<sup>234</sup> TIP REPORT 2010, *supra* note 8, at 233. The investigation that led to the conviction was conducted by SIEDO (*Subprocuraduría de Investigación Especializada en Delincuencia Organizada*), the Assistant Attorney General for Special Investigations and Organized Crime. This entity investigates federal human trafficking cases that involve more than three victims while FEVIMTRA handles cases that involve three or fewer victims. *Id.*

<sup>235</sup> See *supra* Part III.C.3.

<sup>236</sup> See *supra* Part III.C.2.

<sup>237</sup> FEVIMTRA could bring to the Inter-Secretarial Commission its experience in investigation of crimes targeting women, searching for missing women, providing aid to victims of crimes against women, and launching crime prevention campaigns, among others. FEVIMTRA, *supra* note 36.

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benefit from the advice of the non-governmental organizations, consultants, and academic experts that are already permitted to join that commission.<sup>238</sup> Having FEVIMTRA at the table would streamline communication between all the interested parties and allow them to coordinate efforts against human trafficking.

Another benefit to having FEVIMTRA be a part of the Inter-Secretarial Commission would be that it has displayed progress in dealing with the problem of violence against women in Mexico. In its first year, FEVIMTRA initiated 100 investigations of violence against women<sup>239</sup> and located 86 women out of 142 women reported missing.<sup>240</sup> Among other services, FEVIMTRA offers legal support, as well as emotional support groups to victims of human trafficking and violence against women.<sup>241</sup> FEVIMTRA's services exhibit efforts to eliminate gender violence and discrimination, both of which can be external motivating factors that make people susceptible to human trafficking.<sup>242</sup> FEVIMTRA could offer these strategies to the Inter-Secretarial Commission, which could in turn evaluate them and determine if they can be used to shape the National Anti-Trafficking Program.

*C. Bilateral Partnership between United States and Mexico*

Victims on both sides of the United States-Mexico border would greatly benefit from improvements to both countries' laws and their implementation. Regardless, the United States and Mexico can accomplish much more if they join efforts and collaborate in a formal bilateral partnership that takes into account the internal and external factors<sup>243</sup> that make human trafficking possible. A bilateral partnership would ensure that both countries' interests are represented in any solution to eradicate human trafficking. It could be beneficial in prosecuting traffickers, protecting victims, and putting preventative measures in place.

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<sup>238</sup> The President may invite representatives of the non-governmental sector as well as academic experts on human trafficking to the Inter-Secretarial Commission. *Ley Para Prevenir y Sancionar la Trata de Personas* [Law to Prevent and Punish Trafficking in Persons] ch. 3, art. 10.

<sup>239</sup> FEVIMTRA FIRST ANNUAL REPORT, *supra* note 204.

<sup>240</sup> *Id.* at 9.

<sup>241</sup> *Id.* at 11-12.

<sup>242</sup> *See supra* Part I.

<sup>243</sup> *Id.*

### 1. *Prosecution of Traffickers*

A formal bilateral partnership could allow the United States and Mexico to share information about traffickers, which could lead to more prosecutions. Currently, if in the course of an investigation, a U.S. prosecutor believes that a trafficker returned to Mexico, the prosecutor may either petition for extradition or submit a request for the Mexican government to prosecute the accused in Mexico.<sup>244</sup> Generally, Mexican President Calderon cooperates with the United States in extraditing criminals.<sup>245</sup>

Several traffickers have been extradited to the United States in connection to high profile cases, such as the Carreto-Valencia brothers who were charged with human trafficking for running a forced prostitution ring in New York.<sup>246</sup> After several family members were charged in 2004, another participant was extradited in 2007 and sentenced in 2008.<sup>247</sup> Another case involved defendants who illegally transported Mexican individuals to Florida and forced them to work in fruit harvesting fields by threatening them with violence.<sup>248</sup> If the strategies used to prosecute these traffickers were maintained by a bilateral partnership, both the United States and Mexico could expedite their investigatory processes instead of acting unilaterally and only responding to each other's requests for extradition and punishment. More efficient prosecutions would leave more resources and time to address the needs of victims.

### 2. *Protection of Victims*

A bilateral partnership could be formed between U.S.

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<sup>244</sup> UNIV. OF CALIFORNIA, BERKELEY, INTERNATIONAL HUMAN RIGHTS LAW CLINIC, TRANSNATIONAL FRAMEWORKS FOR PROSECUTING TRAFFICKERS AND PROTECTING SURVIVORS, SAFETY AFTER SLAVERY: PROTECTING VICTIMS OF HUMAN TRAFFICKING 3 (2004) (stating that there are "presently two mechanisms [which] are available to U.S. law enforcement to initiate prosecution of such criminals: (1) extradition of the accused to the United States or (2) submission of a request to the Mexican government to prosecute the accused in Mexican courts pursuant to Article 4 of the Mexican Federal Penal Code.").

<sup>245</sup> *Mexico Extradites Record Number to U.S.*, CNN, (Nov. 2, 2009), <http://www.cnn.com/2009/US/11/01/mexico.us.extraditions/index.html#cnnSTCText>.

<sup>246</sup> One of President Calderon's anti-drug trafficking efforts involves extraditing traffickers to the United States, which suggest that he generally has a positive disposition towards extradition. *Id.*

<sup>247</sup> TOOL REPORT FOR MEXICO, *supra* note 196, at 9.

<sup>248</sup> *Id.*

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Customs and Border Protection agents and Mexican customs officials in order to create better strategies to identify human trafficking victims at the shared border. Although most immigrants agree to be smuggled, others are abducted and taken against their will.<sup>249</sup> When these immigrants are intercepted at the border, they are often confused with smugglers and the people they are smuggling and not recognized as victims.<sup>250</sup> Having a bilateral partnership could ensure that these issues come to light and that proper training is provided to U.S. Customs and Border Protection agents in order to prevent them from simply deporting victims or sending them back to their traffickers. Even if immigrants have consented to being smuggled, U.S. agents may be able to identify the signs of human trafficking if information is shared across the border. Suspected victims of human trafficking could be turned over to Mexican customs officials for further investigation and possible legal aid and protection.

In a bilateral partnership with representatives from both countries, the United States and Mexico would be able to come up with strategies that keep traffickers and smugglers out of the United States while protecting the victims. For example, if a partnership were in place, the members of the partnership could designate specific steps for U.S. Customs and Border Protection agents to take when they suspect the people they have detained are victims of human trafficking. These steps could include, for example, sending victims directly to predetermined and state-approved Mexican shelters equipped to handle their needs as victims of human trafficking.<sup>251</sup> Another specific step that a partnership may be able to put in place is that U.S. Customs and Border Protection agents could separate people they intercept at the border and ask them specific questions to determine if they are victims. Some victims of human trafficking report that if they had not been near their traffickers at the time they were stopped at the border and if they had been asked more direct questions, they would have revealed that they were being taken against their will and been rescued despite their fear of retaliation from

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<sup>249</sup> See Mike McGraw and Laura Bauer, *US System to Find, Help Victims of Human Trafficking Is Broken*, TRUTHOUT (Dec. 12, 2009), <http://www.truthout.org/1213094>.

<sup>250</sup> *Id.*

<sup>251</sup> Shelters equipped to help human trafficking victims are already in existence in Mexico. See U.S. AGENCY FOR INT'L DEV., *MEXICO TIP SHELTER PROJECT, FINAL REPORT 11* (2009), [http://pdf.usaid.gov/pdf\\_docs/PDACN102.pdf](http://pdf.usaid.gov/pdf_docs/PDACN102.pdf) [hereinafter *MEXICO TIP SHELTER PROJECT*].

traffickers.<sup>252</sup>

### 3. *Prevention of Human Trafficking*

Prevention tends to be a goal that is cast aside in favor of prosecution of traffickers and protection of victims because it is intangible. One can count the number of prosecutions and victims helped but cannot ascertain how many are saved with preventative measures. In the 2009 TIP Report, Secretary of State Hillary Clinton acknowledged that much remains to be done in identifying and tackling the root causes of human trafficking.<sup>253</sup> Clinton urged all governments to leverage their resources and offered U.S. partnership to strengthen anti-trafficking efforts.<sup>254</sup>

One of the ways in which the United States can leverage its resources is by partnering with Mexico in order to continue raising awareness about the dangers of human trafficking and how smuggling can easily lead to trafficking. In addition, a partnership would send a message to both countries about the seriousness of the crime and the urgent need to address it together. In a partnership between U.S. and Mexican representatives, they would be able to strategize to develop viable alternatives to prevent illegal immigration, given that most victims are vulnerable due to a lack of economic alternatives. Furthermore, through a partnership, the United States and Mexico could develop joint and more informed awareness campaigns to warn their citizens about the dangers and criminal consequences of engaging in human trafficking.

### 4. *Challenges*

One obstacle that would be faced in creating a bilateral partnership is the amount of work and resources necessary for its organization and implementation. However, a model of a partnership already exists and could be altered to accommodate a number of anti-trafficking efforts.

The U.S. government, pursuant to the TVPA, established the "President's Initiative to Combat Trafficking in Persons" and allocated fifty million dollars to fund coordinated efforts with eight

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<sup>252</sup> McAdams, *supra* note 218.

<sup>253</sup> TIP REPORT 2009, *supra* note 7, at 1.

<sup>254</sup> *Id.*

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countries.<sup>255</sup> Mexico was one of the eight countries selected for the program and the United States designated \$8.2 million dollars towards anti-trafficking efforts with Mexico.<sup>256</sup> The funds were distributed among the “U.S. Agency for International Development (USAID); the Department of Justice (DOJ); the Department of Homeland Security (DHS); the Department of Labor (DOL); the Department of State’s Office of Population, Refugees and Migration (DOS/PRM); and the Department of Health and Human Services (HHS).”<sup>257</sup> These entities, along with the U.S. Embassy in Mexico, joined efforts with the Mexican government and civil society to (1) raise public awareness; (2) pursue anti-trafficking legislation; (3) strengthen local shelters; and (4) develop and provide technical assistance to anti-trafficking networks.<sup>258</sup> The three-year program was named PROTECT – Project to Support Shelters for Victims of Trafficking in Mexico (*PROTEJA – Proyecto de Apoyo a Refugios para Victimas de Trata de Personas en Mexico*) and was in existence from May 2006 to March 2009.<sup>259</sup>

PROTECT was very effective and its efforts informed the enactment of the Mexican Anti-Trafficking Law.<sup>260</sup> If the United States and Mexico wanted to create a bilateral partnership, they could begin by following the PROTECT model. Although the program ended in March 2009, a website with a record of all the efforts will remain available for the public until March 2011<sup>261</sup> and will be accessible beyond that date. The United States and Mexico could minimize start-up costs and resources by utilizing this model.

## V. CONCLUSION

Human trafficking is the slavery of the 21<sup>st</sup> century<sup>262</sup> and as such, it is incredibly challenging to eradicate it. Human trafficking is especially sinister because it takes advantage of people’s basic instinct—their desire to improve their living conditions. The promise of a better job, better pay, and a better life, is what

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<sup>255</sup> MEXICO TIP SHELTER PROJECT, *supra* note 251, at 1-2.

<sup>256</sup> *Id.* at 3.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 4.

<sup>259</sup> *Id.*

<sup>260</sup> MEXICO TIP SHELTER PROJECT, *supra* note 251, at 15-20.

<sup>261</sup> *Id.* at 8.

<sup>262</sup> *See supra* Part I.

traffickers use every day as bait to exploit their victims.<sup>263</sup> Anti-trafficking efforts have greatly improved since the United Nations convened to draft the Palermo Convention denouncing the abuse and exploitation of people across the world.<sup>264</sup> Many governments around the globe have joined the efforts to eliminate these vile crimes. However, much remains to be done.

A number of countries have enacted anti-trafficking legislation while others have made improvements to legislation.<sup>265</sup> Countries' individual efforts are especially necessary in times of economic downturn when people become more desperate to improve their living conditions, and are more susceptible to traffickers.<sup>266</sup> Although anti-trafficking efforts of individual countries will continue to be important, coalitions and partnerships are the next frontier in the fight against human trafficking.<sup>267</sup> In over a decade, since 2000, of evaluating and reporting about human trafficking via Trafficking in Persons Reports, the world has come to learn that human trafficking is a transnational crime that touches every corner of the world. A solution to this problem must take into consideration the individual factors that allow traffickers to exploit people with impunity and that make those people targets for exploitation.

The United States and Mexico have a unique opportunity to collaborate to address human trafficking along their shared border. As they continue their separate anti-trafficking efforts, they should consider expanding upon the model they developed with the three-year program PROTECT.<sup>268</sup> The desire to improve their economic conditions and be reunited with family members will always seem to be a risk worth taking to people in desperate situations. However, by working together, in a bilateral partnership, the United States and Mexico can create viable alternatives that do not include people risking their lives, and becoming prey to traffickers, in their attempts to build a better life.

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<sup>263</sup> *See id.*

<sup>264</sup> *See supra* Part II.A.1.

<sup>265</sup> *See generally* TIP REPORT 2009, *supra* note 7.

<sup>266</sup> *See id.* at 32.

<sup>267</sup> *See* TIP REPORT 2010, *supra* note 8, at 1.

<sup>268</sup> *See supra* Part IV.C.4.