

Coyote Ugly: Ineffective Human Smuggling Statutes in Central America Call for a New Regional Treaty

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TABLE OF CONTENTS

I.	INTRODUCTION	240
II.	BACKGROUND.....	244
	A. <i>Push Factors: Reasons why Children and Migrants are</i> <i>Emigrating from Central America</i>	245
	B. <i>Pull Factors: Reasons why Migrants Come to the U.S.</i>	250
III.	HOW NORTH AND CENTRAL AMERICAN COUNTRIES ARE Failing to Combat Human Smuggling in the Region	252
	A. <i>The United States</i>	252
	B. <i>Central American Actors</i>	254
IV.	FAILURES IN INTERNATIONAL INSTRUMENTS: GUATEMALA AS AN EXAMPLE.....	256
	A. <i>The Palermo Convention and the International Consensus</i> <i>to Combat Transnational Crime</i>	257
	B. <i>Guatemala has Responded the Trafficking Protocol, But</i> <i>It Has Not Done the Same for the Smuggling Protocol</i>	258
V.	DEFICIENCIES IN THE PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS	260
VI.	GUATEMALA'S NATIONAL LEGISLATION	264

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A.	<i>Human Smugglers Cannot be Prosecuted Under Human Trafficking Charges</i>	266
B.	<i>Human Smugglers Can Be Charged with Other Crimes</i>	268
C.	<i>Problem with Not Having Human Smuggling Statutes</i>	270
VII.	GUATEMALA IS VIOLATING THE PROTOCOL, PROVING THAT THE PROTOCOL IS INEFFECTIVE	270
A.	<i>Guatemala is Not Following the Smuggling Protocol in Good Faith</i>	272
B.	<i>Guatemala Cannot Rely on Its National Laws to Justify Its Lack of Proper Human Smuggling Statutes</i>	273
VIII.	GUATEMALA IS NOT ALONE: MEXICO, HONDURAS, AND EL SALVADOR HAVE NOT ADOPTED THE INTERNATIONAL LEGAL STANDARD FOR HUMAN SMUGGLING	274
A.	<i>El Salvador</i>	274
B.	<i>Mexico</i>	275
C.	<i>Honduras</i>	276
D.	<i>The U.S.</i>	277
IX.	A NEW DEFINITION: THE IMPORTANCE OF CONSENT	278
X.	A MEANS TO AN END: A REGIONAL CONVENTION AND A WORKING GROUP	282
A.	<i>SAARC and EU: Regional Examples</i>	282
B.	<i>Lessons for the Americas</i>	287
C.	<i>The Organization of American States</i>	289
XI.	CONCLUSION	291

I. INTRODUCTION

Dressed in shorts and sandals, the coyote¹ was hard to distinguish from the other migrants who stood at the bus stop. He was in Tamaulipas, Mexico, waiting to meet his contact from the Gulf cartel. Since his migrants,² his *pollos*,³ a twelve-year-old girl and a seventeen-year-old boy, were from Guatemala, the deal would be between \$500 to \$700 per person.⁴ He had enough left over from the \$5,000 he received from each

1. “Coyote” is a term used for human smuggler. See Amanda E. Schreyer, *Human Smuggling Across the U.S.-Mexico Border: U.S. Laws Are Not Stopping It*, 39 SUFFOLK U.L. REV. 795 (2006).

2. An international migrant is a person who has moved from one country to another with the intention of taking up residence there for a relevant period of time. See Tomas Hammar & Kristof Tamas, *Why Do People Go or Stay?*, in INTERNATIONAL MIGRATION, IMMOBILITY AND DEVELOPMENT: MULTIDISCIPLINARY PERSPECTIVES 16 (Tomas Hammer, Grete Brochmann, Kristoff Tamas & Thomas Faist eds., 1997).

3. In Spanish, *pollo* means “chicken,” and is a word smugglers use for their migrants. See TERRY GREENE STERLING, *ILLEGAL: LIFE AND DEATH IN ARIZONA’S IMMIGRATION WAR ZONE* 39 (2006). Human smugglers are sometimes referred to as *polleros*, or “chicken herders.” *Id.*

4. The fee depends on where the migrants are from. Central American migrants are more expensive than Mexican migrants. See E. Eduardo Castillo and Christopher

child's parent at the start of the journey. He would get the other half once the kids reached their destination.⁵ Part of the money was used to pay off transportation, hotel and food costs.⁶ Now, he was just waiting to bribe the cartel to get through their territory. Once they were in Monterrey, he would hand them over to another coyote who would get them across the Rio Grande and into Texas. At least, that was the plan.

He looked around at the other migrants while he waited, thinking that many of them had no idea what lay ahead. Along the journey, "they will be preyed upon by cartels, police, Mexican immigration authorities, *maras*⁷ and random rural gangs."⁸ Some will be robbed, enslaved, and forced into narco-assassin squads.⁹ Eight out of ten women will be the victim of rape.¹⁰ Without hiring someone like him, there was very little chance that they would ever make it to the United States ("U.S.").

Sherman, *Migration spotlights Mexico "coyote" smugglers*, ASSOCIATED PRESS (July 22, 2014), <http://bigstory.ap.org/article/migration-spotlights-mexican-coyote-smugglers> (testimony from Rafael Cardenas Vela, nephew of former Gulf cartel leader Osiel Cardenas Guillen).

5. Coyotes charge between \$4,000 to \$10,000 for their services, depending on the destitution—half is paid in the beginning, the other half is paid once the deal is done. Interview with Victor Clark-Alfaro, Director, Binational Center for Human Rights, in Tijuana, Mexico (Sept. 19, 2014).

6. *Id.*; see also David Kyle & John Dale, *Smuggling the State Back In: Agents of Human Smuggling Reconsidered*, in GLOBAL HUMAN SMUGGLING, COMPARATIVE PERSPECTIVES 34 (David Kyle & Rey Koslowski, eds., 2nd ed. 2011) (increase in U.S. border enforcement activities in the last two decades has heightened the risks and resources required of professional smugglers, ultimately driving up costs of illegal migration). See generally UNICEF, *Going North: Violence, Insecurity and Impunity in the Phenomenon of Migration in Guatemala* (2011), at 5, http://api.ning.com/files/SVfVaVsl8W3ekcOBcvLJkfbx28I9FhRAtrV*omPdKo5KYx9pM8HeGBTOsMM8E3YkblIlliwmntj05D4SsFWTquqfLSt6Xd91/UNICEFGoing_North.pdf (in Guatemala, organized crime and narco-traffickers control about 60% of the territory, including major migration routes).

7. *Maras* is another word for "street gangs." See Steven C. Boraz & Thomas C. Bruneau, *Are the Maras Overwhelming Governments in Central America?*, MIL. REV. Nov.—Dec. at 36 (2006), http://usacac.army.mil/CAC2/MilitaryReview/Archives/English/MilitaryReview_20061231_art007.pdf.

8. Francisco Goldman, *Forward* to OSCAR MARTINEZ, *THE BEAST: RIDING THE RAILS AND DODGING NARCOS ON THE MIGRANT TRAIL*, at xi (Daniela Maria Ugaz & John Washington trans., 2013).

9. *Id.*; see José E. Arvelo, *International Law and Conflict Resolution in Colombia: Balancing Peace and Justice in the Paramilitary Demobilization Process*, 37 GEO. J. INT'L L. 411, 419–20 (2006) (discussing "narco-assassin squads," also known as narco-death squads, as a loose, private right-winged paramilitary force that developed in the 1980s to protect drug cartels and corrupt military commanders from left-wing guerilla forces).

10. Goldman, *supra* note 8, at xi.

To his *pollos*, he was both a compass and a guardian. The children were friends of friends. The girl did not want to end up like the other girls in her class—pregnant from a rape by local *mareros*.¹¹ The boy was escaping the Zetas,¹² who threatened to kill him if he did not traffic cocaine for them.¹³ He wanted them to be satisfied with his service so they could recommend him to another family or child in need of a traveling guide. Without a good recommendation, he would lose business.¹⁴ But the surge of unaccompanied alien minors (“UAMs”) from Central America, specifically Guatemala, Honduras, and El Salvador, kept him in business. Furthermore, the benefits of making money outweighed the possibility of serving more jail time in the U.S.¹⁵ After all, he would be deported back to Guatemala eventually, and business would start up again.

The coyote’s story illustrates the international concern of deterring a flourishing underground trade in moving people across borders. Efforts are being made to combat smuggling rings, often to no avail. The problem is that U.S. Border Patrol does not identify smugglers who are caught crossing the border as smugglers.¹⁶ Instead, they are classified as migrants and are deported back to their country of origin where they resume business. If U.S. Border Patrol does identify a smuggler, then he or she either faces criminal charges in the U.S. or is sent back home to face penalties.¹⁷ Some may not even face penalties at all if their home country does not recognize the internationally agreed-upon definition of human smuggling and prosecute human smugglers accordingly.

11. *An Administration Made Disaster: The South Texas Border Surge of Unaccompanied Alien Minors: Hearing before the H. Comm. of the Judiciary*, 113th Cong. (2014) at 6 (statement submitted by Leslie E. Velez, Senior Protection Officer, United Nations Commissioner for Refugees, based on real testimony); see Luz E. Nagle, *Criminal Gangs in Latin America: The Next Great Threat to Regional Security and Stability?*, 14 TEX. HISP. J. L. & POL’Y 7, 9 (2008) (explaining that *marero* is a collective word for “gangs”).

12. *Los Zetas* is a Mexican drug gang that operates in Mexico, Honduras, Guatemala, Nicaragua, and El Salvador. Juan J. Fogelbach, *Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras*, 12 SAN DIEGO INT’L L.J. 417, 441 (2011).

13. See *Pirir-Boc v. Holder*, 750 F.3d 1077, 1080 (9th Cir. 2014) (Guatemalan applicant Oliverto Pirir-Boc was granted asylum in the U.S. after escaping attempts on his life for refusing to join the Mara Salvatrucha gang because of his belief that they were “criminals who rape women and rob people”).

14. Clark-Alfaro, *supra* note 5 (smugglers depend on recommendations to get business).

15. *Id.* Most smugglers were once migrants themselves.

16. Interview with Elizabeth Camarena, Associate Director, Casa Cornelia Law Center, in San Diego, Cal. (Oct. 1, 2014).

17. See U.S. Immigration and Nationality Act. (I.N.A.), including §§ 274(a)(1)(A) and 274 (a)(2) (codified as amended at 8 U.S.C. §§ 1324(a)(1)(A) and 1324(a)(2) (2012) (some illegal alien smugglers may face prison terms and then are deported back to their country). See also *United States v. Martinez-Candejas*, 347 F.3d 853 (10th Cir. 2003) (affirming District Court’s decision to sentence defendant to 46 months in federal prison before being deported).

Effective action to prevent and combat the smuggling of migrants requires a comprehensive international approach, including cooperation, the exchange of information, and socio-economic measures.¹⁸ The universal instrument that addresses human smuggling issues is the United Nations (“U.N.”) Protocol against Smuggling of Migrants by Land, Sea and Air (the “Smuggling Protocol”), a supplement to the U.N. Convention against Transnational Crime (“Palermo Convention”).¹⁹ The objectives of the Protocol are twofold: establishing the smuggling of migrants as a criminal offense within each State,²⁰ and facilitating cooperation in the prevention, investigation, and prosecution of the crime of smuggling migrants.²¹

However, the Smuggling Protocol, like most Central and North American legislation, reflects a misunderstanding of the differences between human smuggling and human trafficking. Human smuggling is often misused and baked into the definition of human trafficking—a criminal offense that is related to smuggling but with vastly different legal and theoretical ramifications. This Comment calls for the rethinking of the international emphasis on human trafficking by looking at its neglected sister and illuminating the consequences of mis-defining two related yet distinct international criminal offenses. This Comment is an original intervention in the area of international and transnational crime. It is the first of its kind to examine the deficiencies of the Smuggling Protocol through case studies and the first to offer practical reforms and theoretical clarifications of the definition of human smuggling to serve as a useful tool in future attempts to combat human smuggling and human trafficking.

Part II examines the push and pull factors that contribute to the ebb and flow of mass migration from Central America to the U.S., including desperate living conditions, menacing gang realities, and attractive U.S. immigration policies. Part III reveals how U.S. and Central American actors are failing to adopt preventative measures. Part IV examines how Central American State Actors have failed to adopt the Smuggling Protocol. Particular attention will be given to Guatemala as a regional example because of its unique position as a historical and geographical country of origin, transit, and destination for human smuggling.

18. G.A. Res. 55/25, at 40 (Jan. 8, 2001) [hereinafter Smuggling Protocol].

19. See G.A. Res. 55/25, at 31 (Jan. 8, 2001) [hereinafter Palermo Convention].

20. Smuggling Protocol, *supra* note 18, art. IV, at 42.

21. See *id.* art. II, at 41.

Part V dissects the failures of the Smuggling Protocol because it misapplies human trafficking terms to the definition of human smuggling and delegates the responsibility of solving this regional problem to individual State Actors. Part VI looks at human smuggling statutes from one particular State, Guatemala. Case law analysis from Guatemala reveals that Guatemala's legislation is insufficient to combat human smuggling within Guatemala and throughout the region. Although Guatemala signed the Smuggling Protocol, it has not followed it in good faith.

Part VII looks at why Guatemala has not implemented the Smuggling Protocol, proving that the only international instrument available to guide states is ineffective. Guatemala is not alone; El Salvador, Honduras, and Mexico have not implemented measures mandated by the Protocol even though all of these states have signed and ratified it.

Part VIII examines how the definition of human smuggling varies across these countries and how a divided definition hinders the possibility of a future unified approach. Part IX offers a new definition of human smuggling that will categorize it as a separate offense from human trafficking. In concluding, this Comment will emphasize that the legal solution to the human smuggling problem in Central America is the harmonization of national legislation through the development of a regional convention, which would be enforced by a monitoring working group.

II. BACKGROUND

Human smuggling and human trafficking comprise one of the fastest growing areas of international criminal activity.²² Both activities consist of a number of different crimes that span several countries, but it is important to distinguish between the two concepts. Separate international legal instruments address smuggling of migrants and trafficking in persons. Each instrument and crime has vastly different requirements and consequences. "Human smuggling," also referred to as "alien smuggling," involves the procurement of an illegal entry into a country for financial or other material benefit.²³ "Human trafficking" is a distinct offense involving an alien who is being transported by force, coercion or deception and for purposes of forced labor or prostitution.²⁴ The element of consent mainly

22. *Fact sheet: Distinctions between Human Smuggling and Human Trafficking*, HUMAN SMUGGLING AND TRAFFICKING CTR., 1 (April 2006), <http://www.state.gov/documents/organization/90541.pdf> [hereinafter Human Smuggling and Trafficking Fact Sheet].

23. Smuggling Protocol, *supra* note 18, art. III, ¶ (a); 8 U.S.C. § 1324 (2012).

24. *See* 18 U.S.C. §§ 1592-95 (2012); 22 U.S.C. §§ 7101-7110 (2012); ARIZ. REV. STAT. ANN. Tit. 13, §§ 1306-1309; *see also* Smuggling Protocol, *supra* note 18 (an internationally agreed upon definition of "human trafficking" is "the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other

distinguishes the two crimes. The smuggled migrant normally consents to be smuggled and often pays large sums of money with the hopes that the smuggling operation will be a success.²⁵ Unlike human smuggling, human trafficking targets the migrant as an object of exploitation; there is no consent.²⁶ Furthermore, trafficking, like the crimes of homicide, assault, and kidnapping, is a crime against an individual.²⁷ Smuggling of migrants is a crime against the government as a breach of immigration laws.²⁸ While there are major differences between smuggling and trafficking, the underlying issues that give rise to these situations are similar. Extreme poverty, lack of economic opportunities, civil unrest, and political uncertainty, are all factors contributing to an environment that encourage human smuggling and trafficking in persons.²⁹

A. Push Factors: Reasons why Children and Migrants are Emigrating from Central America

In Central America, gang violence is the largest factor contributing to the smuggling business.³⁰ “Today, the largest, most violent, and most organized gangs operate in Central America and Mexico.”³¹ Many of these transnational gangs, like the 18th Street Gang (also known as “M-18”) and the *Mara Salvatrucha* (also known as “MS-13”), got their start

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”).

25. Smuggling Protocol, *supra* note 18, art. III.

26. *Id.*; Colleen DiSanto, *Alien Smuggling Along the Arizona-Mexico Border Federal and State Responses*, Ariz. Att’y, Jan. 2007, at 29–30; G.A. Res. 55/25, art. III(a) (Dec. 25, 2003), supplement to Anti-Trafficking Protocol [hereinafter Trafficking Protocol] (“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”).

27. *ASEAN and Trafficking in Persons: Using Data as a Tool to Combat Trafficking in Persons*, INT’L ORG. FOR MIGRATION 3 (2007), http://publications.iom.int/bookstore/free/ASEAN_and_trafficking_in_persons.pdf.

28. *Id.*

29. Human Smuggling and Trafficking Fact Sheet, *supra* note 22; see Hammar & Tamas, *supra* note 2, at 3.

30. *See An Administration Made Disaster: The South Texas Border Surge of Unaccompanied Alien Minors: Hearing before the H. Comm. of the Judiciary*, 113th Cong. (2014) at 6 (statement submitted by Leslie E. Velez, Senior Protection Officer, United Nations Commissioner for Refugees, based on real testimony), *supra* note 11.

31. Jillian N. Blake, *Gang and Cartel Violence: A Reason to Grant Political Asylum from Mexico and Central America*, 38 YALE J. INTL. L. ONLINE 31, 32 (2012).

in the downtown neighborhoods of Los Angeles and spread to Central America after the U.S. started to deport undocumented felons in the 1990s.³² More than 90% of the deportees were from El Salvador, Guatemala, and Honduras.³³ After arriving in their countries of origin with no connections or knowledge of the area, their only source of survival was to retain their gang lifestyle.³⁴

The gang cultures of the so-called “Northern Triangle” countries, Guatemala, El Salvador and Honduras, have developed a degree of politicization, sophistication, and international reach that allows them to function as de facto governments controlling substantial territory.³⁵ Some of the gangs even rule entire municipalities and collect “taxes” by extorting payments from local businesses.³⁶ Those who resist become targets for violent retribution.³⁷

The Northern Triangle is considered the deadliest zone in the world outside of active war zones in terms of scale, spending, and the amount of weapons used.³⁸ In April 2014, the U.N. reported that Honduras has the

32. *Id.* “The proliferation of *maras* in Central America is attributable in large part to a United States immigration and criminal justice policy that deports foreign-born criminal convicts back to their countries of origin following incarceration . . . [F]or several years the United States has been pouring tens of thousands of criminals, including extremely violent offenders, into Central America’s weakest and most failing states.” Emma Mahern, *La Mano Extendida: The Interaction Between International Law and Negotiation as a Strategy to End Gang Warfare in El Salvador and Beyond*, 24 IND. INT’L & COMP. L. REV. 767, 770 (2014).

33. 2011 *World Development Report: Conflict, Security and Development*, WORLD BANK 78 (2011), http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011_Full_Text.pdf.

34. Nagle, *supra* note 11, at 10; Celinda Franco, *The MS-13 and 18th Street Gangs: Emerging Transnational Gang Threats?*, CONG. RESEARCH SERV., RL34233 8 (2007).

35. Deborah Anker & Palmer Lawrence, “Third Generation” Gangs, Warfare in Central America, and Refugee Law’s Political Opinion Ground, 14-10 IMMIGR. BRIEFINGS 1 (Oct. 2004), <https://harvardimmigrationclinic.files.wordpress.com/2013/02/14-10-immigr-briefings-1.pdf>; Lieutenant Colonel Howard L. Gray, *Gangs and Transnational Criminals Threaten Central American Stability*, 7 U.S. ARMY WAR C., STRATEGY RES. PROJECT (2009), <https://www.hsdl.org/?view&did=740050>.

36. Int’l Human Rights Clinic & Human Rights Program at Harvard Law School, *No Place to Hide: Gang, State, and Clandestine Violence in El Salvador* 28–29 (Feb. 2007), [http://www.law.harvard.edu/programs/hrp/documents/FinalElSalvadorReport\(3-6-07\).pdf](http://www.law.harvard.edu/programs/hrp/documents/FinalElSalvadorReport(3-6-07).pdf).

37. “In 2010, for example, after bus drivers banded together to resist paying ‘taxes’ to MS-13, the gang attacked two crowded buses in the capital, San Salvador, spraying one bus with automatic weapons power and setting another on fire with the passengers inside.” Brief for Harvard Immigration and Refugee Clinical Program and Other Immigration Rights Advocates, as Amici Curiae Supporting Petitioner, at 10, *Fuentes-Colocho v. U.S. Att’y Gen.*, (9th Cir. 2014) (No. 13-70470).

38. Anker & Lawrence, *supra* note 35, at 2; U.N. Office of Drug and Crime, Global Study on Homicide, at 24, 150 (2013), https://www.unodc.org/documents/gsh/pdfs/2014_GLOBAL_HOMICIDE_BOOK_web.pdf [hereinafter UNODC Global Study on Homicide]; See Blake, *supra* note 31 (U.S. military officials report that, in terms of the level of

highest murder rate in the world.³⁹ Almost 1 of every 360 males ages 15 to 29 fall victim to intentional homicide each year.⁴⁰ The other two Northern Triangle countries are not much better off. In 2013, the U.N. reported that El Salvador had the fourth largest homicide rate in the world.⁴¹ In 2014, El Salvador rose to the third largest homicide rate in the world.⁴² As of mid-2015, trends showed that El Salvador would surpass Honduras as the world's most homicidal country due at least in part to escalating gang conflicts.⁴³ In August 2015, in El Salvador, there was one killing on average every hour.⁴⁴ Meanwhile, Guatemala has the fifth largest homicide rate in the world with an average of 96 murders per week.⁴⁵

Violence in Central America has been escalating at alarming rates since 2011.⁴⁶ The combination of Mexico's security strategy to disrupt its cartels and the 2011 U.S. crackdown on drug trafficking⁴⁷ has pushed Mexican drug cartels into Central America, where they compete with the

violence, the Mexican and Central American conflicts now rival the conflicts of recent years in Iraq and Afghanistan [citing Mulrine, *Pentagon: Central America "Deadliest" Non-War Zone in the World*, CHRISTIAN SCI. MONITOR (Apr. 11, 2011), <http://csmonitor.com/usa/military/2011/0411/pentagon-central-america-deadliest-non-war-zone-in-the-world>].

39. CNN Staff, *Which countries have the world's highest murder rates? Honduras tops the list*, CNN WORLD (Apr. 11, 2014), <http://www.cnn.com/2014/04/10/world/un-world-murder-rates/>.

40. UNODC Global Study on Homicide, *supra* note 38, at 30.

41. *Id.* See also UNODC Homicide Statistics 2013, <http://www.unodc.org/gsh/en/data.html>.

42. UNODC Global Study on Homicide, *supra* note 38, at 24.

43. See Jonathan Watts, *One murder every hour: how El Salvador became the homicide capital of the world*, THE GUARDIAN (Aug. 22, 2015), <http://www.theguardian.com/world/2015/aug/22/el-salvador-worlds-most-homicidal-place> (gang violence has escalated since jailed gang leaders were relocated to high-security prisons with fewer visiting rights and reduced privileges in February 2015); see also Michael Lohmuller, *Honduras Set to Lose Title of 'Murder Capital of the World'?*, INSIGHT CRIME (July 16, 2015), <http://www.insightcrime.org/news-briefs/honduras-set-to-lose-title-of-murder-capital-of-world>.

44. Watts, *supra* note 43.

45. See UNODC Global Study on Homicide, *supra* note 38; Bureau of Diplomatic Security, U.S. Dep't of St., *Guatemala 2015 Crime and Safety Report*, OSAC (June 10, 2015), <https://www.osac.gov/pages/ContentReportDetails.aspx?cid=17785>.

46. See UNODC Global Study on Homicide, *supra* note 38.

47. Karen Hooper, *The Mexican Drug Cartel Threat in Central America*, STRATFOR, (Nov. 17, 2011), <https://www.stratfor.com/weekly/20111116-mexican-drug-cartel-threat-central-america>. See also Brianna Lee, *Mexico's Drug War*, COUNCIL ON FOREIGN RELATIONS, (last updated Mar. 5, 2014), <http://www.cfr.org/mexico/mexicos-drug-war/p13689>.

already established local gangs for money, power, and land.⁴⁸ In order to protect their territory, gangs look to expand their operations through recruitment. In El Salvador, for example, gangs historically target children as young as twelve years old.⁴⁹ Many gangs rely heavily on forced recruitment to expand and maintain their membership.⁵⁰ Children considered fit for combat may be taken out of schools, neighborhoods, and soccer fields.⁵¹ Any resistance to recruitment is met with threats of death, or often death itself.⁵² The commonly held mentality is that if someone is not in a gang, then he or she is against all gangs.⁵³ Instead of submitting to gang life, parents or grandparents find ways to send their children or grandchildren north.

The increase in violence is eroding the personal safety of local populations and influencing mass migration efforts of UAMs from the Northern Triangle to the U.S.⁵⁴ Before fiscal year 2011, “U.S. Customs and Border Protection officers encountered an average of 8,000 unaccompanied children on an annual basis.”⁵⁵ In 2011, three times more children from Guatemala, Honduras, and El Salvador arrived at the U.S. border.⁵⁶ The numbers increased exponentially in 2014. In the earlier part of 2014, children alone made up more than 57,000 arrivals into the U.S.,⁵⁷ and the expected 90,000 total apprehensions of UAMs in 2014 represented a 1,381 percent increase since 2011.⁵⁸ From October 1, 2014, to September 30, 2015, UAM apprehensions along the Southwest border increased in Texas (Big Bend and El Paso Sector), Arizona (Yuma Sector), and California

48. Scott B. MacDonald, *Central America’s Northern Triangle Drug Challenge*, 29 No. 7 INT’L ENFORCEMENT L. REP. (Jan. 2013) at 250.

49. See Fogelbach, *supra* note 12, at 423.

50. U.N. High Commissioner for Refugees (UNHCR), *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, (Mar. 31, 2010), <http://www.unhcr.org/refworld/docid/4bb21fa02.html>.

51. Fogelbach, *supra* note 12, at 423.

52. Alexandra Grayner, *Escaping Forced Gang Recruitment: Establishing Eligibility for Asylum After Matter of S-E-G-*, 63 HASTINGS L.J. 1417, 1424–25 (2012).

53. Fogelbach, *supra* note 12, at 429.

54. See Dan Restrepo & Ann Garcia, *The Surge of Unaccompanied Children from Central America: Root Causes and Policy Solutions*, CTR. FOR AMERICAN PROGRESS (July 24, 2014), <http://www.americanprogress.org/issues/immigration/report/2014/07/24/94396/the-surge-of-unaccompanied-children-from-central-america-root-causes-and-policy-solutions/>.

55. *Id.*

56. *Id.*

57. *Id.*

58. *An Administration Made Disaster: The South Texas Border Surge of Unaccompanied Alien Minors: Hearing on H.R. 113–84 before the H. Comm. on the Judiciary*, 113th Cong. 2nd Session, 1 (2014) [hereinafter *An Administration Made Disaster*] (statement of the Hon. Bob Goodlatte, Chairman, Comm. on the Judiciary).

(San Diego Sector).⁵⁹ Although the overall number of children that have crossed the border had temporarily decreased in mid-2015,⁶⁰ by late 2015 to early 2016, the rate of apprehensions on the U.S. southern border had begun to climb again.⁶¹ In response, the Office of Refugee Resettlement at the Department of Health and Human Services (“HHS”) has begun a process to expand its temporary capacity to house these unaccompanied children.⁶² “[T]he apprehension and processing of these children present unique operational challenges for the CBP [U.S. Customs and Border Patrol] and HHS”—addressing these challenges remain an important priority for the Department of Homeland Security (“DHS”).⁶³

59. The U.S. Customs and Border Protection reports that there was a 228 % increase in the Big Bend Sector, 62% increase in the El Paso Sector, 211% increase in the Yuma Sector, and a 14% increase in the San Diego Sector from FY 2014 to FY 2015. U.S. CUSTOMS AND BORDER PROTECTION, SOUTHWEST BORDER UNACCOMPANIED ALIEN CHILDREN STATISTICS FY 2015, (July 2015), <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2015> [hereinafter SOUTHWEST BORDER UAM STATISTICS FY 2015].

60. *Id.* The number of arrivals in the latter half of 2014 slowed down due to the efforts of Mexican authorities at the Mexico-Guatemala border. Mark Stevenson, *Mexico operations thwart child, family migrants*, ASSOCIATED PRESS, Aug. 30, 2014, <http://news.msn.com/world/mexico-operations-thwart-child-family-migrants>. Stevenson reports that such efforts may not be sustainable for the long-term based on geography and politics. *Id.* The Department of Homeland Security has nevertheless prepared for the possibility of another “surge” of Central American families in the spring of 2015. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE’S NEW FAMILY DETENTION CENTER IN DILLEY, TEXAS, TO OPEN IN DECEMBER (Nov. 17, 2014), <http://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december>. The 39,970 UAMs that were apprehended in fiscal year 2015 was still four times more children than what the U.S. encountered prior to 2011. *Compare* SOUTHWEST BORDER UAM STATISTICS FY 2015, *supra* note 59, *and* Restrepo & Garcia, *supra* note 54. Additionally, the number of UAMs that cross the Southwest border seem to fluctuate. U.S. CUSTOMS AND BORDER PROTECTION, SOUTHWEST BORDER UNACCOMPANIED ALIEN CHILDREN STATISTICS FY 2016 (2016), <http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016> [hereinafter SOUTHWEST BORDER UAM STATISTICS FY 2016].

61. U.S. Department of Homeland Security, *Statement by Secretary Jeh C. Johnson on Southwest Border Security* (Jan. 4, 2016), <https://www.dhs.gov/news/2016/01/04/statement-secretary-jeh-c-johnson-southwest-border-security> [hereinafter Secretary Johnson January 2016 Statement on Border Security].

62. *Id.* In November 2015, ORR increased the bed space capacity from 7,900 to 8,400 beds and is preparing for temporary bed space in the event an even greater number of additional beds will be needed. *Id.*

63. SOUTHWEST BORDER UAM STATISTICS FY 2015, *supra* note 59.

Among the primary reasons causing children to migrate are “unremitting violence, both from gangs and other organized criminal groups.”⁶⁴ In a study published in March 2014, “58% of children cited violence in their home countries as at least one key reason for leaving.”⁶⁵ The percentage of children citing violence as a key reason for migration varied by country: El Salvador (72%), Honduras (57%), and Guatemala (38%).⁶⁶ The source of violence from each country varied as well.⁶⁷ In El Salvador and Honduras, brutal methods of forced gang recruitment such as the “join or die” method, the militarization of security forces under iron fist policies, and government corruption forced children to flee.⁶⁸ In Guatemala, violence by gangs coming from Mexico, government corruption, garnered violence towards women, and a unique food crisis forced children from home.⁶⁹

B. Pull Factors: Reasons why Migrants Come to the U.S.

Conservatives in U.S. Congress emphasize that the recent change in immigration policies, which makes it easier for children to cross the border, is an incentive to come to the U.S.⁷⁰ The first congressional hearing in

64. UNHCR REGIONAL OFFICE FOR THE UNITED STATES AND THE CARIBBEAN, AN EXPLORATION OF THE REASONS FOR THE MOVEMENT OF UNACCOMPANIED AND SEPARATED CHILDREN FROM EL SALVADOR, GUATEMALA AND HONDURAS BEFORE AND AFTER THE DRAMATIC RISE IN THEIR ARRIVALS TO THE UNITED STATES BEGINNING OCTOBER 2011, at 2 (Dec. 2013) [hereinafter AN EXPLORATION OF THE REASONS FOR THE MOVEMENT OF UNACCOMPANIED AND SEPARATED CHILDREN]. Compare the current reason for children’s migration to the U.S. (violence) to the key reasons reported in a study conducted prior to 2011: “the search for better opportunities, including employment and education, and family reunification.” *Id.* Although there were inferences that violence could have been a motivating factor for emigration, the actual number of children who explicitly identified violence as a reason for migrating before October 2011 was low. *Id.*

65. LESLIE E. VELEZ, U.N. HIGH COMMISSIONER FOR REFUGEES, SUBMISSION TO HOUSE COMMITTEE ON THE JUDICIARY, HEARING ON AN ADMINISTRATION MADE DISASTER: THE SOUTH TEXAS BORDER SURGE OF UNACCOMPANIED ALIEN MINORS, at 2 (2014).

66. *Id.* “UNHCR is not alone among UN agencies and other intergovernmental bodies in the region noting the violent roots of this displacement.” *Id.* at n.9. Bernt Aasen, UNICEF Regional Director for Latin America and Caribbean says, “[c]lear and compelling evidence . . . show distinct ‘push factors’ are at the heart of why these children flee. They are often escaping persecution from gangs and other criminal groups, brutality and violence in their own communities and even in their homes, as well as persistent conditions of poverty and inequalityFalse” Statement, UNICEF, Dramatic Increase of Unaccompanied Children Seeking to Enter the United States, (June 10, 2014), http://www.unicef.org/media/media_73755.html.

67. VELEZ, *supra* note 65.

68. AN EXPLORATION OF THE REASONS FOR THE MOVEMENT OF UNACCOMPANIED AND SEPARATED CHILDREN, *supra* note 64, at 11.

69. *Id.*

70. *An Administration Made Disaster*, *supra* note 58, at 1 (statement of the Hon. Bob Goodlatte, Chairman of the Comm.).

2014 on the issue was named “An Administration Made Disaster: The South Texas Border Surge of Unaccompanied Alien Minors.”⁷¹ House Republicans argued that lax border enforcement and the Deferred Action for Childhood Arrivals (“DACA” program), which grants a two year reprieve from deportation and work permits to eligible undocumented youth, have given children in Central America an incentive to come to the U.S.⁷² Additionally, an intelligence report conducted on May 28, 2014, in the Rio Grande Valley area, revealed that 95% of minors came to the U.S. to take advantage of the new law that was giving out free passes, or *permisos*, to unaccompanied children.⁷³ Indeed, Border Patrol agents have recorded interviews with the people they apprehend, who explain that radio shows, churches, and other organizations are telling them that if they come, then they will be released into the U.S. where they can stay.⁷⁴ While no law like this exists, the report confirmed the fear that U.S. immigration policy conveyed a sense of “false advertising.”

With overburdened immigration courts⁷⁵ and overflowing detention centers,⁷⁶ the U.S. is tightening its border control.⁷⁷ But as the U.S. tightens border control and asylum policies, more people are prompted to seek smugglers and the unemployed are prompted to enter the smuggling business.⁷⁸ As the demand for coyotes increases, so do costs.⁷⁹ “What used to be a relatively low-cost, informal affair of crossing the Southwest border now entails great risks and resources and is less likely to be attempted without some type of a professional smuggler.”⁸⁰

71. *Id.*

72. *Id.* at 2, 131.

73. *Id.* at 2.

74. *Id.* at 132–33.

75. Raya Jarawan, *Young, Illegal, and Unaccompanied: One Step Short of Legal Protection*, 14 WASH. & LEE J. CIV. RTS. & SOC. JUST. 125, 126 (2007).

76. Mayra Cuevas & Ralph Ellis, *Converted Warehouse to Process Unaccompanied Children Migrants in Texas*, CNN (June 25, 2014), <http://www.cnn.com/2014/06/24/us/texas-warehouse-unaccompanied-minors/>.

77. See Secretary Johnson January 2016 Statement on Border Security, *supra* note 61 (“We are continuing to enhance our border security resources and capabilities, working closely with state and local counterparts.”).

78. Kyle & Dale, *supra* note 6.

79. Clark-Alfaro, *supra* note 5; Kyle & Dale, *supra* note 6.

80. Kyle & Dale, *supra* note 6.

III. HOW NORTH AND CENTRAL AMERICAN COUNTRIES ARE FAILING TO COMBAT HUMAN SMUGGLING IN THE REGION

A. *The United States*

To address the human smuggling networks that are transporting UAMs, President Obama has directed DHS and the Federal Emergency Management Agency to coordinate a government-wide response by focusing on deterrence, enforcement, containment, and foreign cooperation.⁸¹ In May 2014, Secretary Johnson established a “Level IV” condition of readiness—the highest level of contingency planning within DHS.⁸² Part of the deterrence plan consists of a \$5 million dollar contribution for State Department media campaigns in Mexico, Guatemala, El Salvador, and Honduras to deter potential migrants and their families from making the journey north.⁸³ The campaign will emphasize the dangers of the journey, expel the rumor that UAMs are given a *permiso* to stay in the U.S., and “highlight a shared community responsibility for the welfare of unaccompanied children [the UAMs].”⁸⁴ However, the effectiveness of such campaigns is questionable. Many migrants already know the dangers that lie ahead and

81. The White House Office of the Press Secretary, *Fact Sheet: Unaccompanied Children from Central America*, THE WHITE HOUSE (June 20, 2014), <http://www.whitehouse.gov/the-press-office/2014/06/20/fact-sheet-unaccompanied-children-central-america> [hereinafter *FACT SHEET: Unaccompanied Children*]. In January 2015, The U.S. House of Representatives approved the 2015 Department of Homeland Security Appropriations Act, which provided funding to the DHS through September 30, 2015. See H.R. 240, 114th Cong. (2015). About \$11.2 million will be available to federal agencies for the costs associated with the care, maintenance and repatriations of smuggled aliens unlawfully present in the U.S. *Id.*

82. Statement by Secretary Johnson, *Increased Influx of Unaccompanied Immigrant Children at the Border*, DEP’T OF HOMELAND SECURITY (June 2, 2014), <http://www.dhs.gov/news/2014/06/02/statement-secretary-johnson-increased-influx-unaccompanied-immigrant-children-border>.

83. The White House Office of the Press Secretary, *FACT SHEET: Emergency Supplemental Request to Address the Increase in Child and Adult Migration from Central America in the Rio Grande Valley Areas of the Southwest Border*, THE WHITE HOUSE (July 8, 2014), <https://www.whitehouse.gov/the-press-office/2014/07/08/fact-sheet-emergency-supplemental-request-address-increase-child-and-adu> [hereinafter *FACT SHEET: Emergency Supplemental Request*].

84. *FACT SHEET: Emergency Supplemental Request*, *supra* note 83; *FACT SHEET: Unaccompanied Children*, *supra* note 81; “Challenges at the Border: Examining the Causes, Consequences and Responses to the Rise in Apprehensions at the Southern Border:” “Testimony before the United States S. Comm. on Homeland Security and Gov’t Affairs (July 9, 2014) (testimony of Francisco L. Palmieri, Deputy Assistant Secretary, Bureau of Western Hemisphere Affairs, U.S. Department of State, Washington D.C.), <http://www.hsgac.senate.gov/download/?id=54a62f9c-4843-4433-b6b4-ebc73861feb4>.

choose to take the risk. As one mother put it, “I would rather see my child die on the way to the United States than die on my doorstep.”⁸⁵

The U.S. is also taking steps to improve enforcement by implementing programs in Guatemala, El Salvador, and Honduras to help address the underlying security and economic issues that cause migrants to seek smugglers in the first place.⁸⁶ In Guatemala, the U.S. is launching a \$40 million U.S. Agency for International Development program over five years to improve citizen security within Guatemala.⁸⁷ The program will work in the most violent communities to reduce the risk factors contributing to youth involvement in gangs and address factors driving migration to the U.S.⁸⁸ Similar programs are being implemented in El Salvador and Honduras, targeting at-risk youth who are susceptible to gang recruitment and potential migration through outreach centers.⁸⁹ These socio-economic programs serve as preventative measures to deter migration in the long-term, but in the meantime, a life of poverty and violence is still the reality and so, too, is the need for many to escape such situations with the help of smugglers.

In December 2014, the U.S. launched an in-country refugee program in El Salvador, Guatemala, and Honduras, which provides a safe alternative for UAMs with parents legally present in the U.S. to travel to the U.S. via the U.S. Refugee Admissions Program.⁹⁰ The purpose of the program is to provide certain vulnerable, at-risk children with an opportunity to be reunited with parents—it is not a pathway for undocumented parents to bring their children to the U.S.⁹¹ Even so, this program only provides an alternative for a specific group of UAMs. Those with parents who still

85. Clarence Page, *New Border Politics: Blame Obama First*, CHI. TRIB. (July 9, 2014), <http://www.chicagotribune.com/news/columnists/ct-central-america-immigrants-children-border-ille-20140709-column.html>.

86. See *FACT SHEET: Unaccompanied Children*, *supra* note 81.

87. *Id.*

88. *Id.*

89. *Id.*

90. U.S. Department of State Office of the Spokesperson, *Launch of In-Country Refugee/Parole Program for Children in El Salvador, Guatemala, and Honduras with Parents Lawfully Present in the United States*, U.S. DEP'T OF STATE (Dec. 3, 2014), <http://www.state.gov/r/pa/prs/ps/2014/12/234655.htm>.

91. U.S. Department of State, Bureau of Population, Refugees, and Migration, *In-Country Refugee/Parole Program for Minors in El Salvador, Guatemala, and Honduras With Parents Lawfully Present in the United States*, U.S. DEP'T OF STATE (Nov. 14, 2014), <http://www.state.gov/j/prm/releases/factsheets/2014/234067.htm>.

reside in Northern Triangle countries must seek out a smuggler or travel alone if they want to go north.

To attack the increase in criminal organizations and smuggling rings directly, the DHS plans to boost law enforcement “with a focus on stepped-up interdiction and prosecution.”⁹² DHS has surged personnel to the southwest border to dismantle smuggling operations and has proven successful in arresting some smugglers on criminal charges.⁹³ Still, this is a fight that the U.S. cannot win alone; international cooperation is needed to prosecute these transnational criminal networks because of their mobility across international borders and the flow of illicit income from the trade.

B. Central American Actors

The most promising anti-smuggling initiative developing in Central America is Mexico’s *Programa Frontera Sur* or the Southern Border Program.⁹⁴ The large number of Central American migrants, including families and UAMs, that travel through Mexico’s southern border with Guatemala and Belize has made it one of the most “porous” borders in the region.⁹⁵ The simultaneous operation of criminal networks involved in drug trafficking, human trafficking, and human smuggling “adds several layers to the challenge.”⁹⁶

In response to these difficulties and to facilitate the legal flow of goods and people across the border, Mexican President Enrique Peña Nieto launched *Frontera Sur* on July 7, 2014.⁹⁷ The program has two main objectives: first, to protect migrants who enter Mexico, and second, to manage the ports of entry in a way that promotes the security and prosperity of the region.⁹⁸ The program also includes five components: (1) improvements to temporary and visit permits for Guatemalan and Belizean migrants to

92. *FACT SHEET: Emergency Supplemental Request*, *supra* note 83.

93. Department of Homeland Security Press Office, *Secretary Johnson Announces 192 Criminal Arrests in Ongoing ICE Operation to Crack Down on Human Smuggling to the Rio Grande Valley*, DEP’T OF HOMELAND SECURITY (July 22, 2014), <http://www.dhs.gov/news/2014/07/22/secretary-johnson-announces-192-criminal-arrests-ongoing-ice-operation-crack-down> (192 smugglers were arrested within less than a month of expanding the border personnel in the Rio Grande Valley).

94. Christopher Wilson & Pedro Valenzuela, *Mexico’s Southern Border Strategy: Programa Frontera Sur*, WILSON CTR. (July 11, 2014), <http://www.wilsoncenter.org/publication/mexico%E2%80%99s-southern-border-strategy-programa-frontera-sur>.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

stay legally in Mexico,⁹⁹ (2) enhanced infrastructure for border security and migration, (3) placement of medical units and shelters to protect migrants along the border, (4) creation of a shared database between Guatemala and Mexico on the operation and routes of criminal networks, and (5) an integrated attack strategy with local Mexican government officials from border areas.¹⁰⁰ While *Frontera Sur* does make it easier for migrants to work and visit Mexico, the program only provides benefits for Guatemalans and Belizeans.¹⁰¹ The migrants that arrive from Honduras and El Salvador would not have this option.¹⁰² Although geographically confined to Guatemala and Belize, Mexico's southern border is a Central American border;¹⁰³ it separates Central America from North America and is the first obstacle migrants must face getting to their final destination, *al norte*. Moreover, this program does not address issues faced by migrants in transit because most are trying to escape violence and poverty in their country for good and not travel to Mexico temporarily. Other critics argue that the plan has failed because migrants and smugglers are finding new and even more dangerous routes to evade the profusion of checkpoints and raids along Mexico's southern border.¹⁰⁴

In September 2014, Attorneys General from the U.S., Mexico, El Salvador, Guatemala and Honduras met in Mexico City to find optimal solutions about confronting the smugglers of UAMs.¹⁰⁵ The Attorneys General agreed that "the multi-faceted migration issue must be addressed in

99. *Id.* Already, beginning in January 2014, the *Tarjeta de Visitante Regional de Mexico* (Regional Visitor Card), which allows residents of Guatemala and Belize to enter Mexican southern border communities for up to three days at a time, was made free in order to facilitate the regularization of day-to-day traffic across the Guatemala-Mexico border. *Id.* at 3.

100. *Id.* at 1–2.

101. *Id.* at 3.

102. *Id.*

103. Ana Langner, *Programa Frontera Sur, hecho al vapor*, EL ECONOMISTA (July 8, 2014), <http://eleconomista.com.mx/sociedad/2014/07/08/programa-frontera-sur-hecho-vapor>.

104. Clay Boggs, *Mexico's Southern Border Plan: More Deportations and Widespread Human Rights Violations*, WASHINGTON OFFICE ON LATIN AMERICA (Mar. 19, 2015), http://www.wola.org/commentary/update_on_mexico_s_southern_border_plan_new_routes_more_deportations_and_widespread_human; Joseph Sorrentino, *How the U.S. 'Solved' the Central American Migrant Crisis*, IN THESE TIMES (May 12, 2015), <http://inthesetimes.com/article/17916/how-the-u.s.-solved-the-central-american-migrant-crisis>.

105. Bruce Zagaris, A. U.S. and Central American Attorneys General Establish a Working Group Against Trafficking of Unaccompanied Migrant Children. 30 No. 12 INT'L ENFORCEMENT L. REP. (NEWSLETTER) 482 (Dec. 2014).

accordance with the laws of each country.”¹⁰⁶ The problem is that the laws of each country do not have the same definition of human smuggling. The Attorneys General also called for an integrated strategy and cooperation mechanisms among various government offices within each State.¹⁰⁷ However, genuinely dealing with the transnational smuggling networks in the region requires more than an ad hoc agreement at the level of Attorneys General.¹⁰⁸ What is required is an integrated institution that deals with human smuggling at a regional level.¹⁰⁹ As of right now, each country has a very different definition of what human smuggling is. Thus, the first step is to harmonize the laws of the Northern Triangle countries so that human smugglers are held to the same legal standard regionally.

IV. FAILURES IN INTERNATIONAL INSTRUMENTS: GUATEMALA AS AN EXAMPLE

Guatemala is important in the analysis of human smuggling because of its role as a country of origin, transit and destination for illegal migrants and smugglers. In the late 1990s, the populations of Guatemala’s border towns doubled and tripled in size. Thousands of immigrants from Central America, Africa, Asia, and the Middle East arrived “as part of organized smuggling networks to cross into Mexico and then possibly into the U.S. or Canada.”¹¹⁰ Journalists nicknamed the Guatemalan border town “Tecún Umán,” or “Little Tijuana,” because of the hundreds of smugglers and other businesses that emerged to cater to this transient population.¹¹¹ In response, in 2002, Mexico tightened border control and immigration policies, which was described as placing a “tortilla curtain” on Guatemala.¹¹² For its own part, Guatemala initiated a new policy requiring Salvadorans, Nicaraguans, and Hondurans to carry passports while traveling in Guatemalan territory and increased the criminal penalties on those that transported or harbored illegal immigrants.¹¹³

Currently, penalties for transporting and harboring illegal immigrants, in addition to money laundering statutes, provide the only possible legal

106. U.S. Embassy in Mexico, *Attorneys General Discuss Trafficking of Unaccompanied Migrant Children*, U.S. DIPLOMATIC MISSION TO MEXICO NEWS (Sept. 9, 2014), <http://mexico.usembassy.gov/press-releases/attorneys-general-discuss-trafficking-of-unaccompanied-migrant-children.html>.

107. *Id.*

108. Zagari, *supra* note 105.

109. *Id.*

110. MARIA CRISTINA GARCIA, *SEEKING REFUGE: CENTRAL AMERICAN MIGRATION TO MEXICO, THE UNITED STATES, AND CANADA* 159 (Univ. of Cal. Press 2006).

111. *Id.*

112. *Id.* at 163.

113. *Id.* at 161.

remedies against human smugglers in Guatemala.¹¹⁴ In fact, Guatemala has not properly defined the term “human smuggling” in its Criminal Code, Immigration Act, Law against Organized Crime, or any other law.¹¹⁵ Despite the fact that it has signed several international treaties requiring that it establish legislation to combat human smuggling, Guatemala has not accepted the internationally recognized definition of human smuggling.

A. The Palermo Convention and the International Consensus to Combat Transnational Crime

The first international treaty to classify human smuggling as a transnational crime is the U.N. Convention against Transnational Crime and the Protocols Thereto (“Palermo Convention”).¹¹⁶ The signing of the Palermo Convention demonstrated the international community’s political will to answer global challenges with a global response.¹¹⁷ Countries recognized that they no longer stood a chance of successfully fighting human rights exploitation by limiting themselves to national means.¹¹⁸ The idea was that if crime crosses borders, so must law enforcement.¹¹⁹ In December 2000, 147 Member States, including Guatemala and the U.S., signed the Palermo Convention at a high-level political conference in Palermo, Italy.¹²⁰ The treaty was enacted three years later on September 29, 2003.¹²¹ States that ratified this instrument committed to taking a series of measures against transnational organized crime, including the creation of certain domestic criminal offenses (e.g. participation in an organized criminal group, money laundering, corruption and obstruction of justice); the adoption of new and sweeping frameworks for extradition; mutual legal assistance and law enforcement cooperation; and the promotion of training and technical

114. See Section VI. Guatemala’s National Legislation, *infra*.

115. *Id.* See also Guatemala’s Human Trafficking Law, *infra* note 127. Guatemala’s Immigration Law, *infra* note 185. Law Against Organized Crime, *infra* note 190.

116. See Palermo Convention, *supra* note 19, at 41 (expressing concern that in the absence of an international instrument, “persons vulnerable to trafficking will not be sufficiently protected”).

117. See *id.*

118. See *id.*

119. See *id.*

120. See *id.*

121. See U.N. Treaty Collection, Chapter XVIII, Section 12.b for the Smuggling Protocol (last visited Feb. 6, 2016), https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12-b&chapter=18&lang=en#EndDec [hereinafter Smuggling Protocol Signatories].

assistance for building or upgrading the capacity of national authorities.¹²² Guatemala ratified the Palermo Convention on September 25, 2003, and the U.S. ratified it on November 3, 2005.¹²³

The Palermo Convention applies together with one of its three Protocols: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (“Trafficking Protocol”); the Protocol against the Smuggling of Migrants by Land, Sea and Air (“Smuggling Protocol”); and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (“Firearms Protocol”).¹²⁴ In order to become a Party to one of the Palermo Protocols, a Member State must be a Party to the Palermo Convention.¹²⁵ Guatemala is a Party to all three Protocols in addition to the Convention.¹²⁶ The Trafficking Protocol, in particular, has been successfully implemented in Guatemala’s legal system through its penal code and human trafficking statutes.¹²⁷

B. Guatemala has Responded the Trafficking Protocol, But It Has Not Done the Same for the Smuggling Protocol

Guatemala first criminalized human trafficking in 1973 with the creation of its Criminal Code.¹²⁸ Article 194 initially provided for a one to three years’ prison sentence of anyone who promoted, facilitated, or encouraged

122. See Palermo Convention, *supra* note 19, at 43–47.

123. U.N. Treaty Collection, Chapter XVIII, Section 12 for U.N. Convention against Transnational Crime Signatories, (last visited Feb. 6, 2016), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en [hereinafter Palermo Convention Signatories].

124. See Palermo Convention, *supra* note 19.

125. See *id.* at 49.

126. See Smuggling Protocol Signatories, *supra* note 121; U.N. Treaty Collection, Chapter XVIII, Section 12.a for Trafficking Protocol Signatories (last visited Feb. 6, 2016), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=enat; U.N. Treaty Collection, Chapter XVIII, Section 12.c for Firearms Protocol Signatories, (last visited Feb. 6, 2016), https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-c&chapter=18&lang=en.

127. See Decreto A.N. No. 14-2005, Reforma el Artículo 194 del Código Penal trata de personas [Reformation of Article 194 of the Penal Code Human Trafficking], DIARIO DE CENTRO AMÉRICA [DCA], 27 Feb. 2005 (Guat.) [hereinafter Reformation of Penal Code for Human Trafficking]; see also Decreto A.N. No. 9-2009, Ley contra la violencia sexual, explotación y trata de personas [Law Against Sexual Violence, Exploitation and Human Trafficking], DIARIO DE CENTRO AMÉRICA [DCA], 20 Mar. 2009 (Guat.) [hereinafter Guatemala’s Human Trafficking Law].

128. Decreto A.N. No. 17-73, Código Penal y Exposición de Motivos. 1a ed. Guatemala. Ediciones Especiales, Edición de Colección Temas Jurídicos, [Código Penal de Guatemala] [Penal Code of Guatemala], s/f.e., 332 p. 20 de July 1973 (Guat.) [hereinafter Guatemala’s Penal Code].

transnational prostitution on human trafficking charges.¹²⁹ On December 25, 2003, the Trafficking Protocol was entered into force, establishing an internationally recognized definition of human trafficking:

“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.¹³⁰

Two years later, in 2005, Guatemala reformed Article 194 to coincide with the Trafficking Protocol’s definition.¹³¹ In the preamble to Decree 14-2005, the Guatemalan Congress emphasized the necessity of reforming national law in accordance with the Palermo Convention and the Trafficking Protocol to combat international human trafficking, especially the trafficking of women, children, and other vulnerable members of society.¹³² The Decree expanded the human trafficking statute by conforming its 1973 definition of “prostitution” to the internationally agreed upon definition of human trafficking, which includes sexual trafficking, forced labor, illegal adoption, imposed marriage, and slavery.¹³³ The reform also elaborated on the degree of involvement in human trafficking that could be criminalized and increased the maximum sentence period from three to twelve years.¹³⁴

In 2009, Guatemala created the Law against Sexual Violence and Trafficking (“the Law”) in Decree No. 9-2009.¹³⁵ The purpose of establishing the Law was to prevent, suppress, punish and eradicate sexual violence, exploitation, and trafficking in persons, with a focus on victim protection and financial reparations for victims from offenders.¹³⁶ The Preamble explicitly states that the Law was created to meet the requirement in both the Palermo Convention and the Trafficking Protocol that countries of origin, transit, and destination for human trafficking include measures

129. *Id.*

130. Trafficking Protocol, art. 3(a), *supra* note 26.

131. Reformation of Penal Code for Human Trafficking, *supra* note 127.

132. *Id.*

133. *Id.*

134. *Id.*

135. Guatemala’s Human Trafficking Law, *supra* note 127.

136. *Id.*

to prevent trafficking, punish traffickers, and protect victims.¹³⁷ The preamble also notes that the Law was created because the Criminal Code did not adequately safeguard the rights of children from exploitation and, therefore, it was necessary to update the legal framework in this area.¹³⁸ Nonetheless, the Law does not say the same for human smuggling.¹³⁹

Guatemala has not responded to the Smuggling Protocol in the same way that it has responded to the Trafficking Protocol. The Guatemalan Congress has failed to harmonize the country's "human smuggling" statutes with international law, and it has not created a separate law to combat human smuggling.¹⁴⁰ It is possible that the Smuggling Protocol has had no effect on Guatemalan legislation because it misleads governments as to what human smuggling really is: it reads like the Trafficking Protocol by defining human smuggling in the context of human trafficking. Additionally, it focuses on a national solution to a problem that is inherently international. For these reasons, the Smuggling Protocol is ineffective in achieving its underlying goals of establishing a comprehensive human smuggling offense and facilitating international State cooperation.

V. DEFICIENCIES IN THE PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS

Entered into force in January 2004, the Smuggling Protocol focuses on how to prevent and combat the smuggling of migrants by organized criminal networks and protect the rights of migrants.¹⁴¹ A significant achievement of the Smuggling Protocol is that it provides an internationally agreed-upon definition of human smuggling: 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.¹⁴² The Smuggling Protocol also suggests certain legislative measures to criminalize human smuggling¹⁴³ and ways

137. *Id.*

138. *See id.*

139. *See id.*

140. *See generally* International Office of Migration (IOM), Comparative Matrix of the Legislation of Member States of Regional Conference on Migration (RCM) relating to Migrant Smuggling Part One, <http://www.crmsv.org/Publicaciones/docs/Matrices/MATRIZ%20CRM%20TR%C1FICO%20IL%20CDCITO%20M%201%2005%202011%20Eng.htm>. Guatemala has not adopted the internationally agreed upon definition of human smuggling [hereinafter IOM Smuggling Matrix]; *see also* Smuggling Protocol, *supra* note 18.

141. Smuggling Protocol, *supra* note 18.

142. United Nations Convention against Transnational Crime and the Protocols Thereto, UNODC TREATIES (2015), <http://www.unodc.org/unodc/treaties/CTOC/>; Smuggling Protocol, *supra* note 18, art. 3(a).

143. Smuggling Protocol, *supra* note 18, art. 6.

to identify smuggling activities at sea.¹⁴⁴ Guatemala acceded¹⁴⁵ to the Smuggling Protocol on April 1, 2004.¹⁴⁶ The U.S. ratified the Smuggling Protocol on November 3, 2005.¹⁴⁷

Although the Smuggling Protocol has established that human smuggling is an international criminal offense and created a platform for nation States to identify human smuggling within their borders, it has failed to achieve an international consensus on the present-day realities of human smuggling in North and Central America. The Smuggling Protocol has failed the international community in three respects: (1) it defines migrants as victims, using terms that describe the act of human trafficking and not human smuggling; (2) it focuses primarily on human smuggling at sea; and (3) it relies on individual Member States to create their own legislation, leaving little to international cooperation.

First, the Smuggling Protocol incorrectly describes the relationship between a migrant and his or her smuggler. It focuses on migrants as victims of exploitation¹⁴⁸ and illegal trafficking,¹⁴⁹ which are definitions used to describe human trafficking. It also calls for the need to protect persons “who have been the object of such offenses”¹⁵⁰ by protecting the rights of the smuggled migrants.¹⁵¹ Essentially, the Smuggling Protocol views human smuggling as a degrading act that endangers the lives or safety of the migrants involved.¹⁵² It considers migrants as possible victims of torture¹⁵³ or violence, as a result of being the object of human smuggling.¹⁵⁴ While smugglers can endanger the lives or security of migrants, it is often the nature of the travel itself, rather than the objectives of the smuggler,

144. *Id.* arts. 7–9.

145. “Accession” is a state’s acceptance of the offer or the opportunity to become a party to a treaty already negotiated and signed by other states (and is usually already entered into force), and has the equivalent legal effect as ratification. *See* U.N. Treaty Collection, *Glossary*, https://treaties.un.org/pages/Overview.aspx?path=overview/glossary/page1_en.xml#accession.

146. Smuggling Protocol Signatories, *supra* note 121.

147. *Id.*

148. Smuggling Protocol, *supra* note 18, art. 6, § 3(b).

149. *Id.* Preamble at 54.

150. *Id.* art. 4; *see also* art. 14(1).

151. *Id.* arts. 2, 4, Preamble at 53.

152. *Id.* Preamble at 53, art. 6, ¶ 3, art. 9, ¶ 1(a)-(b).

153. *Id.* art. 16, ¶ 1.

154. *Id.* art. 16, ¶ 2.

that poses the biggest threat to the migrants.¹⁵⁵ Since smuggling networks rely on word-of-mouth recommendations for business, a smuggler that makes smuggling his livelihood knows to keep his migrants satisfied if he wants to get more clients.¹⁵⁶ Alternatively, smuggled migrants are victims of their own socioeconomic circumstances; poverty or violence are often forces causing them to contribute to an illegal migration scheme,¹⁵⁷ in which case the *smuggler* does not *force* them to be smuggled. Even though migrants finance smuggling operations, the migrants themselves are not liable to criminal prosecution.¹⁵⁸ In order to effectively address human smuggling, the Smuggling Protocol must alter the current perception of migrants as victims of exploitation and instead focus on overcoming the reality that human smuggling is often the migrant's only option to escape dire circumstances at home.

Second, although the Smuggling Protocol provides a detailed plan of action for international cooperation at sea, it does little to suggest international cooperation in terms of combating human smuggling on land. Part II of the Smuggling Protocol, titled "Smuggling of Migrants by Sea," gives State Parties guidelines for searching vessels suspected of illegal smuggling activities and requesting cooperation from other State Parties.¹⁵⁹ If a State Party has reasonable grounds to suspect that a vessel flying the flag of another State Party is engaged in the smuggling of migrants by sea, then the suspecting State is supposed to notify the suspected State, request confirmation of registry, and, if so confirmed, may request appropriate measures from the suspected State to board and search the vessel.¹⁶⁰ Then, if human smuggling is confirmed, the suspecting State may take appropriate measures as authorized by the suspected State.¹⁶¹ A State Party is not supposed to take any measures without the authorization of the other State Party.¹⁶² Part II of the Smuggling Protocol also discusses responding to requests for assistance,¹⁶³ compensating damages to vessels for groundless

155. Rough journey conditions include drowning at sea, perishing in hot deserts, and suffocating in containers. See U.N. Office on Drugs and Crime, *International Framework for Action to Implement the Smuggling of Migrants Protocol*, UNODC 3 (2001) [hereinafter *UNODC International Framework for Action*], http://www.unodc.org/documents/human-trafficking/Migrant-Smuggling/Framework_for_Action_Smuggling_of_Migrants.pdf.

156. Clark-Alfaro, *supra* note 5.

157. Hammar & Tamas, *supra* note 2, at 3.

158. Smuggling Protocol, *supra* note 18, art. 5.

159. *Id.*

160. *Id.* art. 8, ¶ 2.

161. *Id.*

162. *Id.* art. 8, ¶ 5.

163. *Id.* art. 8, ¶¶ 4, 6.

searches,¹⁶⁴ ensuring the safety of people on board,¹⁶⁵ taking due account not to prejudice the commercial or legal interests of the suspected State,¹⁶⁶ and respecting the rights and obligations of coastal States in accordance with the law of the sea.¹⁶⁷ The Smuggling Protocol does not provide measures for inter-State cooperation by land, other than by strengthening border control.¹⁶⁸ Moreover, the Protocol gives no guidance whatsoever with regard to smuggling by air, even though the title of the Protocol explicitly refers to smuggling “by land, sea and air.”¹⁶⁹

Third, the Smuggling Protocol calls for Member States to set up their own prosecution strategies and leaves little to inter-State remedies. The Protocol provides rules for State authorities to meet the Smuggling Protocol’s objectives by tightening border control,¹⁷⁰ adopting state legislation,¹⁷¹ securing passport documentation,¹⁷² increasing public awareness,¹⁷³ and preserving the rights of the migrants.¹⁷⁴ While it is important to adopt state legislation, protect travel documents and secure transnational borders, a crime that easily crosses borders demands the attention of all State actors. It is a multinational fight that requires a multinational team of players.

What the Smuggling Protocol encourages in terms of international cooperation is sharing information of migrant routes,¹⁷⁵ returning migrants,¹⁷⁶ providing technical assistance to countries of origin and transit,¹⁷⁷ and settling disputes through negotiations.¹⁷⁸ However, the provision for settling disputes in Article 20 does little to advance the Protocol’s preventative objectives when countries like the U.S. and El Salvador, which do not recognize the compensatory jurisdiction of the International Court of

164. *Id.* art. 9, ¶ 2.

165. *Id.* art. 9, ¶ 1(a).

166. *Id.* art. 9, ¶ 1(c).

167. *Id.* art. 7; *id.* art. 9 ¶ 3(b).

168. *See generally id.*; *see also id.*, art. 11.

169. *See generally* Smuggling Protocol, *supra* note 18.

170. *Id.* art. 11.

171. *Id.* art. 6.

172. *Id.* art. 12.

173. *See id.* art. 15.

174. *Id.* art. 16.

175. *Id.* art. 10.

176. *Id.* art. 18.

177. *Id.* art. 14.

178. *Id.* art. 20.

Justice, do not consider themselves bound by Article 20.¹⁷⁹ Although providing technical assistance and sharing information about smuggling routes do speak to preventative measures, the Protocol’s definition of “providing technical assistance” as providing “vehicles, computer systems and document readers to combat [human smuggling]”¹⁸⁰ does not address the root causes of irregular migration. Smugglers, who operate a complex migration scheme, can just adapt their migration routes and modus operandi once computer systems identify their course of travel. Furthermore, in a region like Central America, which ranks high among Transparency International’s government corruption chart,¹⁸¹ the likelihood of a bona fide intent to exchange information regarding smuggling routes is slim, especially when so many smugglers pay corrupt officials for their silence.¹⁸² Or, as illustrated by the case of Jose Alberto de Leon Gramajo, the head of passports in Guatemala’s Department of Immigration, who was arrested in August 2013 for falsifying travel documents, the corrupt officials may be involved in the crime itself.¹⁸³

In sum, the Smuggling Protocol is ineffective because it incorrectly describes migrants as victims, and because it lacks a foundation for international cooperation and instead leaves the bulk of the human smuggling battle to the individual Member States. In the case of Guatemala, which has not developed the proper measures to combat human smuggling, the illicit business will continue to thrive unless and until Guatemala is held accountable for changing its national legislation.

VI. GUATEMALA’S NATIONAL LEGISLATION

Guatemala’s statute penalizing those who transport or harbor illegal immigrants does not align with the Smuggling Protocol’s internationally

179. See Smuggling Protocol Signatories, *supra* note 121. Guatemala’s Immigration Law, *infra* note 185; see also IOM Smuggling Matrix, *supra* note 140.

180. Smuggling Protocol, *supra* note 18, art. 14, ¶ 3.

181. Transparency International ranks Mexico as the most corrupt country in Latin America (next to Argentina) with political parties, police, legislature and the judiciary as the most corrupt. Dolia Estevez, *The 10 Most Corrupt Mexicans of 2013*, FORBES (Dec. 16, 2013), <http://www.forbes.com/sites/doliaestevez/2013/12/16/the-10-most-corrupt-mexicans-of-2013/>. Guatemala received a score of 29/100, indicating that it is somewhat highly corrupt (where 0 is highly corrupt and 100 is very clean). Transparency International, *Corruptions Perception Index 2013*, TRANSPARENCY INT’L (2013), http://www.transparency.org/files/content/pressrelease/CPI2013_map-and-country-results_EN.jpg.

182. Francisco Goldman, *Introduction* to OSCAR MARTINEZ: LOS INMIGRANTES QUE NO IMPORTA, at xi–xii (Daniela Maria Ugaz & John Washington trans., Icaria Editorial, 2013).

183. James Bargent, *Guatemala’s Head of Passports Arrested for Human Smuggling*, INSIGHT CRIME (Aug. 15, 2013), <http://www.insightcrime.org/news-briefs/guatemalas-head-of-passports-arrested-for-human-smuggling>.

agreed upon definition of “human smuggling,” which involves the procurement of an illegal entry into a country for *financial or other material benefit*.¹⁸⁴ Guatemala’s “smuggling” statute of 1998, Article 104 of the Immigration Act (IA), Decree No. 95-98 states:

[T]he crime of migrant smuggling is committed by any person who promotes or facilitates entry and transit of one or more persons without complying with legal requirements for entering and staying in the country, with the aim of transferring them to another country.¹⁸⁵

Article 104 does not provide that the criminal act is committed for financial or material benefit.¹⁸⁶ Thus, without making a profit, one can harbor illegal aliens and avoid being considered an international human smuggler.¹⁸⁷ Guatemala’s Law against Sexual Violence and Human Trafficking *does* penalize those who illegally transport people for economic benefit.¹⁸⁸ But human smugglers cannot be prosecuted under the human trafficking law because the human trafficking law turns on the element of exploitation, while human smuggling does not.¹⁸⁹ Although there are statutes that prosecute crimes involved in human smuggling, such as money laundering,¹⁹⁰ falsifying documents,¹⁹¹ and hiding aliens,¹⁹² bifurcating a criminal charge into separate charges of illegal harboring and money

184. Compare Smuggling Protocol, *supra* note 18, art. 3(a), and Guatemala’s Immigration Law, *infra* note 185; see also 8 U.S.C.A. § 1324.

185. Decreto A.N. No. 95-98, Ley de Migración [Immigration Law], DIARIO DE CENTRO AMÉRICA [DCA], 26 Nov.1998 (Guat.) [hereinafter Guatemala’s Immigration Law], <http://www.refworld.org/docid/3dbe69e16.html> (last visited Nov. 15, 2014); see also IOM Smuggling Matrix, *supra* note 140.

186. Guatemala’s Immigration Law, *supra* note 185; see also IOM Smuggling Matrix, *supra* note 140.

187. Guatemala’s Immigration Law, *supra* note 185; see also IOM Smuggling Matrix, *supra* note 140.

188. Guatemala’s Human Trafficking Law, *supra* note 127.

189. *Id.*; Guatemala’s Immigration Law, *supra* note 185; see also IOM Smuggling Matrix, *supra* note 140.

190. Decreto A.N. No. 21-2006, Ley contra la delincuencia organizada [Law Against Organized Crime] arts. 2(d) and 2(e)(3), DIARIO DE CENTRO AMÉRICA [DCA] 10 Aug. 2006 (Guat.) (reformed in 2009 in Decree 23-2009 with no effect on articles pertaining to the prosecution of money laundering in trafficking persons).

191. Decreto A.N. No.17-73, Código penal de Guatemala [Criminal Code of Guatemala] art. 321, DIARIO DE CENTRO AMÉRICA [DCA] 27 July 1973 (Guat.) [hereinafter Criminal Code of Guatemala] (the Penal Code has been reformed many times with no effect on articles pertaining to falsifying documents or human smuggling).

192. Guatemala’s Immigration Law, *supra* note 185, art. 106; see also IOM Smuggling Matrix, *supra* note 140.

laundering, for instance, can result in the criminal serving a disproportionate jail sentence. A legal system like Guatemala's that lacks sufficient statutory penalties for human smuggling, which is a serious international crime, violates the Palermo Convention and the Smuggling Protocol, and weakens the international criminal justice system.

*A. Human Smugglers Cannot Be Prosecuted Under
Human Trafficking Charges*

In Spanish-speaking countries, there is still marked confusion between the terms human trafficking, *trata de personas*, and human smuggling, *tráfico ilícito de migrantes*.¹⁹³ The crimes involve similar illegal activities: money laundering, illegal transportation, forged documents, and violation of immigration laws. Thus, it can be difficult to distinguish between the two. Additionally, the two crimes can overlap. For instance, smuggled migrants can become victims of human trafficking if their smuggler exploits them, such as taking them hostage or selling them into trafficking rings.¹⁹⁴ However, once a migrant becomes a victim of exploitation, he or she becomes a victim of human trafficking, *not* human smuggling.

Guatemala's Law against Sexual Violence and Trafficking, Decree No. 9-2009, prosecutes defendants for crimes associated with human trafficking, including illegal adoption, forced prostitution, forced labor, and slavery, among other related offenses.¹⁹⁵ Once traffickers are caught, they are charged with violating Penal Code 194¹⁹⁶ and sentenced from eight to 18 years in prison for trafficking.¹⁹⁷ These crimes involve the element of exploitation, an element that does not exist in human smuggling. Furthermore, smugglers cannot be prosecuted under Guatemalan human trafficking laws for two reasons: (1) human smuggling is not enumerated in human

193. Salvador A. Cicero-Domínguez, *Assessing the U.S.-Mexico Fight Against Human Trafficking and Smuggling: Unintended Results of U.S. Immigration Policy*, 4 NW. U. J. INT'L HUM. RTS. 303, 310 (2005).

194. Human Smuggling and Trafficking Center, *FACT SHEET: Distinctions between Human Smuggling and Human Trafficking*, 1 (April 2006), <http://www.state.gov/documents/organization/90541.pdf>.

195. Guatemala's Human Trafficking Law, *supra* note 127.

196. *E.g.*, *Sentencing of Quiroa, Diaz & Muñoz*, Joint Regional Chamber of Ct. of App. in Jalapa (Guatemala), Instituto Latinoamericano de las Naciones Unidas para la Prevención del Delito y Tratamiento del Delincuente–ILANUD, UNODC No. GTM002 (Nov. 2008), http://www.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/gtm/2010/quiroa_diaz_munoz.html?tmpl=old (issuing sentences of 17 years to each of three defendants for the abduction of six underage girls in Jalapa and driving them to Guatemala for the purpose of facilitating illegal adoptions, convicted under Penal Code, art. 194).

197. *E.g.*, *id.*; U.S. Dep't of State, *Human Trafficking Report: Guatemala* (2014), <http://www.state.gov/j/tip/rls/tiprpt/countries/2014/226731.htm>.

trafficking laws; and (2) the legal ramifications of human trafficking are significantly different than for human smuggling.

If human smuggling were listed as a crime under Penal Code 194, then smugglers would be charged with violating human trafficking statutes. In *G.D.H.C. v. Rosalinda Arleny Rivera Estrada*, the defendant violently threatened and lured a child from his home in order to sell him into illegal adoption.¹⁹⁸ The defendant claimed that she could not be punished under Article 194 of the Penal Code, which established penalties for human trafficking and illegal adoption because it did not provide a definition for “illegal adoption.”¹⁹⁹ The First Instance Court for Crimes, Drug Trafficking and Environmental Crimes held that while Article 194 does not define “illegal adoption,” it does enumerate the prohibited *conduct*. Thus, the conduct was punishable under Article 194.²⁰⁰ The conduct of human smuggling, on the other hand, is not enumerated in Penal Code 194—therefore, human smugglers cannot be charged with human trafficking.

Additionally, the legal consequences of human trafficking are significantly different than those of human smuggling. Human trafficking is a crime against victims with a focus on reparations to the victims.²⁰¹ Under Title 5, Article 58 of Guatemala’s human trafficking laws, traffickers must indemnify their victims, including all costs of their physical, psychological and economic care.²⁰² The law focuses on reparations for victims²⁰³ and their protection once they are back in society²⁰⁴ because it is the victims who bring charges against their traffickers. However, human smugglers would not be able to pay such reparations to their smuggled migrants because the migrants are not being exploited.

198. E.g., *Sentencing of Estrada, Case No. 848-2009*, UNODC Case Database, UNODC No. GTM008, (Jan. 2009) (Guat.) http://www.unodc.org/cld/case-law-doc/traffickingpersons/crimetype/gtm/2009/case_no_848-2009_.html?tmpl=old (sentencing defendant for the forceful, coercive trafficking of a child for the purpose of illegal adoption).

199. *Id.*

200. *Id.*

201. Guatemala’s Immigration Law, *supra* note 185, arts. 112, 114; *see also* IOM Smuggling Matrix, *supra* note 140. *See also* Article 95 of the Bylaws, 429–99. Expulsion of illegal or undocumented aliens and a fine. Therefore, these persons are not considered “victims.” IOM Smuggling Matrix, *supra* note 140.

202. Guatemala’s Human Trafficking Law, *supra* note 127.

203. Traffickers must indemnify their victims including all costs of their physical, psychological and economic care. *Id.*

204. The Ministry of Interior, Minister of Foreign Affairs and the Attorney General are responsible for protection programs for the victims. *Id.* art. 59.

B. Human Smugglers Can Be Charged with Other Crimes

Human smugglers can be arrested through money laundering statutes.²⁰⁵ In fact, migrant smuggling has been associated with money laundering because of the wide range of people who play a direct or indirect role in the crime, from the smuggler to the local banker.²⁰⁶ In August 2014, Guatemalan law enforcement officials, with the help of the DHS, arrested seven members of a suspected human smuggling network in Quetzaltenango, Guatemala.²⁰⁷ The members were part of a Central American smuggling organization that transports people, including UAMs, from Central America to the U.S. through Texas and Arizona.²⁰⁸ The Guatemalan authorities were able to catch and arrest these individuals under Guatemala's money laundering statutes.²⁰⁹ During the investigation, multiple bank accounts used by the smuggling organization were identified.²¹⁰ The amount of account movement totaled over \$3 million U.S. dollars.²¹¹ However, money laundering is only one element of the crime. Human smuggling also involves other crimes, like the illegal transportation of aliens across borders. If smugglers are being penalized *only* for money laundering, then their penalties do not correspond with the severity of the entire crime of human smuggling.

Without the codified crime of human smuggling, criminals may be charged with lighter sentences. In Case No. 38-2009, defendants A.M.B.C., M.C.B., C.E.P.M. and M.L.C.G. abducted a one-month-old child and, using forged documents, gave the child up for illegal adoption for their financial benefit.²¹²

205. For money laundering statutes in Guatemala, *see* Guatemala's Law Against Money Laundering, *infra* note 218.

206. *See* Kyle & Dale, *supra* note 6, at 36.

207. U.S. Immigration and Customs Enforcement, *7 Alleged Human Smuggling Network Members Arrested in Guatemala*, ICE NEWSROOM (Aug. 7, 2014), <http://www.ice.gov/news/releases/7-alleged-human-smuggling-network-members-arrested-guatemala>; *see also* Crónica, *Embajada de Estados Unidos se manifiesta sobre las capturas de ayer*, CRÓNICA (Aug. 7, 2014), https://www.cronica.com.gt/cronica-del-dia/presuntos-integrantes-de-red-de-trafico-de-personas-arrestados-en-quetzaltenango_4907ea/.

208. *7 Alleged Human Smuggling Network Members Arrested in Guatemala*, *supra* note 207.

209. *Id.* The ICE article incorrectly mentions that the Guatemalan government is targeting smugglers through "human smuggling statutes." As this Comment proves, the "human smuggling statute" that is available to the government only criminalizes the transportation of illegal immigrants, which is not the international agreed upon definition for human smuggling. Guatemala's statute lacks the *mens rea* requirement, which is transporting illegal immigrants for *financial or other material benefit*. Therefore, what the ICE article should say is that the Guatemalan government is targeting smugglers using illegal transportation statutes.

210. *Id.*

211. *Id.*

212. AMBC, MCB, CEPM & MLCG, Instituto Latinoamericano de las Naciones Unidas para la Prevención del Delito y Tratamiento del Delincuente (ILANUD), UNODC Case

The Tenth Court of Criminal Sentencing of the Department of Guatemala acquitted defendants A.M.B.C. and M.L.C.G. of human trafficking and charged them with the crime of abduction.²¹³ The Court of Appeals determined that the lower court violated Article 194 of the Penal Code.²¹⁴ The Court of Appeals, therefore, reversed the sentence imposed by the lower court and charged the defendants with trafficking in persons, which resulted in a much harsher sentence.²¹⁵ As the law currently stands in Guatemala, smugglers can be charged with illegally concealing an alien,²¹⁶ illegally transporting an alien,²¹⁷ or money laundering,²¹⁸ but only if they are caught in the process of trying to legitimize their illegal profits.²¹⁹ The penalty for illegally harboring aliens is five to eight years²²⁰ and three to six years for transporting illegal aliens.²²¹ The penalty for money laundering is six to 20 years, plus a fine equal to the amount laundered.²²² The penalty for human trafficking is eight to 18 years and increases by one-third if the trafficked victim is a child, a senior citizen, or disabled.²²³ Human trafficking encompasses all of the above crimes, yet the maximum penalty for human traffickers is shorter than the maximum penalty for money launderers. Similarly, being charged with transporting illegal aliens is seemingly disproportionate to the true nature of human smuggling, which encompasses both illegal entry and money laundering.

No. GTM001, http://www.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/gtm/2009/ambc_mcb_cepm_mlcg.html?tmpl=old.

213. *Id.*

214. *Id.* The Court also said that they violated art. 209, which is outside the scope of this Comment.

215. *Id.* (sentence was increased by one third—see full sentence in Spanish at http://www.unodc.org/res/cld/case-law/gtm/2009/ambc_mcb_cepm_mlcg_html/Sentencia_-_AMBC_MCB_CEPM_MLCG.pdf; for sentencing guidelines, see also Criminal Code of Guatemala, *supra* note 192, arts. 194, 204.

216. Guatemala's Immigration Law, *supra* note 185, art. 106; see also IOM Smuggling Matrix, *supra* note 140, at 9.

217. Guatemala's Immigration Law, *supra* note 185, art. 105; see also IOM Smuggling Matrix, *supra* note 140, at 10.

218. Decree No. 67-2001, Law Against Money and Other Assets Laundering, art. 4 (2001) [hereinafter Guatemala's Law Against Money Laundering] <http://www.banguat.gob.gt/en/docs/laws/lawAgainstMoneyAndOtherAssetsLaundering.pdf>.

219. *Id.* art. 2.

220. IOM Smuggling Matrix, *supra* note 140, at 6.

221. *Id.* at 10.

222. Guatemala's Law Against Money Laundering, *supra* note 218, art. 4.

223. Reformation of Penal Code for Human Trafficking, *supra* note 127, art. 194.

C. Problem with Not Having Human Smuggling Statutes

Without human smuggling statutes, Guatemala's government will struggle to bring proper criminal charges. In practice, because of the interrelationship between trafficking and smuggling, and the absence of a legal definition of human smuggling in the Criminal Code, there are instances where the crime of trafficking has been erroneously applied to human smugglers.²²⁴ Moreover, bifurcating illegal harboring and money laundering into separate charges could lead to disproportionate prison sentences, which are either too harsh or too light.

In 2010, the International Commission against Impunity in Guatemala ("CICIG"), a U.N. investigative body charged with investigating serious crimes in Guatemala, created a legislative proposal suggesting that the Guatemalan government criminalize human smuggling in accordance with the Smuggling Protocol's definition.²²⁵ By September 2012, during the end of the CICIG's mandate, the Guatemalan Criminal Code had failed to adopt the CICIG's recommendation, although there was an initiative to reform the immigration law.²²⁶ Currently, neither the Criminal Code nor the Immigration Act contains a provision to criminalize human smuggling per the Smuggling Protocol.²²⁷ Also, the CICIG did not receive an extension to operate in Guatemala.²²⁸ Guatemala's failure to adopt the CICIG's recommendation to harmonize its laws with the internationally agreed upon definition of human smuggling demonstrates noncompliance with international law.

VII. GUATEMALA IS VIOLATING THE PROTOCOL, PROVING THAT THE PROTOCOL IS INEFFECTIVE

The Vienna Convention on the Law of Treaties ("Vienna Convention") is the tool used to analyze the effectiveness of international treaties.²²⁹ The

224. Comisión Internacional contra la Impunidad en Guatemala [CICIG] [International Commission against Impunity in Guatemala] *Recomendación de Reformas Legales y Reglamentarias de la Comisión Internacional contra la Impunidad en Guatemala* [Recommendation of Legal Reforms and Regulations of the International Commission against Impunity in Guatemala] (Mar. 3, 2010), at 3.

225. *Id.*

226. See CICIG, *Avances en Temas de Seguridad y Justicia en Guatemala*, at 9, available in Spanish only: <http://centralamericasecurity.thedialogue.org/articles/avances-en-temas-de-seguridad-y-justicia-en-guatemala>.

227. See generally Guatemala's Penal Code, *supra* note 128; see also IOM Smuggling Matrix, *supra* note 140.

228. See *Mandate: Agreement to Establish CICIG*, CICIG (accessed Jan. 13, 2016), <http://www.cicig.org/index.php?page=mandate>.

229. See Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Court* '[A Treaty and the Law of Nations are Entirely Different Animals . . .]' Judge Harry T. Edwards, 28 VA. J. INT'L L. 281, 285 (1988).

Vienna Convention is a unique instrument that is designed to govern all other treaties.²³⁰ The purpose of the Vienna Convention is to govern international law by maintaining treaty obligations between Member States.²³¹ Guatemala first signed the Vienna Convention on May 23, 1969, with three reservations, one of which stated: “Guatemala will not apply Articles 11, 12 [. . .] in so far as they are contrary to the provisions of the Constitution of the Republic.”²³² Article 11 claims that States are bound by a treaty through their signature, ratification, acceptance, approval, accession, or by other means if so agreed.²³³ Article 12 confirms that a signature will bind a State to a treaty and that a signature *ad referendum* constitutes a full signature and acceptance of the treaty.²³⁴

However, on July 21, 1997, Guatemala ratified the Vienna Convention with respect to Articles 11 and 12.²³⁵ It removed its earlier reservations about these articles and added:

Guatemala’s consent to be bound by a treaty is subject to compliance with the requirements and procedures established in its Political Constitution. For Guatemala, the signature or initialing of a treaty by its representative is always understood to be *ad referendum* and subject to confirmation. . . by its Government.²³⁶

By accepting Article 12 and signing a treaty *ad referendum*, Guatemala has accepted the responsibility to be bound by a treaty upon signing it. Guatemala is therefore bound by Articles 11 and 12 of the Vienna Convention to the Smuggling Protocol since it has signed the Protocol and its government has confirmed its signature by designating the judiciary, the Public Prosecutor’s Office, and the Ministry of Defense to take appropriate measures to combat human smuggling.²³⁷

230. *Id.*

231. U.N. Conference on the Law of Treaties, *Vienna Convention on the Law of Treaties*, art. 1, U.N. Doc. A/CONF. 39/27 (Jan. 27, 1980) [hereinafter *Vienna Convention*].

232. Vienna Convention on the Law of Treaties, Jan. 27, 1980, 8 I.L.M. 679, 1155 U.N.T.S. 331 [hereinafter *Vienna Convention Signatories*].

233. Vienna Convention, *supra* note 231, art. 11.

234. *Id.* art. 12.

235. Vienna Convention Signatories, *supra* note 232, 13, n.16.

236. *Id.*

237. See U.N. Treaty Collection, *supra* note 126. Also available at: <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-migrantsmugglingprotocol.html>.

A. Guatemala is Not Following the Smuggling Protocol in Good Faith

Signatories to the Vienna Convention, including Guatemala, are bound by *pacta sunt servanda*,²³⁸ the international law principle that treaty obligations must be fulfilled in good faith.²³⁹ The principle of “good faith obligations” derives from, and is kept in force by, the general consent of States.²⁴⁰ Consent ensures the effectiveness of international order and prevents chaos by confirming international law as *the* law.²⁴¹ Consent is the only way to establish rules that legally bind sovereign States.²⁴² Therefore, a party that consents to a treaty’s provisions must follow those provisions in good faith.

Guatemala has not followed the Smuggling Protocol in good faith because it has not codified the internationally agreed upon definition of human smuggling. Article 6 of the Protocol states:

[E]ach State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences [the smuggling of migrants], when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit.²⁴³

The smuggling offense encompasses three elements: (1) the procurement of the illegal entry (2) of a person into a State Party of which the person is not a national (3) in order to obtain, directly or indirectly, a financial or other material benefit.²⁴⁴ However, Article 104 of Guatemala’s Criminal Code leaves out the third element, criminalizing only the illegal entry of an illegal alien.²⁴⁵

Additionally, Guatemala has not criminalized the attempt to commit human smuggling.²⁴⁶ Article 6(2)(a) of the Protocol says that each Party shall adopt legislative measures to criminalize an attempt to commit a human smuggling offense.²⁴⁷ Although Article 14 of the Criminal Code

238. Latin for “agreements must be kept.” BLACK’S LAW DICTIONARY (8th ed. 2004).

239. Vienna Convention, *supra* note 231, art. 26.

240. I.I. Lukashuk, *The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law*, 83 AM. J. INT’L L. 513, 513 (1989).

241. *Id.*

242. *Id.*; *see also* S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 23 (Sept. 7).

243. Smuggling Protocol, *supra* note 18, art. 6.

244. UNODC *International Framework for Action*, *supra* 155, at 5.

245. Guatemala’s Immigration Law, *supra* note 185, art. 104. *See also* IOM Smuggling Matrix, *supra* note 140.

246. Smuggling Protocol, *supra* note 18, art. 6; Guatemala’s Penal Code, *supra* 128, art. 14. *See also* IOM Smuggling Matrix, *supra* note 140.

247. Smuggling Protocol, *supra* note 18, art. 6(2)(a).

penalizes “attempt [of a crime] in general,”²⁴⁸ Guatemala cannot criminalize the attempt of human smuggling if human smuggling is not itself listed as a crime.

B. Guatemala Cannot Rely on Its National Laws to Justify Its Lack of Proper Human Smuggling Statutes

The obligation of good faith implies that a Party to a treaty cannot invoke provisions of its municipal law as justification for failure to perform. This principle of international responsibility is codified in Article 27 of the Vienna Convention, which provides that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”²⁴⁹ When Guatemala ratified the Vienna Convention in 1997, it formulated a reservation with respect to Article 27, “to the effect that the article is understood to refer to the provisions of the secondary legislation of Guatemala and not to those of its Political Constitution, which take precedence over any law or treaty.”²⁵⁰ Guatemala’s internal law, which criminalizes money laundering, illegal entry into Guatemala, and concealing illegal aliens, is secondary legislation because it is not listed in Guatemala’s Constitution.²⁵¹ Because these legal provisions, which serve to combat human smuggling, are secondary legislation, Article 27 applies. Therefore, Guatemala’s criminal statutes do not justify the criminalization of human smuggling as defined in the Protocol.

Although Guatemala has bound itself to the Smuggling Protocol through Articles 11 and 12, it is not following the Protocol in good faith. Because it has not adopted the third element of the Protocol’s definition of human smuggling, Guatemala is in violation of *pacta sunt servanda*. Additionally, Guatemala has failed to perform the Smuggling Protocol per Article 27 of the Vienna Convention because it criminalizes crimes associated with human smuggling, but not human smuggling itself.

248. Guatemala’s Penal Code, *supra* note 128, art. 14; *see also* IOM Smuggling Matrix, *supra* note 140.

249. Vienna Convention, *supra* note 231, art. 27.

250. Vienna Convention Signatories, *supra* note 232.

251. *See* Guatemala’s Constitution of 1985, with Amendments through 1993, CONSTITUTE PROJECT, (Feb. 10, 2015), https://www.constituteproject.org/constitution/Guatemala_1993.pdf.

VIII. GUATEMALA IS NOT ALONE: MEXICO, HONDURAS, AND
EL SALVADOR HAVE NOT ADOPTED THE
INTERNATIONAL LEGAL STANDARD
FOR HUMAN SMUGGLING

When the Attorneys General from the U.S., Mexico, El Salvador, Honduras, and Guatemala first met to address the issues of human smuggling in the region, they agreed to develop an integrated strategy that addressed the issue in accordance with the integrated laws of each State.²⁵² However, the laws of the U.S., Mexico, El Salvador, Honduras, and Guatemala have very different definitions of human smuggling. Different definitions can make the integration process challenging. Without a harmonized, regional understanding of what human smuggling actually is, it will be difficult for a high-level group to work together to fight this transnational crime.

A. El Salvador

El Salvador's Penal Code criminalizes human smuggling, but its definition differs from the Smuggling Protocol.²⁵³ El Salvador signed and ratified the Protocol on August 15, 2002, and March 18, 2004, respectively.²⁵⁴ Article 367-A in Decree No. 1030 defines human smuggling as:

Any person who, on his/her own behalf or through others, attempts to introduce or introduces aliens into national territory in an illegal manner, shelters or transports or guides them with *the purpose of avoiding the immigration controls of the country or other countries* (emphasis added).²⁵⁵

El Salvador's definition of human smuggling can be broken down into three elements: (1) any person who attempts to introduce or introduces aliens into national territory (2) in an illegal manner (3) for the purpose of avoiding immigration controls.²⁵⁶ The law encompasses the first two elements of the Smuggling Protocol's definition: (1) the procurement of the illegal entry (2) of a person into a State Party of which the person is not a national.²⁵⁷ But, like Guatemala, it leaves out the third element of the offense, which requires that the *purpose* of committing the offense be

252. Zagari, *supra* note 105.

253. IOM Smuggling Matrix, *supra* note 140.

254. Smuggling Protocol Signatories, *supra* note 121.

255. IOM Smuggling Matrix, *supra* note 140; *see also* Decreto A.N. No. 745, 05 Nov. 2008, Derecho Penal [Penal Code] art. 367-A, No. 222, sec. 381 DIARIO OFICIAL [DO] 25 Nov. 2008 (El. Sal.) [hereinafter El Salvador's Penal Code]; *Id.*

256. IOM Smuggling Matrix, *supra* note 140.

257. UNODC *International Framework for Action*, *supra* 155, at 5.

to obtain a financial or material profit.²⁵⁸ Instead, the purpose of committing a human smuggling offense in El Salvador is to avoid immigration controls.

B. Mexico

Mexico's definition of human smuggling is the least self-serving and perhaps the most ineffective in the region. Article 138 of Mexico's General Population Act ("the Act") defines human smuggling as "attempting to take or taking Mexicans or aliens to another country without the required documents, *for migrant smuggling purposes*" (emphasis added).²⁵⁹ The same penalty shall apply to any person who brings one or more aliens into Mexican territory "without the required documents issued by relevant authorities, or shelters or transports them through national territory for *migrant smuggling purposes*" (emphasis added).²⁶⁰ The General Population Act does not define migrant smuggling or migrant smuggling purposes.²⁶¹ It does not even mention migrant smuggling anywhere else in the Act.²⁶²

The Act attempts to describe migrant smuggling through three elements: (1) attempting to bring or bringing an alien (2) without required documents (3) for migrant smuggling purposes.²⁶³ Mexico's elements for migrant smuggling are too vague to compare to the Protocol's definition. Mexico signed the Smuggling Protocol on December 13, 2000, and ratified it on March 4, 2003.²⁶⁴ Not only has Mexico left out the Smuggling Protocol's third element, requiring that migrant smuggling is carried out for the purposes of financial or material benefit, but it has also left out the first element of the offense: that migrant smuggling is the procurement of an *illegal entry*.²⁶⁵ Perhaps the phrase "without required documents" replaces the element of an illegal entry. But per Article 27 of the Vienna Convention,

258. *Id.*

259. Ley General de Población [LGP] art. 138, Diario Oficial de la Federación [DOF] 07-01-1974, últimas reformas DOF 17-04-2009 (Mex.) [hereinafter Mexico's General Population Act]; *see also* IOM Smuggling Matrix, *supra* note 140.

260. Mexico's General Population Act, *supra* note 259, art. 138; *see also* IOM Smuggling Matrix, *supra* note 140.

261. Mexico's General Population Act, *supra* note 259, art. 138. *See also* IOM Smuggling Matrix, *supra* note 140.

262. Mexico's General Population Act, *supra* note 259, art. 138. *See also* IOM Smuggling Matrix, *supra* note 140.

263. Mexico's General Population Act, *supra* note 259, art. 138. *See also* IOM Smuggling Matrix, *supra* note 140.

264. Smuggling Protocol Signatories, *supra* note 121.

265. UNODC International Framework for Action, *supra* note 155, at 5.

which Mexico signed and ratified in 1969 and 1974, respectively,²⁶⁶ Mexico cannot invoke new provisions of its internal law to justify noncompliance with the Smuggling Protocol.²⁶⁷ In light of Mexico's status as a country of origin, transit, and destination for human smuggling, its vague laws are most concerning.

C. Honduras

The definition of human smuggling in Honduras's Penal Code is even vaguer than Mexico's definition. Article 195, of Decree No. 144-83, describes a perpetrator of the crime as "anyone who leads a person of any nationality through Honduras to introduce them illegally into another State, *for any purpose*" (emphasis added).²⁶⁸ The Honduran definition can be broken up into three elements: (1) anyone who leads a person of any nationality through Honduras (2) to introduce them illegally into another State (3) for any purpose.²⁶⁹ The only parallel between this definition and the Smuggling Protocol's definition is that both require "an illegal entry."

The problem is that leading a person of "any nationality" through Honduras into another State does not necessarily imply that the smuggled person is an alien. For example, if a Honduran drives a Nicaraguan migrant through Honduras and helps them illegally enter Nicaragua; the transaction would not qualify as human smuggling under Article 195 of the Penal Code. Furthermore, one might argue that if the migrant were a Nicaraguan national, then there would be no illegal entry. Although Honduras has not changed Article 196 to align with the Smuggling Protocol, despite acceding to the Protocol on November 18, 2008,²⁷⁰ and signing and ratifying the Vienna Convention in 1969 and 1979, respectively,²⁷¹ Honduras does pay homage to the Smuggling Protocol in its Law against Human Trafficking.²⁷² In its preamble, the Law against Human Trafficking mentions the Smuggling Protocol as being effective in Honduras, but it does not mention human smuggling anywhere else.²⁷³ Because Honduras has not adopted the

266. See Vienna Convention Signatories, *supra* note 232.

267. Vienna Convention, *supra* note 231, art. 27.

268. See Decreto No.144-83, 23 Aug.1983, Código Penal [Penal Code] art. 195, No. 24, 264LA GACETA, DIARIO OFICIAL[L.G.] 12 March 1984 (Hond.) [hereinafter Honduras's Penal Code].

269. *Id.*

270. Smuggling Protocol Signatories, *supra* note 121.

271. Vienna Convention Signatories, *supra* note 232.

272. See Decreto A.N. 59-2012, Ley Contra la Trata de Personas [Law Against Human Trafficking] LA GACETA (SEPARADA) DIARIO OFICIAL [L.G.], 6 July 2012 (Hond.), http://ciprevica.org/download/biblioteca_virtual/diagn%C3%B3sticos_y_estudios/Ley%20Trata%20de%20Personas%20Honduras%202013.pdf.

273. *Id.*

internationally recognized definition of human smuggling, the Smuggling Protocol is ineffective in Honduras.

D. The U.S.

The U.S. has the most comprehensive laws against human smuggling in both North and Central America. The Immigration and Nationality Act punishes any person who knowingly or recklessly brings or attempts to bring an illegal alien into the U.S. in violation of the law.²⁷⁴ But the punishments vary, depending on the purpose of committing the crime and the consequences to the smuggled migrant.²⁷⁵ Often the sentence increases if the migrant(s) sustained any bodily harm at the expense of the perpetrator.²⁷⁶ The Smuggling Statute, 8 U.S.C. § 1324, acknowledges that the act of smuggling migrants is done for purposes of commercial advantage or private financial gain,²⁷⁷ or for the purpose of committing an offense against the U.S.²⁷⁸

The U.S. encompassed the definition of human smuggling from the Smuggling Protocol, which it signed and ratified in 2000 and 2005, respectively.²⁷⁹ But it also recognizes that human smuggling can be carried out for more than one purpose.²⁸⁰ The problem with the U.S. definition is that the Immigration and Nationality Act does not mention “human smuggling” or make reference to the Smuggling Protocol. Where the Central American states lack certain elements of the Protocol’s human smuggling definition, the U.S. encompasses every element, and then some. It has taken the Protocol’s

274. Immigration and Nationality Act, § 8 U.S.C. 1324(a)(1) (2000).

275. Immigration and Nationality Act, § 8 U.S.C. 1324(a)(1)(B) (2000).

276. See *U.S. v. Mejia-Luna*, 562 F.3d 1215 (9th Cir. 2009) (defendant’s 48-month sentence with four-level upward adjustment for serious bodily injury was warranted, upon his conviction of two counts of transporting illegal aliens for private financial gain, causing serious bodily injury or placing in jeopardy life of person, where aliens suffered injuries, were administered medical treatment, and continued to endure pain at time of trial as result of defendant’s roll-over accident while involved in alien smuggling operation as “load” driver).

277. *Id.*

278. Immigration and Nationality Act, § 8 U.S.C. 1324(a)(2)(B)(i) (2000).

279. Smuggling Protocol Signatories, *supra* note 121.

280. Immigration and Nationality Act, § 8 U.S.C. 1324(a)(2)(B)(i) (2000).

definition and expanded the crime of human smuggling to incorporate national security concerns²⁸¹ and human rights violations.²⁸²

Guatemala, El Salvador, Mexico, Honduras and the U.S. have all ratified the Smuggling Protocol, but they have not adopted every element of the internationally recognized definition of human smuggling provided in the Protocol. Pursuant to the Vienna Convention, these signatories²⁸³ have violated the Smuggling Protocol by applying their own domestic legislation rather than heeding to international treaties and standards.²⁸⁴

However, even the Protocol does not set the optimal standard for human smuggling because it frames the offense in the context of human trafficking by referring to migrants as victims. It provides a definition that could easily be applied to human trafficking offenses. It was this definition that the U.N. Office of Drug and Crime claimed was the Smuggling Protocol's biggest achievement because, for the first time in a global instrument, a definition of human smuggling was developed and agreed upon by the Member States.²⁸⁵ However, the cases of Guatemala, El Salvador, Mexico, Honduras and the U.S. show that a definition of human smuggling has not been agreed upon, even amongst treaty signatories.

IX. A NEW DEFINITION: THE IMPORTANCE OF CONSENT

Although each State's definition is alike in criminalizing the act of bringing illegal aliens across a border, the motives for conducting these acts vary. Human smuggling can be done for the purposes of transferring migrants to another country,²⁸⁶ avoiding immigration control,²⁸⁷ committing a criminal offense against the State,²⁸⁸ human smuggling purposes,²⁸⁹ for financial benefit,²⁹⁰ or for any other purpose.²⁹¹ Illegal entry of an illegal migrant is

281. The offense is punishable if committed with the intent or belief that the alien will commit an offense against the U.S. *Id.*

282. The smuggler will be imprisoned for up to 20 years if they cause physical harm to his or her migrant, or for life if they cause death. Immigration and Nationality Act, §§ 8 U.S.C. 1324(a)(1)(B)(iii)-(iv) (2000).

283. El Salvador and the U.S. have signed the Vienna Convention but have not ratified it. Vienna Convention Signatories, *supra* note 232.

284. See Vienna Convention, *supra* note 231, art. 27.

285. G.A. Res. 55/25, U.N. Convention against Transnational Organized Crime and Protocols Thereto, at 14.

286. See Guatemala's Immigration Law, *supra* note 185.

287. See El Salvador's Penal Code, *supra* note 255; see also IOM Smuggling Matrix, *supra* note 140.

288. See Immigration and Nationality Act, § 8 U.S.C. 1324(a)(2)(B)(i) (2000).

289. See Mexico's General Population Act, *supra* 259; see also IOM Smuggling Matrix, *supra* note 140.

290. See Smuggling Protocol, *supra* note 18, art. 6.

291. See generally Honduras's Penal Code, *supra* note 268.

the *actus reus* of smuggling; the element “for the purpose of” introduces a specific *mens rea* requirement to the definition.²⁹² Smuggling will occur if the implicated individual intended for the action to occur, which requires the consent of the migrant. The problem of classifying human smuggling as an illegal entry for any purpose, or for different purposes, arises when the purpose becomes transporting migrants across the border to exploit them. The reason is that this purpose, unlike the others, turns on the element of consent. And without consent, the act of illegal entry (*actus reus*) for any purpose (*mens rea*) turns into the act of human trafficking.

Consent is important in evaluating the purpose and means of the crime. The Trafficking Protocol has a definition of trafficking that compromises three separate elements: (1) an action; (2) a means by which that action occurs or is made possible; and (3) a purpose to the action, which is specified as exploitation.²⁹³ The Smuggling Protocol has an action and a purpose, but it does not have a means. The *actus reus* of human trafficking is similar to human smuggling; it can be fulfilled by the undefined practices of recruitment, transportation, transfer, harboring, or receipt of persons.²⁹⁴ Such activities can be neutral in and of themselves, but take on a different character when undertaken in a particular way (means) and with a specific intent (purpose).²⁹⁵ Trafficking will occur if the implicated individual transported the victim *with the purpose of* exploitation (no consent),²⁹⁶ whereas smuggling will occur if the implicated individual transports the migrant *with the purpose of* making a profit (consent required).²⁹⁷ Additionally, trafficking will occur if the trafficker transports a victim through *means*

292. United Nations Office on Drugs and Crime, The Role of “Consent” In the Trafficking in Persons, at 24 (2014) [hereinafter UNODC Issue Paper on Consent].

293. *Id.*

294. *Id.* at 25.

295. *Id.*

296. *Id.* at 25, n.1. The Trafficking in Persons Protocol does not define “exploitation”, rather providing an open-ended list that includes, 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”. Trafficking in Persons Protocol, Art. 3(a). The Travaux Préparatoires indicate that the words “at a minimum” were included to ensure that unnamed or new forms of exploitation would not be excluded by implication. UNODC, Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto (2006), at 343, n.22 and at 344, n.30.

297. See definition of migrant smuggling in Smuggling Protocol, *supra* note 18, art. 3(a); see also IOM Smuggling Matrix, *supra* note 140.

of force (no consent),²⁹⁸ and smuggling will occur when the smuggler transports the migrant through *means* of agreement when the migrant agrees to cross boundaries (consent required).²⁹⁹ Therefore, consent is required to distinguish the purpose and means of human smuggling from human trafficking.

Without consent, the laws of human smuggling and human trafficking can be misapplied. In *U.S. v. Alapizco-Valenzuela*, the defendant was caught transporting ten illegal aliens for private financial gain.³⁰⁰ A Kentucky Deputy Sheriff found the illegal migrants in the back of a white minivan while in the process of helping the driver and the defendant change a flat tire.³⁰¹ The illegal aliens were subjected to a four-day long hostage situation, threatened with death at gunpoint, stripped of their shoes and money, and forced to urinate in plastic bottles because they were not allowed to leave the vehicle.³⁰² The operation started in Mexico with the help of a professional human smuggler.³⁰³ The Court charged the defendant with transporting illegal aliens for private financial gain in violation the U.S. smuggling statute.³⁰⁴ Although human smuggling does not involve exploitation, the Court justified the violation with a two-level sentence enhancement for involuntarily detaining smuggled aliens through coercion.³⁰⁵ Like so many other cases, this case shows how the law becomes misconstrued when legislation fails to distinguish between smuggling and a situation of coercion.³⁰⁶

However, some courts have taken steps to correct this misapplication. In the case against *Blanca Elena Rodriguez Orellana*, the Court of First Instance in Santa Ana, El Salvador, held that an erroneous application of El Salvador's human smuggling statute was a violation of the defendant's

298. UNODC Issue Paper on Consent, *supra* note 292.

299. Smuggling Protocol, *supra* note 18, art. 3(a).

300. United States v. Alapizco-Valenzuela, 546 F.3d 1208, 1212 (10th Cir. 2008).

301. *Id.*

302. *Id.* at 1213.

303. *Id.*

304. *Id.* at 1212.

305. *Id.* at 1219.

306. See also United States v. Monsalve, 841 F.2d 1120 (3rd Cir. 1988), where the defendant ran a business smuggling Latin American women into the United States from Costa, Rica, Columbia, and Guatemala for between \$15,000-\$20,000 per woman. Once in the United States, Mr. Monsalve forced the women to work as prostitutes to pay off their smuggling fees. Defendant was sentenced to 240 months in prison for importing illegal aliens for the purpose of prostitution in violation of the U.S. human smuggling statute 8 U.S.C. § 1324. UNODC Human Trafficking Case Law Database, *available at* https://www.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/usa/united_states_v._carlos_andres_mon_salve.html?tmpl=old;University_of_Michigan_Law_School_Human_Trafficking_Clinic_Clinic_Database_available_at_http://www.law.umich.edu/clinical/HuTrafficCases/Pages/CaseDisp.aspx?caseID=450.

due process rights.³⁰⁷ At trial, it was alleged that the defendant, Ms. Orellana, trafficked a minor from Guatemala to El Salvador with the intent to prostitute her for financial gain during the festivities of San Antonio Pajonal in Santa Ana, El Salvador.³⁰⁸ The Judges of the Court of Santa Ana acquitted Ms. Orellana, noting that the prosecution misapplied the legal elements of human smuggling³⁰⁹ to a crime that the Court referred to as human trafficking because exploitation was involved.³¹⁰ Both *Alapizco-Valenzuela* and *Orellana* exemplify how smuggling laws can be misconstrued and incorrectly applied to human trafficking offenses. None of the States mentioned in this Comment, or the Smuggling Protocol, include the element of consent in their definitions of human smuggling. The only way to prevent this misapplication is to create new legislation and harmonize it across Central and North America.

A new human smuggling statute needs to accomplish two things. First, it needs to include the element of consent to provide a proper *mens rea* and means to fit the crime and prevent the misapplication of the law. Second, all the Central and the North American States should harmonize their national laws to fit this new definition. By having a common definition for human smuggling, Central American states would be better suited to work together to fight this transnational crime. For instance, a proposed definition that satisfies both requisites could be: the *voluntary* procurement of an illegal entry of a person into a State Party of which the person is not a national or a permanent resident, for *the purpose of obtaining a financial or material benefit without coercion*.

It is important to emphasize that the entry is voluntary and that the way in which the smuggler obtains payment is without coercion. A voluntary entry emphasizes the means of human smuggling because an involuntary entry includes coercion. Similarly, a voluntary payment emphasizes the

307. 497-CAS-2006, Blanca Elena Rodríguez Orellana. San Salvador, 3 de Septiembre 2009 (El Sal.), https://www.unodc.org/res/cld/case-law/slv/2009/orellana_html/Sentencia_Orellana.pdf [hereinafter 497-CAS-2006].

308. *Id.* See also UN Office on Drugs and Crime, Orellana, UNODC Human Trafficking Case Law Database, UNODC No. SLV001 (2006), <https://www.unodc.org/res/cld/case-law/doc/traffickingpersonscrimetype/slv/2009/orellana.html?tmpl=old> [hereinafter “UNODC Orellana”].

309. *Id.*

310. 297-CAS-2006, *supra* note 307. The Criminal Division of the Supreme Court ended up ordering a new trial partially because the Judges of Santa Ana did not follow Criminal Code Article 130, which required them to provide a well-reasoned argument to acquit the defendant. *Id.*

purpose, or *mens rea*, of the act, to obtain a financial benefit. Otherwise, an involuntary payment, either financial or material, would be classified as human trafficking. Additionally, smuggling operations that turn into hostage situations, where the migrant is held as security for the fulfillment of a condition, involve exploitation and, therefore, fall under the categories of human trafficking, peonage, or servitude; they should not be classified under human smuggling statutes.

X. A MEANS TO AN END: A REGIONAL CONVENTION AND A WORKING GROUP

States cannot adopt new legislation alone—an international or regional tool needs to hold states accountable for changing their laws. For purposes of this Comment’s argument, a regional convention would be a feasible legal instrument because it can adapt to the region’s demands for dealing with human smugglers. However, a written instrument is not enough on its own. There needs to be a mechanism in place that monitors the effectiveness of a Central American Human Smuggling Convention, like an independent working group.

A. SAARC and EU: Regional Examples

A written agreement, combined with a working group, would hold nations accountable for harmonizing their legislation. A human smuggling convention would have the potential to bind North and Central America to a much higher level of obligation, particularly with regard to distinguishing between smuggling and trafficking, than that required by the Smuggling Protocol. A written convention would serve as a guide for a holistic working group, which would require the commitment of independent technical experts, as well as Attorneys General from each Member State, nongovernmental organizations and international government offices.

The South Asian Association for Regional Cooperation (“SAARC”) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution for Regional Cooperation and The Council of Europe Convention on Action against Trafficking in Human Beings (“European Trafficking Convention”) are two examples of specialized treaties that have been concluded between regional groups of States in an effort to combat distinct regional issues. A particularly common problem in the SAARC region is the commercial sexual exploitation of women and children, who are recruited for non-existent jobs and then, sold into sexual slavery or

forced marriages.³¹¹ According to the 2014 Global Study Index (“GSI”), India and Pakistan have the highest number of trafficking victims in the world and the highest prevalence of human trafficking in the Asian Pacific region.³¹² Both India and Pakistan are SAARC members.³¹³

In 2002, Member States of SAARC³¹⁴ concluded the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution for Regional Cooperation (“SAARC Convention”).³¹⁵ As its title implies, the scope of the SAARC Convention is limited to the trafficking of women and children for prostitution.³¹⁶ The SAARC Convention introduces the necessity of creating a convention to combat child sex trafficking in its preamble by noting, with concern, the increasing exploitation of traffickers of women and children from SAARC countries and their increasing use of these countries as points of origin, transit, and destination.³¹⁷ The preamble also recognizes the importance of establishing effective *regional* cooperation to prevent trafficking in prostitution, while also paying homage to international instruments already established for such a purpose.³¹⁸ Article 1 lays out the necessary legal definitions pertinent to the SAARC Convention, including defining “child,” “prostitution,” “trafficking,” and “persons subject

311. In some religious groups, pre-pubescent girls are sold for sexual servitude in temples. T.N. Sathyanarayana and Giridhara R. Babu, *Targeted Sexual Exploitation of Children and Women in India: Policy perspectives on Devadasi System*, *Annals of Tropical Medicine and Public Health* 5, no. 3 (2012), 157–62, <http://www.atmph.org/article.asp?issn=1755-6783;year=2012;volume=5;issue=3;spage=157;epage=162;aulast=Sathyanarayana>. Recent reports suggest that one child goes missing every eight minutes. See Deeptiman Tiwary, *One Lakh Children Go Missing in India Every Year: Home Ministry*, *Times of India* (Aug. 7, 2014), <http://timesofindia.indiatimes.com/india/Onelakh-children-go-missing-in-India-every-year-Home-ministry/articleshow/39779841.cms>. It is feared that some are sold into forced begging, domestic work, and commercial sexual exploitation. *Id.*

312. THE GLOBAL SLAVERY INDEX 2014, 33 (2014), http://d3mj66ag90b5fy.cloudfront.net/wp-content/uploads/2014/11/Global_Slavery_Index_2014_final_lowres.pdf. India tops the list with 14 million victims of trafficking, China comes in second at 3.2 million, and Pakistan is third with 2.1 million trafficking victims. *Id.*

313. See Public Service Commissions of SAARC Member States, SAARC, <http://www.saarc-sec.org/Public-Service-Commissions-of-SAARC-Member-States/110/>.

314. Member States of SAARC include: Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan, and Sri Lanka. *Id.*

315. South Asian Association for Regional Cooperation (“SAARC”), Convention on Prevention and Combating Trafficking in Women and Children and Prostitution, Jan. 5, 2002, <http://www.saarc-sec.org/userfiles/conv-trafficking.pdf> [hereinafter SAARC Convention].

316. *Id.*

317. *Id.*

318. *Id.*

to trafficking.”³¹⁹ The purpose of the SAARC Convention is to promote a regional approach among the Member States.³²⁰ The SAARC Convention entered into force December 2005,³²¹ establishing that its signatories are bound to promote cooperation among the Member States to suppress trafficking in women and children,³²² to ensure that trafficking is an offense punishable under Member States’ respective criminal laws,³²³ and to provide mutual legal assistance in investigations and punishments.³²⁴

The SAARC Convention’s efforts have not gone without criticism.³²⁵ In January 2010, the International Organization for Migration (“IOM”), with support from the Asian Development Bank, organized a regional dissemination meeting to review the effectiveness of the SAARC Convention.³²⁶ The result produced a report entitled, “SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution: Review and Current Status.”³²⁷ Recommendations for strengthening the SAARC Convention and improving its effectiveness included: increasing cooperation among the SAARC Member States, harmonizing domestic trafficking laws, expanding the scope of the document and legal definitions, and establishing an independent treaty monitoring process.³²⁸

The SAARC’s monitoring process is criticized as being almost nonexistent.³²⁹ Per Article 8, the SAARC Convention requires the Member States to establish a Regional Task Force consisting of Member States’ officials to implement the provisions of the Convention and undertake periodic reviews.³³⁰ The Regional Task Force has met on different occasions and has even established a Standard Operating Procedure for each State to implement the provisions of the Convention, including reporting methods and routes used by traffickers and reparations to victims.³³¹ So far, the

319. *Id.* art. 1.

320. *Id.* art. 2.

321. Press Release, Int’l Org. for Migration, *IOM Conducts Review of South Asian Association for Regional Cooperation (SAARC) Convention on Human Trafficking* (Apr. 22, 2010), <http://www.iom.int/cms/en/sites/iom/home/news-and-views/press-briefing-notes/pbn-2010/pbn-listing/iom-conducts-review-of-south-asian-assoc.html>.

322. SAARC Convention, *supra* note 315, art. 2.

323. *Id.* art. 3.

324. *Id.* art 6–8.

325. ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 130 (2010).

326. *IOM Conducts Review of South Asian Assoc. for Regional Cooperation (SAARC) Convention on Human Trafficking*, INT’L ORGANIZATION FOR IMMIGRATION (2010).

327. SAARC Convention, *supra* note 315.

328. *Id.*

329. Gallagher, *supra* note 325, at 466.

330. SAARC Convention, *supra* note 315, art. 8(3).

331. *Gender Related Issues*, SAARC (Jan. 5, 2010), http://saarc-sec.org/areaofcooperation/detail.php?activity_id=10.

Regional Task Force has not implemented independent reviews of the Convention's effectiveness; instead, it has established ways to further the Convention's objectives, such as establishing a regional toll-free hotline for victims.³³² Furthermore, the Task Force's makeup may be too politicized; a working group consisting of government officials may not have the capacity to be impartial or the technical expertise to provide effective oversight.

Conversely, the European Trafficking Convention ("ETC") was created with the purpose of establishing a specific monitoring mechanism to ensure its effectiveness.³³³ The monitoring mechanism established under the ETC is considered by its founding institution to be one of the instrument's greatest strengths.³³⁴ The ETC establishes a system comprising two bodies: a technically oriented Group of Experts on Action Against Trafficking in Human Beings ("GRETA"),³³⁵ and a more politically oriented Committee of the Parties, which is linked directly to the Council of Europe's Committee of Ministers.³³⁶ The ETC mandates that the primary monitoring body, GRETA, is to be composed of 10 to 15 members.³³⁷ The members are to be technical experts elected by the Committee of the Parties on the basis of their expertise, with attention given to their high moral character and impartiality; no two members of GRETA may be nationals of the same State.³³⁸

The ETC sets out a very detailed monitoring process, supplemented by the Rules of Procedure adopted by GRETA in 2009.³³⁹ The evaluation procedure is divided into four-year rounds, with GRETA specifying which

332. *Id.*

333. Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.: 197, entered into force Jan. 2, 2008, art. 1 [hereinafter EU Trafficking Convention], available at <http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm>.

334. GALLAGHER, *supra* note 325, at 473. Conference of the Parties to the United Nations Convention against Transnational Organized Crime, "Report on the Meeting of Experts on Possible Mechanisms to Review Implementation of the United Nations Convention against Transnational Organized Crime held in Vienna on 30 September 2009," UN Doc. CTOC/COP/WG.1/2009/3, Oct. 14, 2009, at ¶ 22.

335. EU Trafficking Convention, *supra* note 333, art. 36.

336. *Id.* art. 37. GALLAGHER, *supra* note 325, at 474.

337. EU Trafficking Convention, *supra* note 333, art. 36.

338. *Id.*

339. GALLAGHER, *supra* note 325, at 474. Council of Europe, Group of Experts on Action against Trafficking in Human Beings (GRETA), "Rules of Procedure for Evaluating Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties," THB-GRETA 2009/3, June 17, 2009 [hereinafter GRETA Rules of Procedure]; Gallagher, *supra* note 325, at 474.

provisions of the ETC will be the focus of each particular round.³⁴⁰ A questionnaire is then sent out to the Member States to ascertain compliance with the relevant provision, along with a set schedule.³⁴¹ The questionnaire is made public.³⁴² When a State Party responds to the questionnaire, GRETA may request additional information.³⁴³ GRETA may also request assistance from a civil society or conduct an on-site visit if necessary “to compliment the information received or to evaluate the implementation of the measures taken.”³⁴⁴ The information gathered is then compiled into a draft report with recommendations on how to address the problems.³⁴⁵ The report is sent to the State Party for comment, and any feedback is taken into account.³⁴⁶ GRETA’s final report and conclusions are made public and sent to the Committee of the Parties.³⁴⁷

Monitoring does not end with the publication of GRETA’s report. In 2012, the first ten countries of the ETC that had been evaluated by GRETA held round-table meetings to discuss the implementation of GRETA’s recommendations.³⁴⁸ The aim was to bring together all relevant stakeholders in the country and provide a forum for identifying needs and possibilities for cooperation activities with the involvement of the Council of Europe.³⁴⁹ The first such round-table was organized in Bratislava, the Slovak Republic, on November 22, 2012.³⁵⁰ It brought together governmental and nongovernmental actors and provided an opportunity for discussing progress made since the publication of GRETA’s report and remaining challenges.³⁵¹ Areas where the Council of Europe could assist the Slovak Republic were also identified.³⁵² Similarly, in 2013, round-table meetings were organized by Cyprus (March 4, 2013), the Republic of Moldova (March

340. GALLAGHER, *supra* note 325, at 474.

341. GRETA Rules of Procedure, *supra* note 339, at rule 3.

342. GALLAGHER, *supra* note 325, at 474.

343. *Id.*

344. GRETA Rules of Procedure, *supra* note 339, at rule 8. In 2012-2013, GRETA made 10 country cite visits. In Spain, GRETA visited a training workshop for the social integration of women and girls victims of sexual exploitation. In Serbia, GRETA visited two social care establishments for children at risk. The visit to the Netherlands included a crisis centre for girls. COUNCIL OF EUROPE, THIRD GENERAL REPORT ON GRETA’S ACTIVITIES 11, printed at the Council of Europe (2013) [hereinafter COE Report on GRETA], *available at* http://www.ungift.org/doc/knowledgehub/resource-centre/2013/GRETA_2013_17_3rdGenRpt_en.pdf.

345. Gallagher, *supra* note 325 at 474.

346. GRETA Rules of Procedure, *supra* note 339, at rule 15.

347. *Id.*

348. COE Report on GRETA, *supra* note 344, at 19.

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

22, 2013), Austria (May 17, 2013), and Bulgaria (May 28, 2014).³⁵³ Following these discussions, a report is sent to national authorities who are invited to pursue specific cooperation projects with the Council of Europe.³⁵⁴ GRETA also cooperates with the Parliamentary Assembly of the Council of Europe to create legislation; on January 25, 2013, the Parliamentary Assembly adopted Resolution 1922 (2013) and Recommendation 2011 (2013) on the trafficking of migrant workers for forced labor based on GRETA's report.³⁵⁵

Two factors that distinguish the ETC from other regional conventions like SAARC and contribute to its success. First, it has GRETA; a primary monitoring body made up of independent human trafficking experts that ensure expertise and impartiality. Second, its Rules and Procedures set up an effective reporting system that offers checks on government's accountability and is enforced through the cooperation of the Council of Europe, the United Nations, the European Union, and nongovernmental organizations.³⁵⁶ The SAARC Convention, on the other hand, fails to follow Europe's example. Its Regional Task Force is made up of State ministers,³⁵⁷ who lack the professional background and objective position of GRETA members. Furthermore, SAARC's Standard Operating Procedure, which is supposed to guide the Task Force in monitoring State compliance with the Convention, instead sets up rules for implementing new objectives like creating a toll-free victim hotline.³⁵⁸

B. Lessons for the Americas

North and Central American States affected by human smuggling issues should look to the ETC for guidance. Once a regionally recognized definition of human smuggling is agreed upon, a written instrument accompanied by a monitoring working group should be established. This working group should emulate GRETA and consist of technical human smuggling experts from different States, who work together congruently

353. *Id.*

354. *Id.*

355. *Id.* at 23.

356. *See id.* at 25–30.

357. SAARC Convention, *supra* note 315, at art. 8(3).

358. *Gender Related Issues*, SAARC, http://saarc-sec.org/areaofcooperation/detail.php?activity_id=10.

with government officials and Attorneys General to ensure compliance with the new Central and North American Human Smuggling Convention.

A group called The Central American Coalition against Human Trafficking and Human Smuggling (“the Coalition”), or *El Coalición Centroamericana Contra la Trata de Personas y el Tráfico Ilícito de Personas*, exists to combat human trafficking in Central America.³⁵⁹ The Coalition is comprised of El Salvador, Nicaragua, Honduras, Costa Rica, Guatemala, Belize, Mexico and the Dominican Republic.³⁶⁰ It works in coordination with the Regional Migration Conference of the Secretariat of Central American Integration (“SICA”) to position human trafficking as a subject of interest to all members of the Coalition and SICA.³⁶¹ Guatemala has been elected as the Presiding President of the Coalition for the current term.³⁶²

Guatemala announced its new role in the Coalition on the Vice President’s website in September 2014.³⁶³ According to the Government, Guatemala’s presidency puts it in a new position to fight regional human trafficking, specifically by providing a space for dialogue amongst Coalition and SICA members on the subject of human trafficking.³⁶⁴ The Government writes that Guatemala’s presidency is a new milestone for the Secretary against Sexual Violence, Exploitation and Human Trafficking, but does not mention its progress in human smuggling.³⁶⁵ Besides being featured in the title of the Coalition, human smuggling is not mentioned anywhere on the website or in the Government’s objectives.³⁶⁶ Guatemala’s main focus for its presidential term is to advocate the creation of shelters and victim rehabilitation into society,³⁶⁷ which again speaks to trafficked victims and not smuggled migrants.

Perhaps the Coalition’s inefficiencies lay in the fact that there is no regional convention to direct its human smuggling initiatives. Like the Smuggling Protocol, the Coalition emphasizes human trafficking by offering

359. Lorena Brenes, *Guatemala presidirá la Coalición Centroamericana contra Trata y Tráfico ilegal de Migrantes*, CB24 NOTICIAS CENTROAMÉRICA, (Aug. 27, 2014), available at <http://cb24.tv/guatemala-presidira-la-coalicion-centroamericana-contra-trata-y-traffic-ilegal-de-migrantes/>.

360. *Id.*

361. *Id.*

362. *Id.*

363. Gobierno de Guatemala [Government of Guatemala], Guatemala obtiene presidencia de la Coalición Centroamericana contra la Trata de Personas y el Tráfico Ilícito de Migrantes [Guatemala obtains the presidency of the Central American Coalition against Human Trafficking and Human Smuggling] (Sept. 9, 2014), https://www.vicepresidencia.gob.gt/svet/?svet=_1¬a=366 [hereinafter Guatemala Obtains Presidency of Coalition].

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

a very victim-oriented approach. But even if there were a convention for human smuggling, the Coalition as it now stands would be insufficient to ensure such a convention's effectiveness. Like SAARC's Regional Task Force, which is comprised of government officials from each Member State, the Coalition is also made up of government officials instead of human smuggling experts. Additionally, both SAARC's Task Force and the Coalition are focused on creating new projects to assist trafficked victims in their reintegration into society rather than staying true to their purpose. The Task Force has done little to ensure member compliance with the SAARC Convention and the Coalition does not seem to focus on human smuggling at all.

C. *The Organization of American States*

However, there is an established organization in North and Central America that has the potential of creating a regional human smuggling convention and electing a working group that emulates GRETA. The Organization of American States ("OAS") brings together all 35 independent states of the Americas³⁶⁸ and constitutes the main political, juridical, and social governmental forum in the Western Hemisphere.³⁶⁹ OAS was established to achieve among its Member States "an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence."³⁷⁰ Moreover, the OAS is the Western Hemisphere's forum par excellence for the development and codification of international law; it has a long history of preparing inter-American legal instruments.³⁷¹

368. These 35 states include: Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Commonwealth of Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, The Commonwealth of the Bahamas, Trinidad and Tobago, the United States of America, Uruguay, and the Bolivarian Republic of Venezuela. See *Member States*, OAS, http://www.oas.org/en/member_states/default.asp (last visited Jan. 11, 2016).

369. *About the OAS: Who We Are*, OAS, (2015), http://www.oas.org/en/about/who_we_are.asp.

370. *Id.*; Charter of the Organization of American States, art. 1, Apr. 4, 1948, 119 O.A.S.T.S. No. 1609.

371. Procedures for Preparing and Adopting Inter-American Legal Instruments within the OAS, AG/RES. 1634 (XXIX-O/99) (1999) [hereinafter *Procedures for Adopting Inter-American Treaties*].

At any time, all Member States have the authority to propose any topic for the consideration of the subject matter of an inter-American legal instrument.³⁷² If the proposal is not rejected, the General Secretariat will prepare a preliminary study, which will include: specification of existing legal instruments and projects in force on the proposed topic, a recommendation as to the need of preparing an inter-American instrument on the topic, and if needed, a recommendation as to the method to be used to prepare the instrument and the type of instrument to be adopted.³⁷³ Throughout the entire preparatory process, OAS's legal arm, the Secretariat for Legal Affairs ("SLA") shall provide advisory and legal support.³⁷⁴ Meanwhile, Member States will participate by completing questionnaires, presenting their views and providing written comments on the drafts.³⁷⁵ Once this process has been concluded, the final draft is submitted to the Permanent Council so that it may be adopted.³⁷⁶ Once an inter-American instrument has been adopted, SLA follows up on its implementation and reports it to the Meetings of Ministers of Justice or of Ministers or Attorneys General of the Americas ("REMJA").³⁷⁷

REMJA consists of Ministers of Justice, or other Ministers, or Attorneys General of Member States, with responsibilities in the area of international legal cooperation, particularly in criminal matters.³⁷⁸ REMJA acts as a hemispheric forum to ensure Member State compliance in areas of shared regional responsibility, including assuring the efficiencies of public policies and cooperation measures.³⁷⁹ Additionally, REMJA assigns mandates to working groups or technical meetings.³⁸⁰ At present, some of REMJA's

372. *Id.* ¶ 3. "[I]nter-American legal instrument" means any treaty, convention, or any other agreement having legal effect adopted by the Member States within the framework of the Organization.

373. *Id.* ¶¶ 6–7.

374. *Id.* ¶ 12.

375. *Id.* ¶ 13. The initial draft will be prepared by the Inter-American Juridical Committee, or any other body considered appropriate. *Id.* at para. 15.

376. *Id.* ¶ 20.

377. See OAS general Secretariat Executive Order 08-01 Rev. 7, Annex G, available at http://www.oas.org/en/sla/docs/executive_order_08-01_Rev7_eng.pdf.

378. Document on the REMJA Process, art. 3, OEA/Ser.K/XXXIV.7.1, REMJA-VII/doc.6/08 rev. 2 (Nov. 29, 2012) [hereinafter Document of Washington]. The Document of Washington was approved by consensus during the plenary session held on April 30, 2008, in the framework of the Seventh Meeting of Ministers of Justice or other Ministers or Attorneys General of the Americas (REMJA-VII) held at OAS Headquarters in Washington, D.C., United States, in compliance with Chapter X, No. 2, of the Conclusions and Recommendations of REMJA VI (REMJA-VI/doc. 21/06 rev. 1) and Resolutions AG/RES. 2228 (XXXVI-O/06) and AG/RES. 2266 (XXXVII-O/07) of the OAS General Assembly and CP/RES. 929 (1629/08) of the OAS Permanent Council.

379. *Id.* art. 4(a)-(b).

380. *Id.* art. 4(c).

working groups include The Working Group on Legal Cooperation on Criminal Matters, The Working Group on Cyber-Crime, The Working Group on Penitentiary and Prison Policies, and The Working Group on Forensic Sciences.³⁸¹ The function of these groups is to implement the mandates they receive from REMJA and to facilitate information sharing and cooperation among the authorities working in those groups.³⁸² If the OAS were to adopt a human smuggling convention, then REMJA would have the possibility of creating a monitoring working group to guarantee its effectiveness.

However, the working groups as they are currently structured are insufficient to guarantee treaty compliance. Like SAARC's Task Force, REMJA's working groups are made up of governmental experts or central authorities.³⁸³ There is no mention of independent technical experts, which would guarantee a degree of impartiality.³⁸⁴ Additionally, even the technical meetings that operate under REMJA's purview consist of the same structural makeup as the working groups.³⁸⁵ Therefore, if the OAS adopts a regional human smuggling convention, then REMJA will have to consider opening its working group membership to neutral technical experts.

XI. CONCLUSION

Human smuggling has always been the neglected sister of human trafficking. Both international treaties and national governments have failed to distinguish the two terms from each other, and countries often prosecute perpetrators for the wrong reasons.³⁸⁶ Such misapplication of the law results in inefficiencies and confusion. Guatemala exemplifies this point and reveals that international treaties targeted towards human trafficking have influenced and changed national legislations;³⁸⁷ however, the international treaty on human smuggling does not have the same effect.

381. *Id.* art. 15.

382. *Id.* art. 16.

383. *Id.* art. 15.

384. *Id.*

385. *Id.* art. 22.

386. UNODC Orellana, *supra* note 308.

387. After Guatemala signed the Trafficking Protocol in 1998, it changed its 1973 definition of human trafficking in 2005 to the internationally agreed upon definition provided by the Protocol. Previous definition charged anyone who promoted, facilitated, or encouraged transnational prostitution for one to three years on human trafficking charges. *See* Guatemala's Penal Code, *supra* note 128. Additionally, Guatemala created the Law against Sexual Violence and Trafficking in 2009; *see also* Reformation of Penal Code for Human Trafficking, *supra* note 127.

Guatemala has not created its own legislation in conjunction with the Smuggling Protocol,³⁸⁸ neither has El Salvador,³⁸⁹ Mexico,³⁹⁰ or Honduras³⁹¹—three other countries that have signed the Smuggling Protocol³⁹² and are significantly affected by human smuggling. According to Article 27 of the Vienna Convention, all four States are violating the Treaty of Treaties and *pacta sunt servanda*³⁹³ and cannot justify national legislation overriding international law,³⁹⁴ which binds them as signatories.³⁹⁵

The Smuggling Protocol's lack of influence in Central America sheds light on the role and application of international legal instruments. The Smuggling Protocol reveals that the ineffectiveness of an international treaty is attributable to the mischaracterization of legal terms and the lack of guidance to foster inter-State cooperation. When the Smuggling Protocol uses terms like “victim”³⁹⁶ to describe human smuggling, it mischaracterizes legal terms and allows for the misapplication of trafficking offenses to human smuggling violations.³⁹⁷ Additionally, by relying on the individual Member States to create their own legislation to fight a transnational crime,³⁹⁸ the Protocol impedes its own objective: to facilitate *cooperation* in the prevention, investigation, and prosecution of the crime of smuggling migrants.³⁹⁹ Borders are porous to human smuggling and without State cooperation, there is little States can do to prevent traveling crime.

The U.S., Guatemala, El Salvador, Mexico and Honduras have taught the international community that relying on State legislation to fight transnational crime is not enough to prevent human smuggling. While each state agrees that the *actus reus* of the crime is the illegal entry of an illegal alien, the purpose of committing the crime differs. Purpose introduces a *mens rea* requirement to a crime.⁴⁰⁰ So even though human smuggling in Honduras and human smuggling in Mexico share the same *actus reus*, they are not the same crime because they have a different *mens rea*.

388. See generally Guatemala's Immigration Law, *supra* note 185. See also IOM Smuggling Matrix, *supra* note 140; Smuggling Protocol, *supra* note 18, art. 3.

389. See IOM Smuggling Matrix, *supra* note 140.

390. See generally Mexico's General Population Act, *supra* note 259.

391. See generally Honduras's Penal Code, *supra* note 268.

392. See Smuggling Protocol Signatories, *supra* note 121.

393. Countries are obligated to follow a treaty in good faith. Vienna Convention, *supra* note 231, art. 26.

394. *Id.* art. 27

395. *Id.*

396. Smuggling Protocol, *supra* note 18, annex II art. 6 § 3(b).

397. UNODC Orellana, *supra* note 308.

398. Smuggling Protocol, *supra* note 18, annex III art. 6, 11, 12, 15, 16.

399. *Id.* art. 6.

400. UNODC Issue Paper on Consent, *supra* note 292.

Consent is an important element that establishes the *mens rea* and *means* of conducting human smuggling. Smuggling will occur when the smuggler has the purpose of making a financial profit, which depends on a financial agreement between the smuggler and the migrant that ensures the migrant's illegal entry. The *means* of this illegal entry requires the permission of the migrant. Otherwise, a migrant who is forced to cross borders against his or her will is coerced, which becomes human trafficking. Therefore, a successful human smuggling definition requires the element of consent.

States have to be held accountable for changing their national legislation and adopting a new definition. A new treaty will set the legal framework for States to modify their legislation, and a monitoring mechanism, like a working group, would guarantee State compliance. The Central American Coalition against Human Trafficking and Smuggling cannot serve this role because it does not evaluate nations' responsibilities.⁴⁰¹ Alternatively, OAS's REMJA has the potential to serve as a monitoring mechanism in Central American, mirroring the successes of ETC's GRETA.⁴⁰² REMJA's proposed working group would encompass technical experts with no governmental ties to ensure impartiality. An effective working group would focus primarily on the success of Member States' implementation of a future convention.

Before a working group is established, a treaty needs to be in force. As the regional architect for treaty building in the Western Hemisphere, OAS has the best tools to construct a new regional framework. The first step is waiting for a Member State to propose human smuggling as a topic for the General Secretariat's consideration.⁴⁰³ The power is in the hands of Member States.

Although gang violence and poverty will continue to exist and influence migration patterns, a regional treaty combined with a working group will lead States in the right direction. Legal instruments are needed in international law to guarantee State compliance and responsibility. A successful treaty will do what most coyotes do—serve as a guide. As one Guatemalan smuggler once said, “if you don't have a compass, you can get lost.”⁴⁰⁴

401. Guatemala Obtains Presidency of Coalition, *supra* note 363.

402. EU Trafficking Convention, *supra* note 333, art. 36.

403. Procedures for Adopting Inter-American Treaties, *supra* 371, ¶ 3.

404. Interview with Antonio Martinez, Associated Press, *Human Smuggler: Business is Very Good*, CBS HOUSTON, (Jul. 14, 2014), <http://houston.cbslocal.com/2014/07/21/human-smuggler-business-is-very-good/>.

