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Human trafficking in Mexico and neighbouring countries: a review of protection approaches

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Introduction

Human trafficking is ranked as the fastest growing criminal enterprise in the world, competing with illicit arms trade for the place of second largest criminal industry after drugs trafficking.¹ Additionally, it constitutes a human rights violation that it is understood to amount to a crime against humanity and to be a “new form of slavery”.²

The overwhelming majority of trafficking victims are migrants in search of an economically better, but also safer future.³ Moreover, the socio-demographic characteristics of vulnerable migrants and asylum seekers show a strong resemblance to the profile of the people most vulnerable to human trafficking.⁴

This connection between migration and trafficking in human beings is particularly visible in Mexico and its neighbouring countries. The corridor through Mexico is one of the most used mixed migration routes in the world, with the U.S.-Mexico border being the most crossed border worldwide.⁵ Annually, hundreds of thousands irregular migrants pass through Mexico determined to get to the United States.

Many of these migrants make use of smugglers to help them get there. It is not uncommon that these smuggling agreements evolve into a trafficking situation. In addition, migrants in Mexico run a great risk of being kidnapped and subsequently being trafficked. It also occurs that (irregular) migrants travel for jobs, which simply turn out to be exploitative and/or of a different nature (as to the type of work, the salary paid and the labour conditions) than what was first agreed.

Many anti-trafficking strategies, whether at the international or national level, have adopted methods that include preventing the crime of trafficking, protecting the trafficking victim and

¹ UN Senior Officials Urge Countries to Boost their Efforts to Combat Human Trafficking, *UN News Centre*, 3 April 2012, available at: <http://www.un.org/apps/news/story.asp?NewsID=41696&Cr=human+trafficking&Cr1=> [last accessed: 21 April 2012].

² United Nations Office on Drugs and Crime (UNODC), Human Trafficking: <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html> [last accessed: 26 April 2012]; Council of Europe Convention on Action against Trafficking, Introduction at: http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/FSCovn_en.asp#TopOfPage [last accessed: 26 April 2012].

³ See Anti-Slavery International, *The migration-trafficking nexus: combating trafficking through the protection of migrants' human rights*, The Printed Word UK: 2003, available at: http://www.antislavery.org/includes/documents/cm_docs/2009/t/the_migration_trafficking_nexus_2003.pdf [last accessed: 23 April 2012] (hereinafter: *Anti-Slavery International 2003*), par. 1.

⁴ International Labour Organizations (ILO), *ILO Action against trafficking in human beings*, 12 February 2008, available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_090356.pdf [last accessed: 21 April 2012] (hereinafter: *ILO Action against trafficking 2008*), p. 5; The United States (U.S.) Department of State, *Trafficking in Persons Report 2011*, available at: <http://www.state.gov/j/tip/rls/tiprpt/2011/164232.htm> [last accessed: 21 April 2012] (hereinafter: *U.S. TIP Report 2011*), country chapter Mexico.

⁵ Comisión Interamericana de Derechos Humanos de la Organización de los Estados Americanos (CIDH), *Anexo al Comunicado de Prensa 82/11, Observaciones Preliminares de la Relatoría sobre los Derechos de los Migrantes de la CIDH a México*, 2 August 2011, available at: www.cidh.org/pdf/%20files/ANEXO.82-11.pdf [last accessed: 21 April 2012] (hereinafter: *CIDH 2011*), p. 3; World Bank Development Prospects Group, *Migration and Remittances Factbook 2011: Top Ten Country Groups*, p. 5, available at: <http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1199807908806/Top10.pdf> [last accessed: 21 April 2011] (hereinafter: *World Bank Migration and Remittances Factbook 2011*).

prosecuting the trafficker. However, in practice, the main focus has been on combating trafficking through law enforcement, including prosecution of the offenders and the crackdown of criminal networks that engage in trafficking.

This paper, in contrast, approaches the struggle against human trafficking from a migration and asylum protection perspective. Whereas many studies and policy approaches make a strict distinction between smuggling of migrants and trafficking in persons, this research, emphasizes the relationship between the crime of trafficking, smuggling of migrants, mixed migration flows and the crimes that migrants encounter while trying to make their way to, from and through Mexico.

The paper thus focuses on the problem of human trafficking in Mexico as a major country of origin, transit and destination. Given that the majority of the migrants and trafficking victims come from Central America and are destined to go to the United States, the paper takes an extended view to the United States as a country of destination and the four Central-American countries El Salvador, Guatemala, Honduras and Nicaragua as countries of origin.

The international definition of trafficking in persons

In 2000, the United Nations General Assembly reached agreement on a universal instrument that aims “to prevent and combat trafficking”, “to assist victims of such trafficking” and “to promote international cooperation towards those ends”.⁶ This Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children (hereinafter: Trafficking Protocol) supplements the United Nations Convention against Transnational Organized Crime.

The Trafficking Protocol entered into force on 25 December 2003⁷ and is currently ratified by 147 states, including Mexico, the United States and the aforementioned Central American four.⁸ It therewith provides the first internationally accepted definition of human trafficking.⁹ This definition, as laid down in Article 3 of the Trafficking Protocol, reads:

For the purposes of this Protocol:

- (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction,

⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, General Assembly Resolution A/RES/55/25, 15 November 2000, available at: <http://www2.ohchr.org/english/law/protocoltraffic.htm> [last accessed: 23 April 2012] (hereinafter: *Trafficking Protocol*), Article 2.

⁷ See UNODC: <http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html> [last accessed: 21 April 2012].

⁸ Mexico ratified the Trafficking Protocol on 4 March 2003, the United States ratified the Trafficking Protocol on 3 November 2005, El Salvador ratified the Trafficking Protocol on 18 March 2004, Guatemala accessed the Trafficking Protocol on 1 April 2004, Honduras accessed the Trafficking Protocol on 1 April 2008, Nicaragua accessed the Trafficking Protocol on 12 October 2004; United Nations Treaty Collection: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en [last accessed: 21 April 2012].

⁹ See also United Nations High Commissioner for Refugees (UNHCR), *International protection for trafficked persons and those who fear being trafficked*, 20 December 2007, ISSN 1020-7473, available at: <http://www.unhcr.org/refworld/docid/4c247bc32.html> [last accessed: 21 April 2012] (hereinafter: *UNHCR 2007*), p. 6.

of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

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

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

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

The definition consists of several components that represent an interlinked chain of events and that should all be met in order to constitute trafficking.¹⁰ Firstly, it defines the *act or action* that composes trafficking, being recruitment, transportation, transfer, harbouring or receipt of persons.¹¹ These acts might be carried out by the same or by different persons. The recruiter can be known or unknown to the trafficked victim. Sometimes, family members or boyfriends initiate the trafficking agreement, and many other varieties are imaginable.¹²

Secondly, the Trafficking Protocol lists the *means* by which trafficking is executed.¹³ These means always include some form of coercion, deceit, or force. Typically, violence or the threat of violence will be used against the victim or against family members. Sometimes fake promises of good jobs are made. In other situations, parents or relatives are paid to hand over their child or a family member.

Thirdly, the definition describes the *purpose or goal* of the act of trafficking: exploitation.¹⁴ The Trafficking Protocol clarifies that such exploitation minimally includes prostitution, other sexual exploitation (e.g. child pornography or sexual slavery), forced labour or service (e.g. forced labour in agriculture, mining, or domestic services), slavery or practices similar to slavery (e.g. child camel jockeys), servitude, and the removal of organs.

¹⁰ Aronowitz, A.A.: Understanding Trafficking in Human Beings. A Human Rights, Public Health, and Criminal Justice Issues, in Mangay Natarajan (ed.), *International Crime and Justice*, New York: Cambridge University Press, 2011 (hereinafter: *Aronowitz 2011*), p. 119.

¹¹ UNODC: <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html> [last accessed: 26 April 2012]; Aronowitz 2011, *supra* note 11, p. 119.

¹² See for instance International Organization for Migration (IOM), Hélène Le Goff & Thomas Lothar Weiss, *La Trata de Personas en México: Diagnóstico sobre la asistencia a víctimas*, June 2011, available at: http://www.oim.org.mx/pdf/La%20Trata%20de%20personas_diagnostico2.pdf [last accessed: 21 April 2012] (hereinafter: *IOM Diagnóstico 2011*), pp. 60-93 for a description of trafficking processes and the different possible elements, forms, recruiting and exploitation methods and locations.

¹³ UNODC: <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html>; Aronowitz 2011, *supra* note 11, p. 119.

¹⁴ UNODC: <http://www.unodc.org/unodc/en/human-trafficking/what-is-human-trafficking.html>; Aronowitz, *supra* note 11, p. 119.

It should be born in mind that initially consented labour agreements could still become trafficking when the nature of the job and the circumstances under which it is carried out, are different from what was agreed and the situation becomes one of exploitation. For example, domestic servants can become subject to bad labour conditions, forced sexual acts and abuse.

Although the definition of the Trafficking Protocol has been widely endorsed, the national implementation of this definition may diverge. Countries sometimes fail to include certain elements or add ones as deemed appropriate. For instance, the U.S. definition does not include the purpose of exploitation for the removal of organs.¹⁵ And in Mexico, a recently adopted new law on trafficking, which is expected to soon enter into force, explicitly adds forced marriages and illegal adoption as a form of exploitation.¹⁶

Trafficking in persons: scale and nature of the problem

It is very difficult to find accurate statistics on the exact scale of human trafficking. Not only is it in the traffickers' interest to work as clandestinely as possible, but also, victims are often too afraid or too ashamed to report to or to seek help from the authorities. This fear is stimulated by those traffickers who remove migration and identity documents from victims and who threaten that any contact with the authorities will immediately lead to their deportation.¹⁷

In addition, public officials in many countries lack the equipment, knowledge or training to detect trafficking victims, or they apply varying definitions of human trafficking, as a result of which they fail to identify victims.¹⁸ Finally, the use of varying methodology or the absence of precise record keeping undermines the accurate collection of data.¹⁹

The statistics that are available are based on the actual known number of victims, or on estimates. These numbers vary greatly and can "range from four million to twenty-seven million".²⁰ However, even from the minimum figures it is evident that the magnitude of the trafficking business is staggering. The International Labour Organisation (ILO) has (conservatively) estimated that a total of 2.4 million people worldwide have been trafficked into forced labour.²¹ The total number of trafficked people across borders, as well as within, as estimated by the U.S. government lies between 2 and 4 million annually.²²

¹⁵ 22 U.S.C. 7102 (8) and (9). See also United States Congressional Research Service, *Trafficking in Persons in Latin America and the Caribbean*, 9 September 2011, RL33200, available at: <http://www.unhcr.org/refworld/docid/4e96ba0f2.html> [last accessed: 21 April 2012] (hereinafter: *Congressional Research Service 2011*), p. 1.

¹⁶ Ley General para Prevenir, Sancionar y Erradicar los Delitos en Materia de Trata de Personas y para la Protección y Asistencia a las Víctimas de estos Delitos (General Act to Prevent, Sanction and Eradicate the Crimes related to Trafficking in Person and for the Protection of and Assistance to Victims of these Crimes), adopted on 20 March 2012, available at: <http://www.senado.gob.mx/index.php?ver=sp&mn=2&sm=2&id=13871&lg=61> [last accessed: 4 May 2012], Article 10.

¹⁷ See Anti-Slavery International 2003, *supra* note 3, par. 2.

¹⁸ Goodey, J.: Human Trafficking, in Fiona Brookman et al. (ed.), *Handbook on Crime*, Cullompton: Willon, 2010 (hereinafter: *Goodey 2010*), p. 699; ILO Action against trafficking 2008, *supra* note 4, p. 11; Aronowitz, *supra* note 10, p. 120.

¹⁹ Goodey 2010, *supra* note 18, p. 699; Aronowitz 2011, *supra* note 10, p. 120.

²⁰ Aronowitz 2011, *supra* note 10, p. 120, referring to U.S. Department of State 2008 estimations.

²¹ ILO Action against trafficking 2008, *supra* note 4, p. 3.

²² Congressional Research Service 2011, *supra* note 15, p. 3.

Human trafficking is tremendously attractive for offenders, as it is a highly lucrative, but low-risk business. Despite a focus on prosecution efforts, chances of being caught are slim and in most countries the crime of trafficking is rarely prosecuted.²³ It has been estimated that the annual profits made of trafficking range from 5-7 billion to 32 billion U.S. dollars.²⁴ The International Organization for Migration (IOM) has calculated that in Latin America alone, sex trafficking “generates some 16 billion U.S. dollars’ worth of business annually”.²⁵

Trafficking and smuggling

In the international approach to prevent and combat trafficking, a clear distinction is drawn between trafficking and smuggling of human beings. By the same resolution through which the Trafficking Protocol was created, the General Assembly adopted a second supplementary Protocol to the Convention Against Transnational Organized Crime: the Protocol against the Smuggling of Migrants, by Land, Sea, and Air.²⁶

This Protocol entered into force on 28 January 2004 and currently counts 129 ratifications.²⁷ It defines smuggling as “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.”²⁸

There are some important differences between trafficking and smuggling. Essential to trafficking is that the act results in a situation of exploitation. Although the process of smuggling can be exploitative in nature, the purpose of it is to bring persons across a border, after which the smuggled person is in principle free to continue his/her own way. Smuggling thus involves crossing international borders, while trafficking can also occur within a country.

In addition, the trafficking definition recognizes that the consent of a trafficked victim is irrelevant when the coercive means as set out in that definition are used. In the case of children, such consent is always considered to be absent, regardless of the means used. Trafficked persons are therefore considered victims.²⁹

Smuggled persons, however, knowingly and intently seek the assistance of smugglers to help them cross the border. Although the process of smuggling may be dangerous, degrading, and

²³ Anti-Slavery International 2003, *supra* note 3, par. 2.

²⁴ Aronowitz 2011, *supra* note 10, p. 118; ILO Action against trafficking 2008, *supra* note 4, p. 1.

²⁵ As cited by Congressional Research Service 2011, *supra* note 15, p. 4.

²⁶ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime A/RES/55/25 (15 November 2000), available at: <http://www2.ohchr.org/english/law/organizedcrime.htm> [last accessed: 23 April 2012] (hereinafter: *Smuggling Protocol*).

²⁷ Including Mexico, the United States, El Salvador, Guatemala, Honduras, and Nicaragua, see: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en [last accessed: 21 April 2011].

²⁸ Smuggling Protocol, *supra* note 26, Article 3(a).

²⁹ Congressional Research Service 2011, *supra* note 15, p. 2.

deceitful, it started out with the consent of the migrant.³⁰ The Smuggling Protocol, therefore, sees smuggled migrants as complicit in the crime of smuggling, yet they are not considered liable for criminal conduct.³¹

Some organisations, such as the ILO, argue that a clear distinction should be drawn between strategies that aim to combat smuggling and those that fight trafficking, as a diffusion of the two could be counter-productive to effective law-enforcement.³² The ILO asserts that “(d)istinction in policies combating trafficking from those addressing smuggling may be necessary to assure consistent defence of migrant workers while seeking to suppress organized crime.”³³

Nevertheless, the ILO recognises that such a distinction can be arbitrary and that “what started as a smuggling situation can change into a trafficking one.”³⁴ For example, the migrant who needed to pay a certain amount to be smuggled across a border may find himself in a situation of debt bondage, in which he is forced to protracted labour in order to pay of his (supposed) debt.³⁵ In fact, smuggled migrants are considered vulnerable to human trafficking.³⁶

The Mexican situation

Human trafficking in Mexico and Central America has received relatively little attention in comparison to trafficking in Asia and Europe.³⁷ The majority of the research addressing such topics as migration, smuggling and trafficking in this region, is dedicated to the problems around the U.S.-Mexico border and the illegal crossing and smuggling of migrants into the United States. The situation of migrants within Mexico has only more recently become topic of attention to a larger audience. The following overview of the mixed migration flow, from through and to Mexico aims to help understand the complexity of these flows and its connection to smuggling and trafficking.

³⁰ See also United Nations High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked, 7 April 2006, HCR/GIP/06/07, available at:

<http://www.unhcr.org/refworld/docid/443679fa4.html> [last accessed: 21 April 2012] (hereinafter: UNHCR 2006), p. 3 and UNHCR 2007, *supra* note 9, p. 5.

³¹ Smuggling Protocol, *supra* note 26, Article 5. See also Congressional Research Service 2011, *supra* note 15, p. 2.

³² ILO Action against trafficking 2008, *supra* note 4, p. 11. See also International Labour Organization (ILO), *Perspectives on Labour Migration. Getting at the Roots: Stopping Exploitation of Migrant Workers by Organized Crime*, 2003, available at:

<http://www.ilo.org/public/english/protection/migrant/download/pom/pom1e.pdf> [last accessed: 21 April 2012] (hereinafter: *ILO Perspectives on Labour Migration 2003*), p. 6.

³³ ILO Perspectives on Labour Migration 2003, *supra* note 32, p. 7.

³⁴ *Ibid.*

³⁵ See for the grey area between trafficking and smuggling: Anker, Van den C., Making Human Rights Accessible: The Role of Governments in Trafficking and Migrant Labor Exploitation, in Alison Brisk & Austin Choi-Fitzpatrick (eds.), *From Human Trafficking to Human Rights: Reframing Contemporary Slavery*, Philadelphia: University of Pennsylvania Press, 2012, pp. 157-171 (hereinafter: *Van den Anker 2012*), p. 162

³⁶ UNHCR 2007, *supra* note 9, p. 5.

³⁷ See also Congressional Research Service 2011, *supra* note 15, p. 5, comparing Latin America and the Caribbean to Europe and Asia.

Mixed migration flows from, through and to Mexico

With 11,9 million nationals living abroad, Mexico is the number one country with the highest emigrant rate.³⁸ Most of the Mexican emigrants live in the United States. Each year, hundreds of thousands of Mexicans legally migrate to the United States. Between 2000 and 2006 over 2,5 million Mexicans migrated to the United States, while in 2007 alone some 560,000 Mexican nationals did.³⁹ One out of every three immigrants in the United States are of Mexican descent, adding up to a total of 11,6 million Mexican immigrants living in the United States.⁴⁰

In addition to being a source country for economic migrants, Mexico is also country of origin to asylum seekers. Worldwide, as at January 2011, 6,816 asylum seekers from Mexico have been granted refugee status, have received complementary protection or were in a refugee-like situation waiting for their status to be verified, while 9,970 asylum applications from Mexican nationals were pending procedure.⁴¹ Again, the majority of these applications are filed in the United States, which received 6,133 applications in 2011.⁴²

Overall, with more than one million legal immigrants annually, the United States is the “top country of destination”.⁴³ It is also the number one receiving industrialized country of asylum applications, counting for 74,000 new asylum applications in 2011.⁴⁴ Additionally, the United States is the destination for a great number of irregular migrants. It is estimated that in 2010, the United States hosted 11,2 million irregular migrants.⁴⁵ The main nationalities among the irregular migrants are Mexicans (59 per cent) and Central Americans (15 per cent).⁴⁶

Countless more migrants attempt, but fail to cross the U.S. border as they die on their way, are stopped at the border, or are deported.⁴⁷ The 2003 IOM World Migration Report informed that around the period of reporting, 1,5 million irregular migrants were arrested at

³⁸ Leaving India in second place with 11,4 million emigrants: World Bank Migration and Remittances Factbook 2011, *supra* note 5, p. 3.

³⁹ United Nations Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante: addendum: mission to Mexico (9-15 March 2008)*, 24 March 2009, A/HRC/11/7/Add.2, available at: <http://www.unhcr.org/refworld/docid/49e88e952.html> [last accessed: 23 April 2012] (hereinafter: *UN Special Rapporteur on Migrants Bustamante 2008*), p. 9.

⁴⁰ International Organization for Migration (IOM), *World Migration Report 2011: Communicating Effectively about Migration*, available at: http://publications.iom.int/bookstore/free/WMR2011_English.pdf [last accessed: 22 April 2012], (hereinafter: *IOM World Migration Report 2011*), p. 64.

⁴¹ UNHCR Regional Operations File – Latin America: Mexico, Statistical Snapshot; <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e492706&submit=GO#> [last accessed: 22 April 2012].

⁴² Of which 104 were granted, 1,073 denied, 125 abandoned, and 1,492 withdrawn; The United States (U.S.) Department of Justice, Executive Office for Immigration Review Office of Planning, Analysis, and Technology, *Immigration Courts FY 2011 Asylum Statistics*, February 2012, available at: <http://www.justice.gov/eoir/efoia/FY11AsyStats-Current.pdf> [last accessed: 22 April 2012].

⁴³ IOM World Migration Report 2011, *supra* note 40, p. 64.

⁴⁴ UN High Commissioner for Refugees (UNHCR), *Asylum Levels and Trends in Industrialized Countries*, March 2012, available at: <http://www.unhcr.org/4e9beaa19.html> [last accessed: 22 April 2012] (hereinafter: *UNHCR Asylum Levels and Trends 2011*), p. 3.

⁴⁵ IOM World Migration Report 2011, *supra* note 40, p. 63.

⁴⁶ Hanson, G.H., *The Economics and Policy of Illegal Immigration in the United States*, San Diego: Migration Policy Institute, December 2009, available at: <http://www.migrationpolicy.org/pubs/Hanson-Dec09.pdf> [last accessed: 22 April 2012] (hereinafter: *Hanson 2009*), p. 5.

⁴⁷ UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 39, p. 8.

the U.S.-Mexico border every year, while it estimated that on a daily basis 4,000 irregular migrants succeeded in make it across.⁴⁸

As the principal overland gateway to the north, Mexico has become a major transit country. It is a great challenge to obtain trustworthy statistics on the actual amount of in-transit irregular migrants and undocumented asylum seekers entering and passing through Mexico. Mexico's almost 1100-mile southern border with Guatemala and Belize is extremely porous, with only a few regular border control posts.⁴⁹ Estimations of the number of undocumented migrants annually entering Mexico lie between 140,000 and 400,000.⁵⁰ It is believed that the majority of these migrants are in transit on their way to the United States.⁵¹

However, for a significant number of migrants and, to a lesser extent, for asylum seekers, Mexico is also the country of their destination. The Mexican migrants heading northwards leave many jobs available, especially in the agricultural and domestic service industry.⁵² It is estimated that just in the Southern state of Chiapas, there are 250,000-300,000 migrant foreign workers employed in agriculture, such as in the coffee plantations.⁵³ The vast majority of these migrant workers are Guatemalans, and secondly other Central Americans.⁵⁴

UNHCR statistics on Mexico hold that, as at January 2011, there were 1,395 recognized refugees in Mexico, while 172 asylum seekers were awaiting the result of their procedure.⁵⁵ Numbers provided by the Mexican Commission for Refugee Aid (*Comisión Mexicana de Ayuda al Refugiado*, COMAR)⁵⁶ demonstrate that in the timeframe 2002-2010, Mexico received 4,251 applications for asylum, of which 845 were recognized as refugees.⁵⁷ In 2011, the numbers of applications and recognized refugees were 752 and 259, respectively.⁵⁸ In that same year, Mexico also recognized 26 people as in need of complementary protection.⁵⁹

⁴⁸ That means that annually the number of irregular migrants that succeed in crossing the border almost equals the number of migrants that are apprehended: International Organization for Migration (IOM), *World Migration Report 2003, Managing Migration – Challenges and Responses for People on the Move*, available at: http://publications.iom.int/bookstore/free/WMR_2003.pdf [last accessed: 22 April 2012] (hereinafter: *IOM World Migration Report 2003*), p. 60.

⁴⁹ Most checkpoints are in-land: Verduzco, G. & De Lozano, M.I.: *Migration from Mexico and Central America to the United States: Human Insecurities and Paths for Change*, in T.D. Truong & D. Gasper (eds.), *Transnational Migration and Human Security*, Hexagon Series on Human and Environmental Security and Peace 6, Berlin Heidelberg: Springer-Verlag, 2011, pp. 41-56 (hereinafter: *Verduzco & De Lozano 2011*), p. 45-46.

⁵⁰ CIDH 2011, *supra* note 5, p. 3.

⁵¹ *Ibid.*

⁵² UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 39, p. 8.

⁵³ *Ibid.*, p. 11.

⁵⁴ Verduzco & De Lozano 2011, *supra* note 49, p. 47; UN Special Rapporteur Migrants Bustamante 2008, *supra* note 39, p. 11.

⁵⁵ UNHCR Regional Operations File – Latin America: Mexico, Statistical Snapshot; <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e492706&submit=GO#> [last accessed: 22 April 2012].

⁵⁶ The COMAR is the government agency that assesses asylum claims, grants or denies status, and assists refugees and people in need of complementary protection.

⁵⁷ In addition, 1,125 asylum seeker terminated and 671 abandoned the procedure: Secretaría de Gobernación (SEGOB), Comisión Mexicana de Ayuda a Refugiados (COMAR), *Estadísticas Globales 2002-2010: Población Refugiada en México*, available at: http://www.comar.gob.mx/work/models/COMAR/Resource/128/1/images/estadistica_comar00910%284%29.pdf [last accessed: 21 April 2012] (hereinafter: *SEGOB/COMAR 2002-2010*).

⁵⁸ Katya Somohano Silva, COMAR, Mexico City, Telephone interview, 23 March 2012.

⁵⁹ *Ibid.*

In the period 2002-2010, 98 different nationalities were accounted for among the asylum applications.⁶⁰ However, most asylum applications in Mexico come from the Central American countries El Salvador, Honduras and Guatemala.⁶¹ Generally, the United States, Mexico and Canada have seen an increase in the number of asylum applications from Central Americans, as a result of the rise of violence in Central American countries.⁶²

Finally, it has been estimated that around 3.5 million, mostly indigenous, Mexicans have migrated internally.⁶³ A large part of the internal movement is for economic reasons; people moving from rural to urban areas or circulating through Mexico to find work, especially in seasonal agricultural labour.⁶⁴

However, according to the Internal Displacement Monitoring Centre (IDMC), an international body established by the Norwegian Refugee Council, numerous Mexicans also try to escape (drug) violence and (political and religious) conflict, which results in their internal displacement.⁶⁵ The IDMC calculated that in 2011 the number of internally displaced persons reached 160,000.⁶⁶

Dangers on the road

For a multitude of reasons, the journey of migrants from the south to the north of Mexico is exceptionally dangerous.⁶⁷ The first source of danger is the freight train, known as ‘the train of death’.⁶⁸ Most migrants jump on this train just north of Tapachula, Chiapas in the south of Mexico, to help them move northwards and cover large territory in a cheap manner.

There are numerous accounts of people falling off and dying or losing limbs during the train ride. These accidents sometimes happen when members of criminal networks or public officials force migrants to come off the train. United Nations (UN) Special Rapporteur on the Human Rights of Migrants Bustamante relayed having received reports of “frequent operations during which the police and private security forces use extreme violence, beat

⁶⁰ SEGOB/COMAR 2002-2010, *supra* note 57.

⁶¹ *Ibid.*

⁶² United Nations High Commissioner for Refugees (UNHCR), *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, available at: <http://www.unhcr.org/refworld/docid/4bb21fa02.html> [last accessed: 22 April 2012] (hereinafter: *UNHCR 2010*), p. 1.

⁶³ UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 39, p. 9; CIDH 2011, *supra* note 5, p. 3.

⁶⁴ UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 39, p. 9.

⁶⁵ The IDMC explains more thoroughly the possible causes for displacement, as well as its context and the responses to address the vulnerable position of internally displaced persons in: Internal Displacement Monitoring Centre (IDMC), *Internal Displacement due to criminal and communal violence*, 25 November 2011, available at: [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/677BB8CBA2F6DAB9C1257953004A18BE/\\$file/mexico-overview-nov2011.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/677BB8CBA2F6DAB9C1257953004A18BE/$file/mexico-overview-nov2011.pdf) [last accessed: 22 April 2012] (hereinafter: *IDMC 2011*), p. 4-8.

⁶⁶ Internal Displacement Monitoring Centre (IDMC), *Global Overview 2011: People internally displaced by conflict and violence*, April 2012, available at: [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/081F7B080CF6371AC12579E40046EDA9/\\$file/global-overview-2011.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/081F7B080CF6371AC12579E40046EDA9/$file/global-overview-2011.pdf) [last accessed: 4 May 2012], p. 59.

⁶⁷ Amnesty International classifies it as one of the most dangerous migration routes in the world: Amnesty International Report, *Invisible Victims: Migrants on the Move in Mexico*, 28 April 2010, available at: <http://amnesty.org/en/library/asset/AMR41/014/2010/en/8459f0ac-03ce-4302-8bd2-3305bdae9cde/amr410142010eng.pdf> [last accessed: 23 April 2012] (hereinafter: *Amnesty International 2010*), p. 5.

⁶⁸ Verduzco & De Lozano 2011, *supra* note 49, p. 48.

people or throw them out of the train, causing serious accidents which can result in the amputation of limbs (arms or legs)”.⁶⁹

In addition, various NGOs report on infinite accounts of abuses, assaults, beatings, torture, threats, rape and other sexual violence, extortions, and even killings.⁷⁰ These gross human rights violations are said to be committed by criminal networks, operating along the train line and other migration routes, but also by local and municipal police, immigration officials, train personnel, who work either on their own behalf or in collusion with criminal organizations.⁷¹

Furthermore, in the last years, Mexico has seen an explosion in the amount of kidnappings of irregular migrants, among who could be small numbers of asylum seekers.⁷² The Mexican National Commission on Human Rights (*Comisión Nacional de los Derechos Humanos*, CNDH) informed that in a six-month period between 2008 and 2009, 9,758 migrants had been kidnapped on 198 occasions.⁷³ Even a higher number was registered in the period April-September 2010, when on 214 occasions a total of 11,333 migrants were kidnapped.⁷⁴ The CNDH emphasizes that it counted the minimum numbers in testimonies, therefore that the problem could in fact be bigger than these numbers demonstrate.⁷⁵

Survivor testimonies collected by NGOs and the IOM generally describe the following mode of operation of these kidnappings: migrants are forced to get off the freight train, taken to a so-called ‘safe house’ (which is a location where migrants are deprived of their liberty) and forced to reveal telephone numbers of their families, living either in their home countries or in the United States, who are then told to pay a ransom.⁷⁶

In the process, migrants are often tortured and raped in order to force them to reveal information, or for no apparent reason. Migrants are beaten in front of other migrants, threatened, and sometimes end up getting killed for not being able to pay the ransom, although paying the ransom does not necessarily guarantee one’s safety.⁷⁷ In 2010, a mass

⁶⁹ UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 39, p. 18.

⁷⁰ See for instance Amnesty International 2010, *supra* note 67; Washington Office on Latin America (WOLA) & Centro de Derechos Humanos Miguel Agustín Pro Juárez, A.C. (Center Prodh), *A Dangerous Journey through Mexico: Human Rights Violations against Migrants in Transit*, December 2010, available at: <http://www.wola.org/sites/default/files/downloadable/Mexico/2010/DangerousJourney.pdf> [last accessed: 24 April 2012] (hereinafter: *WOLA & Center Prodh 2010*).

⁷¹ Amnesty International 2010, *supra* note 67, p. 21-24; Verduzco & De Lozano 2011, *supra* note 49, p. 49-51; United Nations Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN CMW), Concluding Observations: Mexico, Fourteenth Session 4-8 April 2011, 3 May 2011, CMW/C/MEX/CO/2, available at: <http://www2.ohchr.org/english/bodies/cmw/cmws14.htm> [last accessed: 23 April 2012] (hereinafter: *UN CMW 2011*), p. 6

⁷² Amnesty even qualifies the practice of kidnappings as a routine: Amnesty International 2010, *supra* note 73, p. 11.

⁷³ The CNDH is comparable to a national Ombudsman: Comisión Nacional de Derechos Humanos (CNDH), *Informe Especial sobre los casos de secuestro en contra de migrantes*, 22 February 2011, available at: <http://www.cndh.org.mx/node/35> [last accessed: 22 April 2012] (hereinafter: *CNDH 2011*), p. 12.

⁷⁴ *Ibid.*, p. 26.

⁷⁵ *Ibid.*, p. 23.

⁷⁶ See IOM Diagnóstico 2011, *supra* note 12, p. 67, Amnesty International 2010, *supra* note 67, p. 11, and WOLA & Center Prodh 2010, *supra* note 70, p. 3.

⁷⁷ IOM Diagnóstico 2011, *supra* note 12, p. 66; Amnesty International 2010, *supra* note 67, p. 11; CIDH 2011, *supra* note 5, p. 9.

grave was discovered with the bodies of 72 migrants, who had supposedly refused to join the criminal organization.⁷⁸ Numerous migrants simply disappear, never to be found again.⁷⁹

In situations where migrants cannot pay the ransom (or even if they can), they might be forced to provide services to the gang or cartel, as a way of paying of their ‘debt’. This may involve sexual exploitation, domestic servitude, and being forced to recruit other migrants to join the organization or gang.⁸⁰ In other words, these kidnappings can evolve into a trafficking situation.

Among the irregular migrants, women and children are the most vulnerable, as they form a large percentage of the migrant group and run a greater risk of being trafficked, raped, and otherwise sexually and physically abused or exploited.⁸¹ It is estimated that six in every ten female migrants will be subjected to some form of sexual abuse during their journey through Mexico.⁸² Amnesty International reports that some smugglers even provide an anti-conception injection before women enter Mexico, to lower the risk of getting pregnant.⁸³

When migrants have succeeded in transiting Mexico, they face the difficult task of crossing the U.S.-Mexico border. In the last two decades, the United States has greatly expanded its border control efforts.⁸⁴ Along parts of the border, the United States has erected a wall, increased border patrols and enhanced surveillance techniques.⁸⁵

These efforts have not withheld migrants from trying to move to the United States. Instead, it is argued that enhanced border control has pressured migrants into more frequently using the services of smugglers to cross the border and into taking more dangerous routes through the scourging desert and relentless rivers.⁸⁶ Reportedly, between 1996-2008, 4,000 migrants died while trying to cross the United States-Mexico border as a result of hypothermia and drowning.⁸⁷

Push and pull factors

Even though most migrants are aware of the dangers they will encounter on their way north, especially in Mexico, they are nonetheless willing to take these risks in order to escape their misery. As one migrant from El Salvador stated, while referring to the deplorable economic and public security situation in Central America: “We are going to die, one way or another.”⁸⁸

The primary reason for leaving and moving northward is the search for an economically better future. Unemployment rates in Central American countries are among the highest in the world, up to 42,9 per cent in Guatemala and 44,6 per cent in Honduras.⁸⁹ In addition, enormous poverty prevails. In 2008, 39 per cent of Ecuadoreans lived in poverty, in El

⁷⁸ WOLA & Center Prodh 2010, *supra* note 70, p. 1.

⁷⁹ Valladares, D., Following the Trail of Missing Migrants, *IPS*, 28 July 2011, available at: <http://ipsnews.net/news.asp?idnews=56674> [last accessed: 22 April 2012]; CIDH 2011, *supra* note 5, p. 9.

⁸⁰ See IOM Diagnóstico 2011, *supra* note 12, p. 67.

⁸¹ UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 39, p. 9.

⁸² Amnesty International 2010, *supra* note 67, p. 5; UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 39, p. 15.

⁸³ Amnesty International 2010, *supra* note 67, p. 15.

⁸⁴ See for more on increased border control efforts below under “Border control”.

⁸⁵ UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 39, p. 9.

Salvador 47,5 per cent, in Guatemala 54,8 per cent, and the number of people living in poverty in Honduras in that year, was as high as 68,9 per cent.⁹⁰ Interviews the IOM held with trafficking victims from the region showed that for more than 76 per cent of the victims, the “American dream”, or the search for better socioeconomic opportunities (also in Mexico) was the main reason for heading north.⁹¹

These push factors are reinforced by strong pull factors, essentially being the high demand for low-skilled or cheap labour in the United States.⁹² Supposedly, it will take an irregular Mexican migrant in the United States no more than two weeks to find a job.⁹³ Moreover, reportedly they are paid up to nine times more than what they would make in Mexico.⁹⁴

This situation is reflected in the labour market of Mexico. Mexicans heading north leave their jobs, which increases the demand for low-skilled, particularly agricultural, labour in Mexico.⁹⁵ It is said that Guatemalan migrant workers earn up to 50 per cent more than what they would be paid in Guatemala, even though this is less than what their Mexican co-workers get paid.⁹⁶

The second main motive for Central Americans and Mexicans to decide to migrate is the high level of violence in (some parts of) these countries. Since more or less the early 1990s, Central American countries have seen an enormous increase in gang membership, gang influence, and gang-related violence.

At the end of the civil wars being fought in the Central American region in the 1980s, the governmental void provided fertile ground for gangs (in Spanish: *maras*) to develop their networks. As a result of the wars, many weapons were readily available, former soldiers had difficulty reintegrating in society, there was a complete lack of a judicial and societal system, people had grown accustomed to high levels of violence, and enormous poverty prevailed.⁹⁷

Simultaneously, the U.S. government started to deport Central Americans residing in the United States, who were members of the U.S. gangs that had begun to develop in the 1980s. With their need for a social network in a country mostly unfamiliar to them, the deported

⁸⁶ Cicero-Domínguez, S.A., 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 (2005), available at: <http://www.law.northwestern.edu/journals/jihr/v4/n2/2> [last accessed: 22 April 2012] (hereinafter: *Cicero-Domínguez 2005*), par. 50-51.

⁸⁷ UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 39, p. 9; Verduzco & De Lozano, *supra* note 49, p. 48.

⁸⁸ Shoichet, C.E., Despite danger, Central Americans migrate through Mexico, *CNN*, 20 May 2011, available at: <http://edition.cnn.com/2011/WORLD/americas/05/19/mexico.migrants/index.html?iref=allsearch> [last accessed: 22 April 2012].

⁸⁹ IOM Diagnóstico 2011, *supra* note 12, p. 53.

⁹⁰ CNDH 2011, *supra* note 78, p. 7.

⁹¹ IOM Diagnóstico 2011, *supra* note 12, p. 55.

⁹² Verduzco & De Lozano 2011, *supra* note 49, p. 42; Anti-Slavery International 2003, *supra* note 3, par. 3.1.

⁹³ Anti-Slavery International 2003, *supra* note 3, par. 3.1.

⁹⁴ IOM World Migration Report 2003, *supra* note 48, p. 66.

⁹⁵ UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 39, p. 11.

⁹⁶ *Ibid.*

⁹⁷ United Nations High Commissioner for Refugees (UNHCR), *Living in a World of Violence: An Introduction to the Gang Phenomenon*, July 2011, PPLA/2011/07, available at: <http://www.unhcr.org/refworld/docid/4e3260a32.html> [last accessed: 22 April 2012] (hereinafter: *UNHCR Gang Phenomenon 2011*), p. 8-9.

gang members sought these gang contacts, brought in their criminal skills and therewith fuelled the growth of the gang phenomenon in Central America.⁹⁸

Over the years, the United States has continued to deport gang members to Central America, as well as Mexico. Allegedly, even today “70 per cent of gang members who are picked up by the police are deported.”⁹⁹ As at 2005, a total number of 340,000 ex-convicts had been deported to Mexico.¹⁰⁰ However, as often so, gang members are deported for little more than being suspected of gang-affiliation and for a lack of documentation, without ever having been convicted for a specific crime.¹⁰¹

The United States deports gang members to their home countries on weekly private flights.¹⁰² Expelled gang members attempt to return to the United States on such a frequent basis that the UN Special Rapporteur on the Human Rights of Migrants Bustamante emphasized the use of such words as a “revolving door”, a “merry-go-round”, and an “unending chain”.¹⁰³ In their home countries and on their way back to the United States, the gang members re-establish and expand contacts with gangs, therewith reinforcing their networks from Central America all the way through Mexico and back to the United States.¹⁰⁴

The existence of these gangs or *maras* threatens the lives and safety of Central Americans in various ways. Gangs forcibly recruit new gang members, especially young men, but also women and girls. Female gang members are frequently used for sexual servitude, prostitution, or trafficking, and increasingly for criminal activity.¹⁰⁵ Recruits who refuse to become members or former members, who desert the gang, run the risk of repercussions against themselves or their families.¹⁰⁶ This equally applies to business owners who refuse to pay the ‘*renta*’, which is “a parallel system of illegal taxation”, operated by gangs.¹⁰⁷

Other persons running risks of reprisals, threats, and violence are witnesses of crimes committed by gangs, law enforcement agents, who participate in the fight against gangs and have been identified by gang members, but also NGO-workers, human rights defenders and any other group or activist that shows criticism towards the gangs and/or the governmental tactics to crackdown on these gangs.¹⁰⁸ The wave of violence caused by (inter) gang warfare and criminal activities, pushes people to go on the move in search of a safer environment.¹⁰⁹

⁹⁸ *Ibid.*, p. 8.

⁹⁹ UN Special Rapporteur Migrants Bustamante 2008, *supra* note 39, p. 10.

¹⁰⁰ Cicero-Domínguez 2005, *supra* note 92, par. 58.

¹⁰¹ UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 39, p. 10.

¹⁰² *Ibid.*

¹⁰³ UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 39, p. 10-11.

¹⁰⁴ UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 7, p. 11. On p. 10 of his report UN Special Rapporteur on Migrants Bustamante writes: “One cannot overstate the regional dimension of this phenomenon and its consequences, with Mexico at the centre”.

¹⁰⁵ UNHCR Gang phenomenon 2011, *supra* note 97, p. 19.

¹⁰⁶ United Nations High Commissioner for Refugees (UNHCR), *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, available at: <http://www.unhcr.org/refworld/docid/4bb21fa02.html> [last accessed: 22 April 2012] (hereinafter: *UNHCR 2010*), p. 4.

¹⁰⁷ *Renta* literally means rent, but in practice really is a form of extortion by gang members who demand money or services from business owners and operators of public transportation; UNHCR Gang phenomenon, *supra* note 97, p. 23; UNHCR 2010, *supra* note 106, p. 4.

¹⁰⁸ UNHCR 2010, *supra* note 106, p. 5.

¹⁰⁹ According to the IOM, this is an important factor that unchains the movement of particularly migrants from Honduras and El Salvador: IOM Diagnóstico 2011, *supra* note 12, p. 55-56.

In Mexico, in addition to gangs, violent groups also come in the form of criminal organised networks and drug cartels fighting amongst each other and against the government.¹¹⁰ Violence by criminal organisations has particularly affected or has been targeted at migrants, people living in cartel territory, and small business owners. These people are harassed, extorted, threatened, forced to leave their houses or to join the ranks of criminal groups, and even assassinated.¹¹¹

The migration – smuggling – trafficking connection

Several factors contribute to the fact that irregular migrants and asylum seekers as such are more vulnerable to falling victim to trafficking and other crimes. They lack resources, documents and knowledge of the laws of the country and they are unfamiliar with the territory they are travelling through.¹¹² Also, they choose more dangerous routes through obscure and isolated locations to avoid contact with the authorities.¹¹³ Their wish and sometimes despair to reach the United States makes them even more vulnerable to (fake) offers of jobs and transfer.¹¹⁴

As a result of the dangers on the road and the difficulty of crossing the U.S.-Mexico border, migrants increasingly resort to using smugglers (or as they are called in the region ‘*coyotes*’ or ‘*polleros*’).¹¹⁵ Smuggling and trafficking rings are often run by the same networks.¹¹⁶ Smugglers might sell migrants to a trafficker or smuggled migrants may be forced to pay off their smuggling fee, under dire working conditions and at unfairly low rates.¹¹⁷ This makes it more difficult to distinguish the act of trafficking from smuggling. Adding to the complexity is the fact that criminal groups involved in smuggling and trafficking also conduct kidnappings of migrants or are connected to groups that engage in kidnappings. Sometimes a kidnapping turns into a trafficking situation.

Several other elements contribute to the diffusion of the crimes of trafficking and smuggling and to trafficking being intertwined with the migration flow through Mexico. First of all, according to the CNDH and the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (UN CMW), public officials, especially local and municipal police, but also personnel of the National Institute of Migration (*Instituto*

¹¹⁰ The IDMC is of the opinion that this violence “effectively amounts to internal armed conflict”: IDMC 2011, *supra* note 65, p. 3.

¹¹¹ See IDMC 2011, *supra* note 65, p. 3-6.

¹¹² Verduzco & De Lozano 2011, *supra* note 49, p. 49; Comisión Nacional de Derechos Humanos (CNDH) y Centro de Estudios e Investigación en Desarrollo y Asistencia Social A.C. (CEIDAS), *Diagnóstico de las condiciones de vulnerabilidad que propician la trata de personas en México*, 2009, available at: http://www.iberopuebla.edu.mx/micrositios/observatorioviolencia/bibliotecavirtual/Genero_%20y_Violencia/2_Diagnostico_Trata_de_Personas_CEIDAS_CNDH.pdf [last accessed: 22 April 2012] (hereinafter: *CNDH & CEIDAS 2009*), p. 76.

¹¹³ CNDH & CEIDAS 2009, *supra* note 114, p. 76.

¹¹⁴ *Ibid.*, p. 77.

¹¹⁵ Congressional Research Service 2011, *supra* note 15, p. 3.

¹¹⁶ See UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 39, p. 11;

¹¹⁷ CIDH 2011, *supra* note 5, p. 9; Congressional Research Service 2011, *supra* note 8, p. 3; IOM Diagnóstico 2011, *supra* note 16, p. 23.

Nacional de Migración, INM),¹¹⁸ collude in or condone the crime of trafficking on a disturbingly frequent basis.¹¹⁹

Secondly, there are reports that migrants are recruited (for gang membership or trafficking purposes) directly outside and sometimes even in the shelters that try to provide protection to migrants.¹²⁰ Thirdly, traffickers or others involved in committing or supporting the crime might be the same Central American or Mexican gang members that the United States previously expelled from its territory. Or, Central American migrants may have been forced to participate in criminal activities targeted at migrants.¹²¹

Finally, translation might cause for confusion, given that the word for trafficking in Spanish is '*trata*', while the word for smuggling more closely resembles the English word for trafficking, namely '*tráfico*'. It is not uncommon that people, including public officials, use the word '*tráfico*' where they actually refer to a trafficking situation or that information about smuggling is translated into English as trafficking.¹²²

Furthermore, migrants traveling to Mexico to work in, for instance, agriculture, restaurants and domestic work, are at risk of ending up in an exploitative situation that can be considered trafficking. Generally, labour conditions in these sectors are often below standards and there is little control on the working conditions and the salaries paid.¹²³ However, bad labour conditions do not necessarily constitute trafficking. It does become trafficking when the person involved is deceived, forced or otherwise coerced to do a certain kind of work and ends up in an exploitative situation.

This is for instance the case when Central Americans are recruited to work in the coffee plantations or domestic service in (the southern states) of Mexico and are promised a certain salary, but after arrival find out that their salaries are far less and their working hours much longer than what is allowed by law. At the same time, they might be threatened, abused or otherwise mistreated. In these situations it is difficult to recognise that a person is a victim of trafficking. It becomes a little more obvious when women were recruited to work in bars and restaurants, but instead end up being forced into prostitution.

Anti-trafficking strategies and policy approaches

Anti-trafficking policy strategies generally tend to adopt one or more of the following approaches: a law-enforcement approach (which perceives human trafficking as a crime and

¹¹⁸ The INM is a decentralized body of the Secretariat of Internal Affairs and is in charge with executing the immigration legislation. Among its tasks are processing and assessing applications for legalized temporary or permanent stay in Mexico and managing the migrant holding centres. See: http://www.inm.gob.mx/index.php/page/Que_es_el_INM/en.html [last accessed: 24 April 2012].

¹¹⁹ CNDH 2011, *supra* note 73, p. 28; UN CWM 2011, *supra* note 76, p. 5; Ballinas, V. & Becerril, A., Comisionada del INM, a comparecer, *La Jornada*, 2 July 2009, available at: <http://www.jornada.unam.mx/2009/07/02/politica/014n3pol> [last accessed: 22 April 2012]; Urrutia, A., La gente del INM lleva a *Los Zetas* ante los migrantes: cura de Tenosique, *La Jornada*, 18 September 2011, available at: <http://www.jornada.unam.mx/2011/09/18/politica/008n2pol> [last accessed: 22 April 2012].

¹²⁰ CNDH 2011, *supra* note 73, p. 28; WOLA & Center Prodh, *supra* note 70, p. 4.

¹²¹ CNDH 2011, *supra* note 73, p. 28.

¹²² See also Congressional Research Service 2011, *supra* note 15, p. 1.

¹²³ See UN CWM, *supra* note 71, p. 7; UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 39, p. 11-12.

sometimes even as a threat to national security¹²⁴), a migration approach,¹²⁵ a human rights approach,¹²⁶ or an economical approach addressing the push and pull factors of human trafficking.¹²⁷

Practical responses largely aim to apply the so-called ‘3P’ strategy,¹²⁸ meaning that anti-trafficking measures integrate prevention of trafficking, protection of victims, and prosecution of offenders. In more recent years a fourth ‘P’ has been added to these strategies, which stands for partnerships “between Governmental and non-governmental organizations, private industry, and faith-based organizations – at the grass roots, local, national, and international levels.”¹²⁹

Governments and international organisations have mostly concentrated their efforts on combating trafficking through the third ‘P’: prosecution of human traffickers. For example, the Trafficking Protocol is a supplement to the United Nations Convention on Organized Crime and the office mandated to support countries in the fight against trafficking is the United Nations Office on Drugs and Crime (UNODC). UNODC anti-trafficking projects largely see to the strengthening of national law-enforcement mechanisms.¹³⁰ Also, the multi-stakeholder initiative to promote the fight against trafficking (UN.GIFT) primarily views human trafficking as a crime.¹³¹

The Trafficking Protocol itself, however, entails more than the agreement to criminalise the act of trafficking (Article 5) and to prosecute the traffickers (Article 4). It also aims to ensure that states implement measures to assist and protect trafficking victims (Article 6) and that states adopt policies and programmes to prevent trafficking (Article 9). Moreover, several articles deal with measures related to migration, such as repatriation programmes (Article 8) and border control (Article 11).

Article 7, paragraph 1, of the Trafficking Protocol specifically determines that “each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.” And Article 14 prescribes: “Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.”

The Mexican regional situation demonstrates a strong link between human trafficking and the movement and vulnerability of migrants and asylum seekers, the smuggling of migrants, and

¹²⁴ Piotrowicz, R.: Human security and trafficking of human beings: the myth and the reality, in Alice Edwards & Carla Ferstman, *Human Security and Non-Citizens: Law, Policy and International Affairs*, New York: Cambridge University Press, 2010, pp. 404-418 (hereinafter: *Piotrowicz 2010*) p. 406.

¹²⁵ Organisations such as the IOM, the ILO, and Anti-Slavery International have adopted a migration approach.

¹²⁶ According to Christien van den Anker, international bodies and NGOs are adopting this approach more and more; Van den Anker 2012, *supra* note 35, p. 159.

¹²⁷ Goodey 2010, *supra* note 18, p. 705.

¹²⁸ This strategy can be derived from the Preamble of the Trafficking Protocol, *supra* note 6. See also Goodey 2010, *supra* note 18, p. 705.

¹²⁹ Aronowitz 2011, *supra* note 10, p. 123.

¹³⁰ *Ibid.*

¹³¹ The UN.GIFT was founded on the principle that “human trafficking is a crime of such magnitude and atrocity that it cannot be dealt with successfully by any government alone”: <http://www.ungift.org/knowledgehub/en/about/index.html> [last accessed: 22 April 2012].

the push and pull factors for both migration and trafficking. It therefore provides an exemplary case to study the fight against trafficking from a migration and asylum protection approach and to study the possible ways to implement the migration related measures, as laid down in the Trafficking Protocol.

Analysis of a migration and asylum approach

This section analyses the migration and asylum protection measures that are and could be used as anti-trafficking instruments. Based on existing legislation and practice, I will identify already available options, as well as unused possibilities and alternatives. In doing so, I do not mean to be exhaustive, but rather, I wish to signal possibilities as to how a migration and asylum approach could help combat trafficking through protection, prevention and prosecution and how the use of migration measures could be improved towards that end.

Refugee and complementary protection

A recent research conducted by the IOM in Mexico, in which the IOM interviewed 165 victims of trafficking, included four interviewees who proclaimed they had fled their country of origin to escape from persecution and who only fell victim to traffickers after arrival in the destination country.¹³² In other words, these trafficking victims were in need of international protection unrelated to their trafficking situation.

However, the need for international protection might also arise from the trafficking situation. Persons might seek asylum in another country because they fear being trafficked, or victims of trafficking might have escaped a trafficking situation and fear reprisals or being re-trafficked for which they seek international protection. These victims may have been trafficked in their own country and have fled across borders after their escape, or they may have been trafficked to another country, where they end up seeking protection.

The Mexican Act on Refugees and Complementary Protection (*Ley sobre Refugiados y Protección Complementaria*), which entered into force on 28 January 2011, incorporates the refugee definition as provided in the 1951 Refugee Convention.¹³³ Additionally, it recognizes ‘gender’ to be a separate ground of persecution¹³⁴ and it includes the refugee definition of the Cartagena Declaration.¹³⁵ That means that also persons who fled their country “whose life, security or liberty were threatened due to generalized violence, foreign aggression, internal

¹³² IOM Diagnóstico 2011, *supra* note 12, p. 56.

¹³³ Ley sobre Refugiados y Protección Complementaria, Diario Oficial de la Federación 27 de enero de 2011 (Act on Refugees and Complementary Protection, official publication 27 January 2011), available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/LRPC.pdf> [last accessed: 22 April 2012] (hereinafter: *Act on Refugees and Complementary Protection*), Article 13(I); 1951 Convention Relating to the Status of Refugees, available at: <http://www.unhcr.org/3b66c2aa10.html> [last accessed: 22 April 2012].

¹³⁴ Article 1A (2) of the 1951 Refugee Convention gives the following persecution grounds: race, religion, nationality, membership of a particular social group, and political opinion.

¹³⁵ Americas - Miscellaneous, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, available at: <http://www.unhcr.org/refworld/docid/3ae6b36c.html> [last accessed: 22 April 2012].

conflict, massive human rights violations, or other circumstances that severely disrupted the public order”, can be recognized as a refugee under Mexican law.¹³⁶

To date, the COMAR has granted protection under the Cartagena definition to asylum seekers from Colombia, Sri Lanka and Haiti.¹³⁷ The violence and human rights violations conducted in the Central American context are not at this point considered to fall within the Cartagena definition.¹³⁸ However, the COMAR has granted refugee protection to Central Americans, mainly based on persecution by *maras* for belonging to a particular social group.¹³⁹

U.S. law also largely follows the elements of the refugee definition as given in the 1951 Refugee Convention. A key difference between the two definitions is that U.S. law not only protects against fear of future prosecution, but also against past persecution, while other diversions from the refugee definition result in a lesser protection standard.¹⁴⁰ U.S. law does not include a protection provision similar to the Cartagena definition.¹⁴¹

Despite some legal hurdles regarding, for instance, the establishment of a causal link, Central American asylum applications have on occasion been successful in the United States, including some applications of persons who feared persecution by *maras* for reasons of having a political opinion (against the gang practices), for reasons of religion, or for belonging to a particular social group.¹⁴² Mexicans have also been recognized as refugees, but for more divergent reasons.¹⁴³

Generally, asylum seekers asking protection for reasons related to a past or a possible future trafficking situation are not automatically considered a refugee. According to UNHCR, like all asylum seekers, trafficking victims must demonstrate a well-founded fear of persecution based on one of the grounds of Article 1(A) of the 1951 Refugee Convention.¹⁴⁴

It depends on the case whether trafficking amounts to persecution. However, UNHCR expresses the opinion that some of the acts usually involved in trafficking might already constitute persecution. Such acts include “abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, the deprivation of medical treatment.”¹⁴⁵

¹³⁶ See for an explanation and interpretation of the Cartagena Declaration: United Nations High Commissioner for Refugees (UNHCR), *Persons covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and by the Cartagena Declaration on Refugees (Submitted by the African Group and the Latin American Group)*, 6 April 1992, EC/1992/SCP/CRP.6, available at: <http://www.unhcr.org/refworld/docid/3ae68cd214.html> [last accessed: 22 April 2012].

¹³⁷ Katya Somohano Silva, COMAR, Mexico City, Telephone interview, 23 March 2012.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ INA §101(a)(42)(A), 8 U.S.C.A. §1101(a)(42)(A). For an analysis of the divergence in interpretation of some of the element of refugee protection between U.S. law and the 1951 Refugee Convention and its UNHCR interpretation, see Anker, D.E. *Law of Asylum in the United States*, 4th Ed., Eagan, Minnesota: Thomson West, 2011 (hereinafter: *Anker 2011*).

¹⁴¹ INA § 101(a)(42)(A) and 8 U.S.C.A. § 1101(a)(42)(A).

¹⁴² Anker 2011, *supra* note 140, §5:58.

¹⁴³ See footnote 44: In 2011, the United States granted 104 applications of Mexican asylum seekers. See also Anker 2011, *supra* note 140.

¹⁴⁴ UNHCR 2006, *supra* note 30, p. 6.

¹⁴⁵ *Ibid.*

Lack of fear of future persecution related to the trafficking past, does not exclude the possibility of asylum protection. The experiences of the past might still provide a reason to grant refugee status, if the trafficking experience “was particularly atrocious and the individual is experiencing ongoing traumatic psychological effects which would render return to the country of origin intolerable.”¹⁴⁶ In addition, UNHCR considers that reprisals, the fear of being re-trafficked, “ostracism, discrimination or punishment by the family and/or local community, or in some instances, by the authorities upon return” may amount to persecution.¹⁴⁷

Mexican law does not explicitly say that trafficking amounts to persecution, but it describes certain acts of persecution, including physical, psychological and sexual violence.¹⁴⁸ And, according to the COMAR, applications by trafficking victims will be reviewed inclusively and with a certain flexibility.¹⁴⁹

In the United States, trafficking is recognised as a human rights violation that might amount to persecution.¹⁵⁰ However, case law shows discrepancies in the acceptance of different situations related to trafficking as constituting persecution. For example, threats of trafficking were not considered to amount to persecution, while the fear of revenge by a trafficking ring was.¹⁵¹

It has been widely accepted, including by Mexico¹⁵² and the United States,¹⁵³ that the agents of persecution can be both states and non-state actors. UNHCR explains that in case of non-state actors, the state must be unwilling or unable to provide protection to the victim. The mere existence of legislative and/or administrative measures is insufficient to conclude that states are providing that protection; it must also be assessed “whether these mechanisms are effectively implemented in practice.”¹⁵⁴

It could be argued that the violent influence of *maras* together with the great level of state corruption and collusion with these criminal networks has left Central American governments sometimes unwilling and sometimes unable to give protection. Tyler Marie Christensen, in an independent research paper published by UNHCR, has suggested that, due to high levels of corruption and involvement of public officials in the trafficking business, the Mexican state could also be considered unable to provide protection, despite the fact that many legislative and administrative measures are in place to combat trafficking.¹⁵⁵

¹⁴⁶ *Ibid.*, p. 7.

¹⁴⁷ *Ibid.*

¹⁴⁸ Reglamento de la Ley sobre Refugiados y Protección Complementaria, Diario Oficial de Federación 21 de febrero de 2012 (Regulation to the Act on Refugees and Complementary Protection, official publication 21 February 2012), available at: http://www.diputados.gob.mx/LeyesBiblio/regley/Reg_LRPC.pdf [last accessed: 22 April 2012] (hereinafter: *Regulation to the Act on Refugees and Complementary Protection*), Article 6.

¹⁴⁹ Georgina Quiñonez Chávez, COMAR, Mexico City, Personal interview, 22 March 2012.

¹⁵⁰ UNHCR 2007, *supra* note 9, p. 11.

¹⁵¹ UNHCR 2007, *supra* note 9, p. 12. See Anker 2011, *supra* note 140, §4:11-4:34 for a detailed overview of what amounts to persecution according to U.S. law.

¹⁵² Regulation to the Act on Refugees and Complementary Protection, *supra* note 152, Article 7.

¹⁵³ See Anker 2011, *supra* note 140, § 4:7-4:10; See also UNHCR 2007, *supra* note 9, p. 17, which highlights a case of parents as the agents of persecution in a trafficking situation.

¹⁵⁴ UNHCR 2006, *supra* note 30, p. 9. See also pp. 8-10 of UNHCR 2006 for a more extensive explanation of when a state is considered unwilling or unable to provide protection and the relationship to persecution grounds.

¹⁵⁵ United Nations High Commissioner for Refugees (UNHCR), *Trafficking for sexual exploitation: victim protection in international and domestic asylum law*, April 2011, ISSN 1020-7473, available at:

Once it is established that the act of trafficking in a particular case amounts to persecution, either through involvement of the state or against which the state is unwilling or unable to protect the victim, it must be assessed whether that victim is persecuted for reasons of one or more of the persecution grounds. UNHCR explains that although the principal reason for trafficking a person is usually for profit, certain persons could be specifically targeted, because of any of the persecution grounds.¹⁵⁶

However, it is most likely that trafficking victims are recognised as a refugee for belonging to a particular social group, because under circumstances victims of trafficking might be acknowledged as constituting a social group of itself. To be considered a particular social group, the persons in this group must share a “common characteristic” (which is usually something innate, immutable or fundamental to a person) or be “perceived as a group by society”.¹⁵⁷

According to UNHCR, “former victims of trafficking may also be considered as constituting a social group based on the unchangeable, common and historic characteristic of having been trafficked” or because society perceives trafficking victims as a group.¹⁵⁸ However, if that is the case, it is the past experience that provides the aspect that may constitute a group and not a shared fear of future trafficking.¹⁵⁹

UNHCR clarifies that certain groups of men, women or children, who share characteristics that might make them more vulnerable to trafficking, could be considered a particular social group. Such marginalizing factors could, for instance, be the level of poverty, the fact that a woman is divorced or widowed, or the fact that a child is an orphan or lives on the street.¹⁶⁰

Worldwide, aside from being migrants, most victims of sex trafficking are women and children or adolescents.¹⁶¹ This equally applies to the situation in Mexico and its neighbouring countries.¹⁶² Particularly in Mexico and Central America, women at risk are often single mothers, women with low levels of education, who live in (extreme) poverty, and who have histories of physical or sexual abuse.¹⁶³ Children and adolescents especially vulnerable to trafficking often come from broken homes, are orphans, or live on the street.¹⁶⁴

<http://www.unhcr.org/refworld/docid/4dc253a22.html> [last accessed: 22 April 2012] (hereinafter: *UNHCR Trafficking for sexual exploitation 2011*), p. 22.

¹⁵⁶ For an analysis of all the persecution grounds in relation to trafficking see UNHCR 2006, *supra* note 30, p. 12-14.

¹⁵⁷ UNHCR 2006, *supra* note 30, p. 13; United Nations High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, available at: <http://www.unhcr.org/refworld/docid/3d36f23f4.html> [last accessed: 22 April 2012], p. 3.

¹⁵⁸ UNHCR 2006, *supra* note 30, p. 14.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ ILO Perspectives on Labour Migration 2003, *supra* note 32, p. 10; Congressional Research Service 2011, *supra* note 15, p. 4.

¹⁶² IOM Diagnóstico 2011, *supra* note 12, p. 49-50.

¹⁶³ IOM Diagnóstico 2011, *supra* note 12, p. 51; Congressional Research Service 2011, *supra* note 15, p. 4 (describing risk factors in Latin America and the Caribbean); These characteristics matched the descriptions of trafficking victims assisted by INM and COMAR on multiple elements: Dustin Amaya Cazaras, INM, Mexico City, Personal interview, 2 April 2012; Georgina Quiñonez Chávez, COMAR, Mexico City, Personal Interview, 22 March 2012.

¹⁶⁴ See Congressional Research Service 2011, *supra* note 15, p. 5 (describing the situation in Latin America and the Caribbean).

Even more vulnerable are women and children who belong to indigenous groups and who are for that reason already discriminated against.¹⁶⁵

In principle, Mexican authorities acknowledge this reality and follow UNHCR's interpretation on protection of trafficking victims. The COMAR aims to automatically recognise trafficking victims as belonging to a social group.¹⁶⁶ According to the COMAR in all seven cases between 2009-2012 in which the COMAR received an asylum application of a trafficking victim, he/she was recognized as a refugee on the basis of belonging to a particular social group.¹⁶⁷ The almost immediate acceptance of the persecution ground does not mean that trafficking victims are also automatically recognised as refugees; they still need to demonstrate a well-founded fear of persecution related to that ground.¹⁶⁸

U.S. immigration judges and officials have difficulty accepting that trafficked persons could be a particular social group in itself.¹⁶⁹ However, in some cases immigration judges did accept the existence of a particular social group in the trafficking context. For example, in the cases of “abused, unwanted children sold into labour by their parents”, of an “ethnic group in Thailand, which ha[d] been forced into indentured servitude and deprived of the right of citizenship” and in the case of “young women in Albania threatened with abduction and being forced into prostitution”.¹⁷⁰

Thus, refugee protection for trafficking victims from Central America and Mexico is theoretically available in Mexico and the United States. However, hesitancy of U.S. immigration judges and officials to accept the presence of certain elements of the refugee definition can create obstacles for trafficking victims to receive the refugee protection they actually deserve.

As the Mexican Act on Refugees and Complementary Protection only entered into force in 2011, it is too soon to draw firm conclusions on the success rate of asylum applications by trafficking victims. Under the new law, three out of three victims who were identified and who applied for asylum, received refugee protection.¹⁷¹ So far, the primary obstacles seem to be the identification and detection of victims, and subsequent difficulties in getting access to the available options. This will be discussed in more detail below under “Deportation versus safe repatriation”.

Furthermore, trafficking victims could also have intended to leave their country because they ran the risk of being subjected to torture, or other cruel, inhuman and degrading treatment or punishment. Their flight could have been for reasons unrelated to the trafficking process or unrelated to a persecution ground, or they may fear such treatment after having been trafficked, while not being able to prove the existence of a persecution ground.

¹⁶⁵ IOM Diagnóstico, *supra* note 12, p. 50.

¹⁶⁶ Georgina Quiñonez Chávez, COMAR, Mexico City, Personal interview, 22 March 2012.

¹⁶⁷ The victims were mainly women who had been used for sex trafficking and some children who had been victims of labour trafficking: Georgina Quiñonez Chávez, COMAR, Mexico City, Personal interview, 22 March 2012. The COMAR did not recall the case described by the IOM in IOM Diagnóstico, *supra* note 12, p. 56 in which the asylum seeker was not granted asylum, but a visa on humanitarian grounds.

¹⁶⁸ Georgina Quiñonez Chávez, COMAR, Mexico City, Personal interview, 22 March 2012.

¹⁶⁹ See for an overview of cases that explain what constitutes a particular social group according to U.S. law: Anker 2011, *supra* note 140, §5:42-5:66. See also UNHCR 2007, *supra* note 9, p. 22.

¹⁷⁰ UNHCR 2007, *supra* note 13, p. 23. In this research paper, published by UNHCR, the author Kaori Saito lists some more examples.

¹⁷¹ Georgina Quiñonez Chávez, COMAR, Mexico City, Personal interview, 22 March 2012.

Article 3 of the United Nations Convention against Torture (CAT), signed and ratified by both Mexico and the United States,¹⁷² prohibits “the return of a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.¹⁷³ This obligation has been implemented in Mexican as well as U.S. law.¹⁷⁴

Following its regional obligations under the American Convention on Human Rights and the Inter-American Convention for the Prevention Against Torture,¹⁷⁵ Mexico does also not return anyone to a territory or country, where his/her life is at risk or where he or she runs the risk of otherwise being treated or punished cruelly, inhumanely or degradingly.¹⁷⁶

Once the COMAR has recognized a person as a refugee or as a person otherwise in need of protection, the INM will directly grant a permanent residence permit.¹⁷⁷ Thus, this applies to both refugee and complementary protection. In the United States, however, only refugee status grants a right to stay. Protection against expulsion under Article 3 of the CAT merely protects a person from not being expelled.¹⁷⁸ That means that if a trafficking victims is recognized as a person in need of Article 3 CAT protection, he/she will not also have the right to stay in U.S. territory, the right to work, to find housing etc. Recovery and integration in U.S. society would in that case be impeded.

Temporary protection during criminal trial

The Mexican Migration Act (*Ley de Migración*),¹⁷⁹ which entered into force on 26 May 2011, includes a visa for humanitarian reasons (*Visitante por Razones Humanitarias*). This humanitarian visa can be granted to migrants who are victims or witnesses of a crime committed in Mexican territory.¹⁸⁰ It allows the victim to stay in Mexico until the end of the procedure. Although it is not specified which procedure is meant, it seems that the article refers to a criminal procedure against the suspected offender of the crime committed against the victim.¹⁸¹

¹⁷² Mexico ratified the Convention on 23 January 1986 and the United States ratified it on 21 October 1994: United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en [last accessed: 22 April 2012].

¹⁷³ Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment A/RES/39/46 (1 December 1984), available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en [last accessed: 23 April 2012], Article 3.

¹⁷⁴ Mexico: Act on Refugees and Complementary Protection, *supra* note 137, Article 2 (IV) and Article 28; United States: 8 C.F.R. §208.16(c)(2).

¹⁷⁵ This (implicitly) follows from: American Convention on Human Rights, available at: <http://www.oas.org/juridico/english/treaties/b-32.html> [last accessed: 27 April 2012], Article 5(2) and Article 22(8); Inter-American Convention for the Prevention of Torture, available at: <http://www.oas.org/juridico/english/treaties/a-51.html> [last accessed 27 April 2012], Article 13(4).

¹⁷⁶ Act on Refugees and Complementary Protection, *supra* note 137, Article 2 (IV).

¹⁷⁷ Ley de Migración, Diario Oficial de la Federación 25 de mayo de 2012 (Migration Act, official publication 25 May 2011), available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/LMigra.pdf> [last accessed: 22 April 2012] (hereinafter: Migration Act), Articles 52 (IV) (c) and 54. This is also repeated in the Regulation to the Act on Refugees and Complementary Protection, *supra* note 148, Article 87.

¹⁷⁸ See Anker 2011, *supra* note 140, § 7:2.

¹⁷⁹ See *supra* note 177.

¹⁸⁰ Migration Act, *supra* note 177, Article 52 (V) (a).

¹⁸¹ Hélène LeGoff, IOM, Mexico City, Personal interview, 20 December 2011; Dustin Amaya Cazerias, INM, Mexico City, Personal interview, 2 April 2012.

When the visa for humanitarian reasons expires, the migrant should either leave the country or apply for a different kind of visa, which could eventually be turned into a permanent residence permit.¹⁸² According to the INM, this change into another type of visa is a mere formality to continue regulated stay of the trafficking victim.¹⁸³ However, with the new Migration Act less than a year old, it has yet to be demonstrated in practice whether it will indeed be relatively simple for trafficking victims with a humanitarian visa to extend their stay.

In the United States, trafficking victims are eligible for a so-called T-visa, as provided in the Trafficking Victims Protection Act (TVPA). These visas are only available for victims of forced labour or sex work and of severe forms of trafficking,¹⁸⁴ and they will only be provided under the condition that the victim participates in a criminal trial.¹⁸⁵ The permit is valid for four years, but can be extended and changed into a permanent visa after at least three years of stay and under the condition that the victim has assisted in the criminal investigation or would “suffer extreme hardship upon removal”.¹⁸⁶

The U.S. government applies a quota of 5,000 T-visa per year.¹⁸⁷ This quota is heavily underutilised with only 394 T-visa applications in 2008, of which 247 were granted.¹⁸⁸ In that same year, Mexican nationals were among the top three nationalities to apply for a T-visa.¹⁸⁹ Although the INM could not provide exact information on the number of visa for humanitarian reasons granted to trafficking victims in Mexico, it seems that such visas were granted only in a small number of trafficking cases.¹⁹⁰ According to the INM, of those victims who are detected and identified by the institute, the vast majority chooses to be repatriated and a small group applies for asylum.¹⁹¹

While a temporary residence permit, conditioned on the assistance in a criminal investigation, could be beneficial for the protection of victims and the prosecution of traffickers, there remain points of concern. The fact that these visas are temporally limited may create insecurity with the victim, especially when a visa is granted until the end of the procedure at an uncertain moment and not for a predetermined period. This makes it more difficult for victims to work on recovery and (re)integration in society.¹⁹² In addition, it appears that when

¹⁸² Migration Act, *supra* note 177, Article 53

¹⁸³ Dustin Amaya Cazerias, INM, Mexico City, Personal interview, 2 April 2012.

¹⁸⁴ The term “severe forms of trafficking in persons” means—(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery”; 22 U.S.C.A. § 7102 (8).

¹⁸⁵ UNHCR Trafficking for sexual exploitation 2011, *supra* note 155, p. 26; Anker 2011, *supra* note 140, § 1.16.

¹⁸⁶ 8 U.S.C.A. § 1255 (I)(1)(C)(i) and 8 U.S.C.A. § 1255 (I)(1)(C)(ii). According to Katherine Kaufman it is not difficult for most victims to prove they would suffer such hardship, as in most of their cases the factors apply that are taken into account: Kaufka, K., T Nonimmigrant Visas and Protection and Relief for Victims of Human Trafficking: A Practitioner’s Guide, 06-09 Immigr. Briefings 1 (Sept. 2006).

¹⁸⁷ 8 U.S.C. § 1185 (0).

¹⁸⁸ UNHCR Trafficking for sexual exploitation 2011, *supra* note 155, p. 27.

¹⁸⁹ *Ibid.*, p. 22.

¹⁹⁰ UN CMW 2011, *supra* note 71, p. 8; Dustin Amaya Cazerias, INM, Mexico City, Personal interview, 2 April 2012.

¹⁹¹ Dustin Amaya Cazerias, INM, Mexico City, Personal interview, 2 April 2012. See below under “Deportation versus safe repatriation” for doubts raised on whether these decisions on repatriation are sufficiently well informed.

¹⁹² See also concerns about the temporary permits raised by Tyler Marie Christensen in her independent research paper: UNHCR Trafficking for Sexual exploitation 2011, *supra* note 155, pp. 23 and 25.

a residence permit is not conditioned upon assistance in a criminal procedure, the chances of victims participating in such a procedure are greater.¹⁹³

Residence permits on humanitarian grounds

Some countries, like most European countries, have included in their migration and asylum protection laws the possibility to give residence permits on humanitarian grounds.¹⁹⁴ That generally means that a person does not qualify for refugee protection or protection against return to a country where he/she faces torture, inhuman treatment, or general violence and conflict, but that for humanitarian reasons it would be inhuman or unreasonable to demand that the person return to his/her home country.

For example, Dutch law creates the possibility to grant a visa on humanitarian grounds, which requires that the humanitarian reasons be related to the asylum account and to the reasons for leaving the country of origin. Circumstances such as illness and old age are therefore insufficiently severe to be granted a visa on humanitarian grounds.¹⁹⁵ In most countries, like in The Netherlands, the power to grant such a humanitarian visa is highly discretionary. As a consequence, distribution of humanitarian visas for trafficking victims greatly depends on the circumstances of the case and on the politics of the receiving country.¹⁹⁶

Stay on humanitarian grounds as such, is an option unfamiliar to U.S. law. However, the previously mentioned Mexican visa for humanitarian reasons for victims of a crime can also be granted on a humanitarian ground (*causa humanitaria*).¹⁹⁷ The law does not further specify, what types of situations this might entail.

Article 9 of the Circular regarding the treatment of migrant victims of an offence could be interpreted as opening the door to granting visas for humanitarian reasons to trafficking victims who are not given asylum.¹⁹⁸ However, this Circular has not yet been aligned with the new Migration Act of 2011 and it is unclear if and how it will be amended. The INM and the COMAR generally remark that this decision, whether or not to grant a visa on

¹⁹³ *Ibid.*, p. 25.

¹⁹⁴ See for instance, European Council on Refugees and Exiles (ECRE), *Complementary Protection in Europe*, July 2009, available at:

<http://www.ecre.org/topics/areas-of-work/protection-in-europe/149.html> [last accessed: 22 April 2012].

¹⁹⁵ Vreemdelingenwet 2000 (Dutch Aliens Act 2000), available at: http://wetten.overheid.nl/BWBR0011823/Hoofdstuk3/Afdeling4/Paragraaf1/Artikel29/geldigheidsdatum_24-04-2012 [last accessed: 23 April 2012], Article 29(1)(c); Tussentijds Bericht Vreemdelingencirculaire 2001/29 (Interim Notice on the Circular to the Dutch Aliens Act 2000), *Stcrt. jg. 2001, nr. 182, p. 8*, available at: <https://zoek.officielebekendmakingen.nl/stcrt-2001-182-p8-SC30977.html> [last accessed: 22 April 2012].

¹⁹⁶ See also UN High Commissioner for Refugees, *The trafficking of women for sexual exploitation: a gender-based and well-founded fear of persecution?*, March 2003, ISSN 1020-7473, available at:

<http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=3e71f84c4&query=shearer%20demir%20trafficking%20women> [last accessed: 22 April 2012] (hereinafter: *UNHCR 2003*), p. 22.

¹⁹⁷ Migration Act, *supra* note 177, Article 52 (V)(c).

¹⁹⁸ Circular por la que instruye el procedimiento que deberá seguir el Instituto de Migración en la detención, identificación y atención de personas extranjeras victimas del delito, No. 001/2011, Diario Oficial de la Federación 7 de junio de 2011 (Circular with instructions for the procedure to be followed by the Institute of Migration regarding the detention, identification and assistance to foreigners who are victims of a crime), available at: http://www.dof.gob.mx/nota_detalle.php?codigo=5193668&fecha=07/06/2011 [last accessed: 22 April 2012] (hereinafter: *Circular No. 001/2011*).

humanitarian grounds to trafficking victims, is discretionary, but that the vulnerability of a person will always be taken into account.¹⁹⁹

According to the Mexican non-governmental organisation Sin Fronteras (Without Borders), the option to grant stay based on a humanitarian ground has to date only been used in the case of Haitian nationals who fled the dire conditions in Haiti after the 2010 earthquake. Sin Fronteras suspects that the humanitarian ground will continue to be only used in situations of disaster and catastrophe, causing displacement.²⁰⁰ Therefore, it remains the question whether this humanitarian ground will in practice provide an option of residency for trafficking victims.

A humanitarian visa could protect a trafficking victim from reprisals in the home country, re-victimization and possibly prevent re-trafficking, especially in the case of traumatized victims or victims who have difficulty substantiating their claim that feared treatment amounts to persecution or that such treatment is related to one of the Convention grounds. Additionally, victims might be more willing and be more able to cooperate in investigations into the crime of trafficking, when they do not have to worry about the legality of or the duration of their stay as with the temporary visa during criminal proceedings.²⁰¹ It would therefore be valuable for the United States to explore this option and for Mexico to expand the use of it under Article 9 of the concerning Circular.

Reflection and recovery period

Some legal regimes provide a form of temporary legal stay during, what is often called, a reflection or recovery period. For instance, the Council of Europe Convention on trafficking calls for the introduction of a 30-day recovery and reflection period in all Member States, during which the states authorise the victim to stay in its territory and during which the victim is allowed “to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities”.²⁰² Belgium and The Netherlands, for instance, authorise a reflection period of three months.²⁰³

Mexican law implicates some form of reflection period. When it becomes clear during the interview with the authorities, that the emotional state of the victim does temporarily not allow him/her to make a decision on whether he/she wants to return to his/her country or to stay in Mexico, the victim will be sent to a shelter where he/she receives medical and psychological care.²⁰⁴ The law does not provide a further explanation as to how long the

¹⁹⁹ Dustin Amaya Cazerias, INM, Mexico City, Personal interview, 2 April 2012; Georgina Quiñonez Chávez, COMAR, Mexico City, Personal interview, 22 March 2012.

²⁰⁰ Karla Meza Soto & Monica Oehler, Sin Fronteras, Mexico City, Personal interview, 9 April 2012.

²⁰¹ See also the independent research paper by Tyler Marie Christensen: UNHCR Trafficking for sexual exploitation 2011, *supra* note 155, p. 25.

²⁰² Council of Europe Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series No. 197, Warsaw 16 May 2005, available at: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=197&CM=8&DF=18/12/2011&CL=ENG> [last accessed: 22 April 2012], Article 13.

²⁰³ UNHCR 2003, *supra* note 196, p. 23.

²⁰⁴ Migration Act, *supra* note 182, Article 113; Circular No. 001/2011, *supra* note 198, Article 8. Article 113 of the Mexican Migration Act stipulates that the procedure for detention, identification of and assistance to victims of a crime will be regulated in the ‘*Reglamento*’, however, as to date this *Reglamento* has not yet been published. The ‘*Reglamento*’, which is of lower hierarchical order than a law, elaborates on the provisions in the law.

victim will stay in the shelter, when the procedure will be continued, or who makes that decision.

Sin Fronteras confirmed that the law is unclear as to its practical application of this period.²⁰⁵ However, the INM commented that Article 111 of the Migration Act also applies in this situation, which means that the regular fifteen days to resolve the migration situation is the maximum time for such a recovery period.²⁰⁶ In addition, rather than having examples of a form of recovery period, most sources express concerns that many trafficking victims are not identified or after having been identified as such, are still deported in a relatively fast migration process. This will be further discussed in the next section.

U.S. law does not provide for an official kind of recovery or reflection period, but it does create the authority to grant a certification of ‘continued presence’ to victims of severe forms of trafficking.²⁰⁷ However, this instrument is completely linked to the prosecution process and to ensuring the presence of the victim “in order to facilitate the investigation or prosecution of the trafficker”.²⁰⁸

Continued presence will only be granted if the victim indicates that he/she is willing to assist in the investigation, or when he/she is unable to cooperate as a result of physical or psychological trauma.²⁰⁹ With continued presence victims can remain in the United States for one year and this period can be extended for as long as necessary to complete the prosecution.²¹⁰ A certification of continued presence cannot be extended into a permanent stay.²¹¹

Both for the protection of victims and for the prosecution of traffickers, a recovery or reflection period appears highly beneficial.²¹² Most people will not trust every detail of their story to government officials during the first contact they have with the authorities. Primarily, because it usually takes some time for people to confide in officials and share very private information that they often are ashamed of, but also, because some people are too traumatized, while others are still too afraid and fear reprisals affecting themselves or their families. Sometimes victims simply need time to process the information they received and to decide what would be the best option for them. In other cases, a victim first needs medical and psychological treatment.²¹³

Anti-Slavery International argues that 30 days is not nearly enough for a reflection and recovery period and that the period should at least cover three months, like in Belgium and The Netherlands.²¹⁴ Another option could be to link the length of stay to the condition of the victim, but that criterion is very difficult to assess and it would raise such questions as who

²⁰⁵ Karla Meza Soto & Monica Oehler, Sin Fronteras, Mexico City, Personal interview, 9 April 2012.

²⁰⁶ Dustin Amaya Cazerias, INM, Mexico City, Personal interview, 2 April 2012.

²⁰⁷ The United States (U.S.) Department of Justice, Office of Legal Policy, *Attorney General’s Annual Report to Congress and Assessment of U.S. Government Activities to Combat Trafficking in Persons for Fiscal Year 2010*, December 2011, available at: <http://www.justice.gov/ag/annualreports/tr2010/agreporhumantrafficking2010.pdf> [last accessed: 22 April 2012] (hereinafter: *U.S. Attorney General’s Report on Trafficking 2011*), p. 48.

²⁰⁸ 22 U.S.C. § 7105 (b)(E)(ii)(II)(bb); U.S. Attorney General’s Report on Trafficking 2011, *supra* note 207, p. 48.

²⁰⁹ 22 U.S.C. § 7105 (b)(E)(i) and (ii).

²¹⁰ UNHCR Trafficking for sexual exploitation 2011, *supra* note 155, p. 26.

²¹¹ *Ibid.*

²¹² Anti-Slavery International 2011, *supra* note 3, par. 2 “The merits of a reflection period”.

²¹³ See *Ibid.*

²¹⁴ *Ibid.*

should be authorised to make that decision and on what grounds. In whichever form, both Mexico and the United States should expand this option, unrelated to or at least before any criminal trial.

Deportation versus safe repatriation

Article 8, paragraphs 1 and 2, of the Trafficking Protocol require that a victim's return to his/her country or country of residence be carried out "with due regards for the safety of the person", "without undue or unreasonable delay", "with due regard for the status of any legal proceedings related to the fact that the person is a victim of trafficking", and that the return "shall preferably be voluntarily".

Regarding the safe return of trafficking victims, the UN Office of the High Commissioner for Human Rights in its Trafficking Guidelines recommends that states also consider "(...) ensuring that trafficked persons who do return to their country of origin are provided with the assistance and support necessary to ensure their well-being, facilitate their social integration and prevent re-trafficking. Measures should be taken to ensure the provision of appropriate physical and psychological health care, housing and educational and employment services for returned trafficking victims".²¹⁵

Several bilateral and multilateral agreements, protocols and collaboration mechanisms between Mexico, the United States, and the Central American countries El Salvador, Guatemala, Honduras and Nicaragua that address repatriation of migrants and trafficking victims have been put in place.²¹⁶ In addition, there exists a close cooperation between the Mexican government, Central American governments and the IOM, as part of which the IOM contributed to the creation of protocols and manuals that should provide guidance for the assistance to trafficking victims, particularly with regards to their safe repatriation.²¹⁷

Nonetheless, partly due to a lack of knowledge of the applicable instruments, the implementation of these legislative and administrative mechanisms falls short on a number of issues.²¹⁸ Of the 167 trafficking victims interviewed by the IOM in Mexico, 52 were repatriated immediately, without having been given proper protection and assistance. Moreover, a majority of these victims was minor.²¹⁹ Some victims were deported, rather than repatriated, which in Mexico is followed by a prohibition of re-entering the country for a number of years.²²⁰

When the Mexican authorities detect a migrant, he/she will be brought to a migrant holding centre for identification and verification of his/her migration situation. Within the first 36 hours the migrant will be presented to the authorities for this identification and verification. During this time, the migrant should be informed about the procedure, the possibilities and

²¹⁵ United Nations Office of the High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 20 May 2002, E/2002/68/Add.1, available at: <http://www.unhcr.org/refworld/docid/3f1fc60f4.html> [last accessed: 23 April 2012], Guideline 6 (8).

²¹⁶ IOM Diagnóstico, *supra* note 12, p. 110; UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 39, p. 20; Verduzco & De Lozano 2011, *supra* note 49, p. 52-53.

²¹⁷ IOM Diagnóstico, *supra* note 12, p. 110.

²¹⁸ *Ibid.*, p. 114.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*; The amount of years the migrant will be banned from entering Mexico is highly discretionary: Dustin Amaya Cazerias, INM, Mexico City, Personal interview, 2 April 2012; Karla Meza Soto & Monica Oehler, Sin Fronteras, Mexico City, Personal interview, 9 April 2012.

his/her rights. Officially, the authorities can take no more than fifteen working days to resolve the migration situation and establish whether the migrant wants to voluntarily repatriate, regulate his/her stay in Mexico, or ask for asylum.²²¹

Technically, this procedure should provide the time and the tools to detect and identify trafficking victims. However, various NGOs and UN organs complain that in practice migrants are deported or repatriated very quickly, and that several factors complicate the possibility for migrants to exercise their rights, to file complaints, and to utilise the available migratory and asylum options.

A primary concern is that migrants are insufficiently informed and agree to voluntary repatriation before having received all the necessary information about their rights and the possibilities of regularisation and protection in Mexico.²²² Amnesty International reported having talked to migrants who did not receive any information at all.²²³ And, Sin Fronteras explained that even if the procedural information is provided, it does not always mean the migrants really understood what was said, or for example what it entails to apply for asylum.²²⁴

Moreover, difficulties with exercising one's right to access to legal assistance have been reported by several organisations.²²⁵ It requires some paperwork to be assigned a lawyer. According to Sin Fronteras, migrants are at times already repatriated before completion of this administrative process.²²⁶ Similarly, UNHCR noted that even when they had identified possible trafficking victims in migrant holding centres, they were told these migrants had already agreed to being repatriated, which excluded them from UNHCR's assistance.²²⁷

The UN Special Rapporteur on the Human Rights of Migrants Bustamante and the UN CMW noticed that these problems appear to particularly affect Central American migrants, who at times are not given sufficient time to clarify their migration situation or who, due to the speedy deportation process, have less possibility to know of the existence of and make use of their procedural and legal rights.²²⁸ These procedural obstacles impede the possibility of detecting and appropriately assisting trafficking victims.

Furthermore, according to Verduzco & De Lozano, the United States does not always comply with the repatriation agreements with Mexico. The authors provide information about minors having been separated from their parents before expulsion to prevent them from attempting to re-enter the United States.²²⁹ Also, there have been reports that the United States did not notify the Mexican authorities before repatriation and that some Central Americans are

²²¹ Migration Act, *supra* note 177, Article 111; Dustin Amaya Cazerias, INM, Mexico City, Personal interview, 2 April 2012; Karla Meza Soto & Monica Oehler, Sin Fronteras, Mexico City, Personal interview, 9 April 2012.

²²² For example: UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 39, p. 16, 17 and 20; UN CWM, *supra* note 71, p. 7.

²²³ Amnesty International 2010, *supra* note 67, p. 28.

²²⁴ Karla Meza Soto & Monica Oehler, Sin Fronteras, Mexico City, Personal interview, 9 April 2012.

²²⁵ UN Special Rapporteur on Migrants Bustamante, *supra* note 39, p. 17; Amnesty International 2010, *supra* note 67, p. 28.

²²⁶ Karla Meza Soto & Monica Oehler, Sin Fronteras, Mexico City, Personal interview, 9 April 2012.

²²⁷ Hans Hartmark, UNHCR, Tapachula, Chiapas, Personal interview, 4 November 2011.

²²⁸ UN CMW 2011, *supra* note 71, p. 5; UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 39, p. 19.

²²⁹ Verduzco & De Lozano 2011, *supra* note 49, p. 52.

repatriated to Mexico instead of to their home countries, leaving them undocumented and vulnerable in another foreign place.²³⁰

On another note, the deportation by the United States of gang members to Mexico and Central America is a migratory measure that intends to fight crime in the United States, but that seems to exacerbate the smuggling and trafficking problem, as it reinforces criminal networks throughout the region. Alarming numbers of ex-convicts have already been deported and many more await deportation: as at 2005, almost 35,000 Mexican nationals were serving time in U.S. prisons, albeit state or federal.²³¹ All of these convicted criminals faced deportation at the end of their sentence.²³²

Some very small efforts have been made to help reintegrate these deportees in society and therewith prevent them from re-joining the ranks of their gangs and fall back to committing crimes. For example, Mexico initiated a programme that paid for education of Mexicans in American prisons. However, this programme only reached about 700 inmates.²³³

To help combat trafficking, a more holistic, regional repatriation strategy needs to be developed and truly implemented. All Central American countries, Mexico and the United States should be involved in the development of a scheme that could include such mechanisms as reintegration, education and the removal of gang-related tattoos should that be desired.

Resettlement of trafficking victims

In some cases a trafficking victim might have been recognised as a refugee, but at the same time it may be considered too dangerous for the victim to remain in the country to where he/she was trafficked and where he/she received a refugee status. The risk of reprisals (against both the victim and family members) and re-trafficking are especially present in the Mexican regional context, where networks of gangs and criminal organizations stretch throughout all of Central America, Mexico and the United States.

In an independent research paper, published by UNHCR, Michael Boulton explains that the relative small size of the Central-American countries makes it more difficult to flee from *maras* within a country.²³⁴ Given the extensive network of the gangs, covering Central America, Mexico and the United States, it is highly thinkable that victims could still be at risk of reprisals from Central American gangs in Mexico and the United States or vice versa.

This raises the question whether for trafficking victims who are granted refugees status, but who remain at risk in the host country, resettlement could be an option. Resettlement is a mechanism for refugee protection, carried out under UNHCR auspices,²³⁵ that aims to provide a durable solution and that includes elements of ‘responsibility sharing’ and

²³⁰ *Ibid.*, p. 52-53.

²³¹ Cicero-Domínguez 2005, *supra* note 86, par. 53.

²³² See for a more detailed explanation of this problem: Cicero-Domínguez 2005, *supra* note 86, par. 53-58.

²³³ Cicero-Domínguez 2005, *supra* note 86, par. 72.

²³⁴ UNHCR Gang Phenomenon 2011, *supra* note 97, p. 24.

²³⁵ United Nations High Commissioner for Refugees (UNHCR), *UNHCR Resettlement Handbook*, July 2011, available at:

<http://www.unhcr.org/cgi-bin/texis/vtx/home/opendocPDFViewer.html?docid=46f7c0ee2&query=resettlement%20handbook> [last accessed: 22 April 2012] (hereinafter: *UNHCR Resettlement Handbook 2011*), p. 4 (Preface).

‘international solidarity’.²³⁶ Other durable solutions are integration in the host state or voluntary repatriation. Resettlement is only considered an option when, after full evaluation of all the three durable solutions, it is concluded that resettlement is the best route to take.²³⁷

Historically, the mechanism has been used to manage large influx of refugees. For example, after the Second World War more than a million European refugees were resettled worldwide; in 1972 about 40,000 Asian Ugandans were resettled, when President Idi Amin of Uganda expelled practically the entire ethnic Asian community; and in the early 1980s, over 700,000 Indochinese ‘boat people’, who fled the Indochinese conflict by boat to other South East Asian countries, were resettled.²³⁸ However, in recent years, preferences developed towards individual refugees in need of resettlement.²³⁹

UNHCR has adopted the following inclusive ‘resettlement submission categories’ that a refugee needs to fall within, in order to be eligible for resettlement: a host country cannot guarantee the legal and physical protection of the refugee, the refugee is a survivor of violence and torture, the refugee has specific medical needs, the refugee is a woman or a girl at risk, family reunification is possible, the refugee is a child or adolescent at risk (often unaccompanied minors), or the refugee lacks local integration prospects (often when in protracted refugee situations).²⁴⁰

UNHCR explains that legal and physical protection in another country may be required when “refugees are faced with threats which seriously jeopardize the continued stay in a country of refuge”.²⁴¹ According to UNHCR, such threats might include the risk of being trafficked (for the purpose of sexual slavery), especially in the case of women.²⁴² Also, refugees are considered for resettlement under the women and girls at risk category when they run a risk of being trafficked “for the purposes of sexual slavery, forced labour, and other forms of exploitation.”²⁴³

A complicating factor that prevents a full use of the resettlement program is that UNHCR largely depends on the willingness of countries to accept refugees. In the 2011 UNHCR Resettlement Handbook only 25 countries are listed as participating in the resettlement scheme worldwide.²⁴⁴ Mexico and the four Central American countries discussed in this paper are not among those countries, but the United States is one of the main contributors to the programme.

Each country can apply its own additional criteria to determine which refugees they want to accept for resettlement. Under U.S. law, cumulative criteria demand that refugees: “1) Be among those refugees determined by the President to be of special humanitarian concern of the United States; 2) Meet the definition of a refugee pursuant to Section 101(a)(42) of the

²³⁶ *Ibid.*, p. 36.

²³⁷ *Ibid.*, p. 36.

²³⁸ *Ibid.*, pp. 47-48.

²³⁹ *Ibid.*, p. 49.

²⁴⁰ *Ibid.*, pp. 243-296.

²⁴¹ *Ibid.*, p. 247.

²⁴² *Ibid.*, p. 249.

²⁴³ *Ibid.*, p. 266.

²⁴⁴ *Ibid.*, p. 66 (Brazil and Hungary start with their programmes in 2012).

INA (see below); 3) Not be firmly resettled in any third country; and 4) Be otherwise admissible under U.S. law.”²⁴⁵

In addition to those criteria, the United States identifies priorities. Listed among the first priority are such categories as women-at-risk and persons facing “compelling security concerns”.²⁴⁶ Thus, under these criteria trafficking victims could theoretically be eligible for resettlement in the United States.

Although Mexico is not a participant in the UNHCR resettlement programme, it is not excluded that refugees be resettled in Mexico on an *ad hoc* and individual basis. However, to date, no refugees have been resettled in Mexico or from Mexico to another country.²⁴⁷

In the analysis of the resettlement options, language and cultural aspects are taken into consideration to facilitate the integration of a refugee in a new society.²⁴⁸ The countries participating in the programme with Spanish as an official language are Argentina, Chile, Paraguay, Spain and Uruguay.²⁴⁹ For trafficked refugees who cannot remain in the country of asylum, the possibilities of resettlement within the aforementioned countries and of expansion of the resettlement programme in those and other (Latin-American) countries for these cases should be further explored.

Temporary work permits

As described above, there is a strong demand for low-skilled labour in the United States, which attracts Mexican and Central American workers. In addition, Mexican migrants moving to the United States, leave vacant low-skilled work that provides jobs for hundreds of thousands of Central American migrants. Simultaneously, poverty pushes many Mexicans and Central Americans to migrate north. More restrictive migration policies will not be able to counter the low-skilled migration flow, as long as the market needs these low-skilled migrant workers and as long as poverty in the region prevails.²⁵⁰

It is argued that stricter migration policies are counter-productive to the fight against trafficking in persons and only contribute to an increase of the trafficking business.²⁵¹ As the ILO puts it: “more liberal migration regimes would probably diminish trafficking”.²⁵² The UN CMW even recommends that states “promote regular, safe migration under decent conditions as part of a strategy to combat trafficking in persons and migrant-smuggling”.²⁵³

Temporary work permits could be a powerful means in the prevention of human trafficking for at least the following reasons: migrants do no longer need the services of a smuggler or a trafficker, and they do not need to take clandestine routes that are within the territory of

²⁴⁵ *Ibid.*, p. USA/2. Country chapters available at: <http://www.unhcr.org/4a2ccf4c6.html> [last accessed: 26 April 2012].

²⁴⁶ *Ibid.*, p. USA/3. Country chapters available at: <http://www.unhcr.org/4a2ccf4c6.html> [last accessed: 26 April 2012].

²⁴⁷ Georgina Quiñonez Chávez, COMAR, Mexico City, Personal interview, 22 March 2012.

²⁴⁸ UNHCR Resettlement Handbook 2011, *supra* note 235, pp. 353-354.

²⁴⁹ *Ibid.*, p. 66. Argentina has a quota of 50 refugees annually. Paraguay and Uruguay both have a quota of 15 refugees. These countries do not apply additional requirements. However, Paraguay and Uruguay focus their programmes on refugees from Latin America. Chile has no additional quota or requirements. Although Spain is listed in the Handbook as participant, there is no country chapter available, which implies that its programme has not yet started. See UNHCR Resettlement Handbook 2011, *supra* note 235, country chapters, available at: <http://www.unhcr.org/4a2ccf4c6.html> [last accessed: 26 April 2012].

criminal networks. Also, documentation puts migrants in a less vulnerable position and in a stronger bargaining position regarding work conditions and salary. Finally, it is easier to keep track of and therefore protect documented migrants.²⁵⁴

Both the United States and Mexico have created possibilities for temporary work migration. To temporarily work in the United States an immigrant can get an H-2A visa for seasonal agricultural work²⁵⁵ or an H-2B visa for seasonal non-agricultural work.²⁵⁶ It must be demonstrated that U.S. citizens are not available to do the work. Both types of temporary visa are valid for a maximum of one year and can be extended to a maximum of three years. Family member are allowed to join the principal applicant.²⁵⁷

Despite this option, there are still hundreds of thousands of Central American and Mexican migrants who are not able to obtain such visas. The number of immigrants eligible for the H-2B visa is limited to a quota of 66,000 per year. Although the H-2A visa does not have a cap, in practice the number of H-2A visas granted annually is similar to that of the H-2B visas.²⁵⁸ This means that compared to an estimated undocumented working immigrant population of 8,3 million, the group of immigrants that do receive a visa (around 150,000 annually) is very small.²⁵⁹

Mexican law provides for a visa that allows foreign nationals of the countries that Mexico shares its Southern border with, being Guatemala and Belize, to stay in Mexico for one year.²⁶⁰ During that year, the temporary migrant is allowed to work and to enter and leave the country as he/she pleases. However, the migrant worker is only allowed to stay in the regions designated by the Secretariat of Internal Affairs (*Secretaría de Gobernación*). Historically, these have been the southern-most states of Mexico. In addition, other nationalities could get

²⁵⁰ See for an analysis of the push and pull factors and anti-immigration policies: Anti-Slavery International 2003, *supra* note 3, Section 3 and ILO Perspectives on Labour Migration 2003, *supra* note 32, p. 5.

²⁵¹ The United States (U.S.) Department of State, *Trafficking in Persons Report 2010*, available at: <http://www.state.gov/g/tip/rls/tiprpt/2010/index.htm> [last accessed: 22 April 2012], p. 24.

²⁵² ILO Perspectives on Labour Migration 2003, *supra* note 32, p. 11.

²⁵³ UN CMW 2011, *supra* note 71, p. 9.

²⁵⁴ On the other hand, there are organisations such as WOLA that argue that temporary work permits are merely a tool for governments to eschew their real responsibility to overhaul migration systems addressing the underlying concerns and to invest in reducing poverty and stimulating development; Washington Office for Latin America (WOLA), *Migration, Development, and Human Rights in the United States and Mexico: Policy recommendations for both governments*, September 2011, available at:

<http://www.wola.org/sites/default/files/downloadable/Rights%20and%20Development/2010/WOLA%20IC%20policy%20paper%20update%20SEPT%202011.pdf> [last accessed: 22 April 2012] (hereinafter: *WOLA 2011*), p. 4.

²⁵⁵ U.S. Citizen and Immigration Service, H-2A Temporary Agricultural Workers:

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=889f0b89284a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=889f0b89284a3210VgnVCM100000b92ca60aRCRD> [last accessed: 20 April 2012].

²⁵⁶ U.S. Citizen and Immigration Service, H-2B Temporary Non-Agricultural Workers:

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=d1d333e559274210VgnVCM100000082ca60aRCRD&vgnnextchannel=d1d333e559274210VgnVCM100000082ca60aRCRD> [last accessed: 20 April 2012].

²⁵⁷ See for more information on the (requirements of) H-2A and H-2B visas: Hanson 2009, *supra* note 46, p. 4 and Fragomen Global, *Global Business Immigration Handbook*, Thomson West: 2012, § 20:18 and § 20:19.

²⁵⁸ Hanson 2009, *supra* note 49, p. 6.

²⁵⁹ *Ibid.*, p. 4.

²⁶⁰ Migration Act, *supra* note 177, Article 52 (IV); UN CMW 2011, *supra* note 71, p. 8.

a temporary work visa, for a maximum of 180 days, if they already have a job offer in Mexico. However, these procedures appear to be primarily focused on high-skilled work.²⁶¹

A regional comprehensive strategy addressing these lacunas, could contribute to safer migration as a means to combat trafficking. Still, even with documented labour migration, labour conditions for low-skilled labour are often substandard and labour relations with migrant workers can remain abusive if there is insufficient labour control.²⁶² To combat exploitative labour circumstance and to decrease the vulnerability of migrant workers, an enhanced comprehensive scheme for legal temporary migrant work that comprises the entire region should thus be combined with more stringent labour inspections.²⁶³

Border control

Article 11 of the Trafficking Protocol requires states to “strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.” Many unilateral and bilateral migratory measures adopted to combat smuggling, trafficking and irregular migration see to the strengthening of border controls.

Since the 1990s, the United States has significantly increased its border patrol efforts along its southern border with Mexico. Legislation in 2006 and 2007 made it possible to erect two walls of 1,125km and more than 700km respectively.²⁶⁴ Additionally, border patrol and surveillance was increased by recruiting 23,000 new agents and by installing “105 radar equipment and photographic towers”.²⁶⁵

Although Mexico has increased its border control efforts, the southern border remains highly porous, as measures have concentrated on patrols throughout the country.²⁶⁶ The majority of migrants are arrested and subsequently detained not along the border, but *en route* in Mexico.²⁶⁷

Central American countries have, in contrast, liberated their border controls. On 30 June 2005, El Salvador, Guatemala, Honduras and Nicaragua signed an agreement, which intended to create free movement in these four countries of citizens from the member states to the agreement.²⁶⁸ It, therefore, makes it easier for Central Americans to reach the Mexican border.

²⁶¹ Migration Act, *supra* note 177, Article 52 (II); an applicant would need an invitation from authorities or an academic institution, or an invitation based on artistic, sports or cultural activities.

²⁶² See also UN CMW Report 2011, *supra* note 71, p. 7 (which expresses the concern for the labour conditions of domestic workers in Mexico) and p. 8 (“the working conditions of seasonal agricultural workers remain disadvantageous, with low wages, late payment of wages and long working hours”); WOLA 2011, *supra* note 254, p. 3-4; WOLA is even of the opinion that temporary work visa contribute to reducing acceptable labour standards: WOLA 2011, *supra* note 254, p. 4.

²⁶³ See also UN CMW 2011, *supra* note 71, p. 7.

²⁶⁴ Verduzco & De Lozano 2011, *supra* note 49, p. 42.

²⁶⁵ *Ibid.*

²⁶⁶ Along the 1100km border with Guatemala and Belize there are a mere 13 official border crossings. There are, however, hundreds of unofficial locations where migrants cross the Southern border of Mexico; IOM Diagnóstico, *supra* note 12, p. 69-70.

²⁶⁷ Verduzco & De Lozano 2011, *supra* note 49, p. 46.

²⁶⁸ Convenio de Creación de la Visa única Centroamérica para la libre movilidad de extranjeros entre las Repúblicas de El Salvador, Guatemala, Honduras y Nicaragua (Covenant creating a single Central American visa for the free movement of foreign nationals between de Republics of El Salvador, Guatemala, Honduras and

Stricter U.S. border controls have not led to a decrease in irregular migration.²⁶⁹ Rather, allegedly it has pressured irregular migrants into resorting to the assistance of smugglers and into seeking more clandestine (often meaning more dangerous) routes.²⁷⁰ Numbers support this claim: since the mid-1990s more than 4,000 migrants died on their way across the border.²⁷¹ Deaths were mainly caused by “hypothermia/sunstroke and drowning.”²⁷² Mexican in-country checkpoints appear to also have led migrants into taking more evasive and dangerous routes.²⁷³

Thus, stricter border control, to the extent that the United States has implemented them, do not necessarily contribute to preventing and detecting trafficking. On the other hand, neither does the opening of all borders, given that Central American countries also remain the destination and transit for trafficking victims of other Central American nationalities.²⁷⁴

This reality calls for exploration of other and more sophisticated kinds of border control measures that primarily focus on detecting trafficking, but that do not force irregular migrants into more dangerous routes and into the hands of smugglers and traffickers. Such initiatives should already start in the Central American countries, as the free movement not only allows migrants to travel more freely, but also allows trafficking and smuggling rings to more freely operate their business from Central America.

Conclusion

The analysis of the migration and trafficking connection in the Mexican region demonstrates that there is a plethora of migration and asylum protection measures readily available in the combat against trafficking. Some of these measures are already adopted, but at times underutilised, while other options are still unexplored. Expanding anti-trafficking strategies from a migration and asylum protection perspective could be beneficial to the prevention of trafficking, the protection of victims, and the furtherance of prosecution of traffickers.

Mexico, the United States and the Central American countries El Salvador, Guatemala, Honduras and Nicaragua, have already put in place some of the possible measures. So far as the application of the adopted measures is underutilised, this seems primarily to be a result of a lack of detection and identification of trafficking victims. Also, underutilisation could be ascribed to such factors as a lack of knowledge among governmental agencies and (consequently) victims, relatively new legislation that still needs to be implemented properly, and a mind-set that is concentrated on the prosecution of the crime of trafficking (which results in migration solutions that are primarily connected to criminal trials).

Additionally, there appears to be a lack of incentives for victims to make use of the available options, for example, to file an asylum application or to regulate stay, to file complaints or to

Nicaragua), 149/2008, 30 de junio de 2005, available at: <http://www.oas.org/dil/AgreementsPDF/149-2008.PDF> [last accessed: 22 April 2012].

²⁶⁹ Cicero-Domínguez 2005, *supra* note 86, par. 50.

²⁷⁰ ILO Perspectives on Labour Migration 2003, *supra* note 32, p. 5-6; Verduzco & De Lozano write: “Apparently every border control implemented by the US government is correlated with an increase in the number of migrant deaths”; Verduzco & De Lozano 2011, *supra* note 49, p. 48.

²⁷¹ See UN Special Rapporteur on Migrants Bustamante 2008, *supra* note 39, p. 9; Anti-Slavery International 2011, *supra* note 3, par. 3.1; Cicero-Domínguez 2005, *supra* note 86, par. 49.

²⁷² Verduzco & De Lozano 2011, *supra* note 49, p. 48.

²⁷³ WOLA 2011, *supra* note 254, p. 5.

²⁷⁴ U.S. TIP Report 2011, *supra* note 4, country sections on El Salvador, Guatemala, Honduras and Nicaragua.

remain in the country while cooperating in criminal investigations. For instance, in Mexico, many migrants, among who may be trafficking victims, opt for immediate voluntary repatriation. This decision is stimulated by the absence of information, by difficulties in obtaining access to legal assistance, and therewith by the lack of prospect of opportunities and security in Mexico.

In the United States, opportunities to stay in U.S. territory are first and foremost connected to the victim's willingness and ability to participate in a criminal investigation. However, after a trial, the victim might still be denied extended stay. This contributes to a victim's insecurity (about the future and about safety during trial) and impedes the opportunities of recovery and reintegration. When making greater use of the available or still to be explored migration measures, more attention could thus be paid to the needs of the victim and his/her ability to exercise his/her rights.

Finally, the majority of migration measures are developed nationally, or maybe bilaterally. Considering the clear regional causes and effects of migration and trafficking in Mexico and its neighbouring countries, there is room for more comprehensive, regional strategies, particularly regarding border control measures, repatriation policies, temporary work schemes, and greater participation in the UNHCR resettlement programme.

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8 U.S.C.A. § 1101(a)(42)(A)
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22 U.S.C.A. § 7102 (8)
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Interviews

| | |
|------------------|---|
| 3 November 2011 | Luis Flores, IOM, Tapachula, Chiapas, Mexico |
| 4 November 2011 | Hans Hartmark, UNHCR, Tapachula, Chiapas, Mexico |
| 12 December 2011 | Alejandra Carrillo, UNHCR, Mexico City, Mexico |
| 20 December 2011 | Hélène LeGoff, IOM, Mexico City, Mexico |
| 22 March 2012 | Georgina Quiñonez Chávez, COMAR, Mexico City, Mexico |
| 23 March 2012 | Katya Somohano Silva, COMAR, Mexico City, Mexico |
| 2 April 2012 | Dustin Amaya Cazerias, IOM, Mexico City, Mexico |
| 9 April 2012 | Karla Meza Soto & Monica Oehler, Sin Fronteras, Mexico City, Mexico |

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