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Los Vaqueros, Coyoters, y Pollos: Combating Human Smuggling Beyond the Border

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LOS VAQUEROS, COYOTEROS, Y POLLOS: COMBATING HUMAN SMUGGLING BEYOND THE BORDER

Marshall B. Lloyd*

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ABSTRACT

The United States and México have worked in partnership for years in efforts to combat human smugglers that operate within México at a shared border region. This paper provides a concise overview of contemporary policy developments in both countries that have a common interest in stopping human smuggling, but diverse views on how to combat criminal cartels that perpetuate it. A common interest contributes to institutional solutions to combat cartels that include traditional prosecutorial initiatives and establishing a regional response to transnational crimes. The suggestions in this article may be a viable means to address concerns about the border and initiate a coordinated response to combat cartels that are operating across the Western Hemisphere. One novel approach is a regional tribunal to minimize the need for the United States to function as the only viable, sovereign nation-state in the Americas to ensure that cartels engaged in illicit businesses are not operating in the region with impunity. Empowering a regional tribunal minimizes the need for the United States to function as the dominant, sovereign nation-state in the Americas confronting human smuggling, squabbling over border disputes, and resolve some jurisdictional issues associated with domestic prosecutions.

I. INTRODUCTION

The magnitude of international smuggling operations and human trafficking is difficult to estimate in light of the clandestine nature of the trade.¹ According to recent estimates from the International Labor Organization (“ILO”) and Walk Free Foundation, the number of persons enslaved worldwide is about 40 million,² generating almost \$150 billion per year in profits for traffickers.³ Global trends indicating an increase in the number of victims may be attributed to improved detection of persons smuggled transnationally and within domestic borders.⁴ For some, human smuggling creates an image of predators exploiting asylum seekers, refugees, and others who seek entry into the

1. See generally UNODC, GLOBAL REPORT ON TRAFFICKING IN PERSONS 6–7 (2009), http://unodc.org/documents/Global_Report_on_TIP.pdf (noting that a lack of data hampers the ability of policymakers to develop a global understanding of human trafficking). But see U.S DEP’T OF STATE, 2019 TRAFFICKING IN PERSONS REPORT 38 (June 2019), <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf> (listing enforcement actions reported by foreign governments to the U.S. State Department from 2012 through 2018, identifying 85,613 trafficking victims in 2018).

2. INTERNATIONAL LABOUR ORGANIZATION ET AL., GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 21–23 (2017), <https://bit.ly/44pkiZn>. The report identifies three categories of enslaved persons: forced labor, forced sexual exploitation, and state imposed forced labor. *Id.* at 23. The data, noting a disproportionate impact on women and girls, also includes forced marriage as categories of modern slavery. *Id.* at 22.

3. INTERNATIONAL LABOR OFFICE, PROFITS AND POVERTY: THE ECONOMICS OF FORCED LABOUR 7–13 (2014), <https://bit.ly/3LyBpiG> (noting 21 million people were victims of forced labour in 2012 and acknowledging the difficulty of estimating victims and profits that includes state-imposed forced labour).

4. See UNODC, GLOBAL REPORT ON TRAFFICKING IN PERSONS 21 (2018), <https://bit.ly/3ntUKJI>.

United States from countries in Latin America and beyond the Western Hemisphere.⁵ Routes from Central America to the United States–México border are traversed by modern-day desperadoes consisting of police, immigration authorities, gangs, and criminal cartels operating throughout the region.⁶ Migrants, commonly referred to as “pollos,”⁷ are herded within states of origin, transit, or destination, hearkening back to México’s legacy of vaqueros⁸ leading cattle drives northward prior to the Treaty of Guadalupe Hidalgo⁹ and the Gadsden Purchase of 1853.¹⁰ Cattle drives were part of economic development that continued throughout the late 1800s along famous routes such as the Chisholm Trail and Goodnight-Loving Trail.¹¹ During this period, cattlemen took advantage of a change in marketing beef to the American public and the availability of “de-commissioned horsemen of the Confederate cavalry plus freed ex-slaves and Mexican gauchos” as a result of the Civil War.¹² These cattle drives crisscrossed a terrain of rivers, Indian Territory, and range lands until the early 1900s, when fencing of ranches and the expansion of shipping livestock by rail ended the cowboy era.¹³

Today, historical cattle trails, rail systems, and contemporary means of transportation have enabled the creation of a lucrative business of human smuggling as

5. See, e.g., Jennifer M. Chacón, *Human Trafficking, Immigration Regulation, and Subfederal Criminalization*, 20 NEW CRIM. L. REV. 96, 106–28 (2017) (describing state-level prosecutions for human smuggling and trafficking efforts among states to combat exploitation of migrants); Samuel Vincent Jones, *The Invisible Man: The Conscious Neglect of Men and Boys in the War on Human Trafficking*, 2010 UTAH L. REV. 1143, 1147–54 (2010) (details profiteering with respect to trafficking and smuggling involving criminal networks); and Luz Estella Nagle, *Selling Souls: The Effect of Globalization on Human Trafficking and Forced Servitude*, 26 WIS. INT’L L.J. 131, 132–36, 147 (2008) (providing an account of mistreatment of trafficked victims).

6. See, e.g., Juan J. Fogelbach, *Gangs, Violence, and Victims in El Salvador, Guatemala, and Honduras*, 12 SAN DIEGO INT’L L.J. 417, 437–43 (2011) (documenting the existence of gangs and criminal organizations in El Salvador, Guatemala, Honduras, México, Nicaragua, the United States and Canada engaged in a broad range of crime).

7. See, e.g., *United States v. Liera*, 585 F.3d 1237, 1240 (9th Cir. 2009) (explaining that pollos—“chickens” in English—is a slang term in Spanish referring to persons illegally smuggled into the United States).

8. See, e.g., Phil Livingston, *The History of the Vaquero: Rooted in Necessity and Shaped by the Land, the Mexican Cowboy Tradition Influenced the Origin of Cowboys*, AM. COWBOY NEWSL. (Feb. 13, 2017), <https://www.americancowboy.com/ranch-life-archive/history-vaquero>; see also, *RIDE, VAQUERO!* (Metro-Goldwyn-Mayer 1953) (a movie starring Robert Taylor as a gunman named Rio who is complicit with Mexican bandit Jose Esqueda, played by Anthony Quinn, and participates in the sacking of Brownsville, Texas).

9. Treaty of Peace, Friendship, Limits, and Settlement, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922 (hereinafter Treaty of Guadalupe Hidalgo). The treaty brought an end to the Mexican-American War, with the United States paying \$15 million to México, which ceded 525,000 square miles of what is now Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming. See *Treaty of Guadalupe Hidalgo*, HISTORY.COM (SEPT. 21, 2022), <http://www.history.com/topics/treaty-of-guadalupe-hidalgo>. México relinquished all claims to Texas and recognized the Rio Grande River as America’s southern boundary. *Id.*

10. Treaty of Boundary, Cession of Territory, Transfer of Isthmus Tehuantepec, U.S.-Mex., art. I, Dec. 30, 1853, 10 Stat. 1031 (hereinafter Treaty of La Mesilla) (the Treaty of La Mesilla took effect on June 8, 1854, requiring a payment “of ten million dollars” upon ratification of the treaty and completion of a survey to mark boundaries). México agreed to sell a strip of land running along its northern border between Texas and California for \$10 million, thus ending lingering conflict over the Mesilla Valley, settling remaining border issues, and allowing for the expansion of the southern transcontinental railroad. OFF. HISTORIAN, *Gadsden Purchase, 1853–1854*, <https://history.state.gov/milestones/1830-1860/gadsden-purchase> (last visited Mar. 31, 2023).

11. See generally *Cattle Drives*, ENCYCLOPEDIA.COM, <https://bit.ly/41GK3D2> (last visited Mar. 31, 2023).

12. *Id.*

13. *Id.* See generally RICHARD SLATTA, *COWBOYS OF THE AMERICAS* (1990) (providing a more in-depth description of American cowboys and the vaqueros of México and other Latin American countries).

coyotes¹⁴ lead the way herding migrants across the border—in some cases to interior locations where they are held until payment is exchanged for transportation.¹⁵ Human smuggling, defined under US law as “[b]ringing to or attempt[ing] to bring to the United States in any manner whatsoever” a known alien “at a place other than a designated port of entry,”¹⁶ incorporates a myriad of smuggling modes to assist undocumented aliens.¹⁷ Smugglers assisting aliens across the border often provide migrants with illegal documents before entering border crossing points, as well as walking across in caravans that overwhelm border officials.¹⁸

Recent events in late 2018, with migrants crossing *en masse*, led the Trump Administration to adopt policies to curtail the entry of undocumented aliens, resulting in the Migration Protection Protocols (“MPP,” commonly referred to as Remain-in-Mexico) asylum policy.¹⁹ Afterwards, a letter of guidance sent within days to immigration officers in U.S. Citizenship and Immigration Services noted that, under the MPP, the United States

“understands that, according to the Mexican law of migration, the Government of Mexico will afford such individuals all legal and procedural protection[s] provided for under applicable domestic and international law,” including the [Convention Relating to the Status of Refugees] and the [Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment]. Further, “[t]he United States expects that the Government of Mexico will comply with the commitments articulated in its statement of December 20, 2018.”²⁰

14. See Daniela Aguilar, *Child Trafficking: From Ecuador to the US, Through Hell*, INSIGHT CRIME (Mar. 31, 2015), <https://insightcrime.org/news/analysis/child-trafficking-from-ecuador-to-the-us-through-hell/> (in México, smugglers are known as “polleros” while the term “coyoteros” is used other Latin American countries).

15. See, e.g., *State v. W. Union Fin. Servs.*, 199 P.3d 592, 611 (Ariz. Ct. App. 2008) (estimating “that \$1.7 billion to \$2.5 billion is generated annually by [undocumented immigrant smuggling] into Arizona,” a “lucrative business” that creates competition among coyote organizations); see also *United States v. Jimenez*, 24 F.3d 250, 250 (9th Cir. 1994) (a case involving a “coyote” smuggling a Mexican citizen who paid five-hundred dollars in exchange for transportation between Tijuana and Sacramento).

16. 8 U.S.C. § 1324(1)(A)(i). Some states have also enacted laws criminalizing human smuggling. See, e.g., TEX. PENAL CODE § 20.05(a) (defining human smuggling as (1) the use of “a motor vehicle, aircraft, watercraft, or other means of conveyance to transport an individual with the intent to” conceal the individual or flee from a peace officer, (2) encouraging a person to remain in the United States “by concealing, harboring, or shielding that person from detection,” or (3) assisting two or more persons “to enter or remain on agricultural land without the effective consent of the owner.”).

17. See, e.g., Theodore Baird, *Theoretical Approaches to Human Smuggling* 7 (Danish Inst. Int’l Stud., Working Paper No. 2013:10, 2013), <https://bit.ly/3M6akVO>. Baird distinguishes between a smuggled migrant and a victim of trafficking and outlines the problems differentiating between smuggling and trafficking of persons. *Id.*

18. See, e.g., Jordan Boyd, *Thousands of Illegal Aliens Overrun Border Checkpoints Overwhelming Border Patrol*, THE FEDERALIST (Sept. 17, 2021), <https://thefederalist.com/2021/09/17/thousands-of-illegal-aliens-overrun-border-checkpoints-overwhelming-border-patrol/>.

19. Section 235 of the Immigration and Nationality Act (“INA”) provides specific procedures regarding the treatment of those not clearly entitled to admission, including those who apply for asylum. 8 U.S.C. § 1225. Section 235(b)(2)(C) of the INA states that that “[i]n the case of an alien . . . who is arriving on land (whether or not at a designated port of arrival) from a foreign territory contiguous to the United States, the Attorney General may return the alien to that territory pending a [removal] proceeding under section 1229a.” 8 U.S.C. § 1225(b)(2)(C). The U.S. notified the Government of México about implementing these procedures under U.S. law. SEC’Y HOMELAND SEC., POLICY GUIDANCE FOR IMPLEMENTATION OF THE MIGRANT PROTECTION PROTOCOLS (Jan. 25, 2019), <https://bit.ly/40UFeEZ>. Announced December 20, 2018, the plan was put into action on January 25, 2019. *Id.*

20. See U.S. CITIZENSHIP AND IMMIGRA. SERVS., PM-602-0169: GUIDANCE FOR IMPLEMENTING SECTION

In coordination with México, sprawling tent communities populated with migrants from Honduras, Nicaragua, El Salvador and Guatemala awaited immigration hearings conducted in pavilions at the edges of the U.S. border.²¹

II. EL NUEVO MARSHAL EN LA CIUDAD: TEXAS AND THE FEDERAL GOVERNMENT GRAPPLE OVER THE BORDER, ENFORCEMENT, AND JURISDICTION OVER HUMAN SMUGGLING

During the initial months of his administration, President Biden took the reins and responded quickly to reverse Trump's immigration policies, signing executive orders addressing the United States-México border and other immigration-related concerns.²² Biden issued an executive order outlining a multi-pronged approach to manage migration and address the root causes of migration, including cartel human smugglers, corruption among public officials that threatens democratic governance, the rule of law, and processing migrants seeking asylum.²³ He also reversed policies of the Trump Administration by enacting the Central American Minors ("CAM") parole policy.²⁴ The CAM policy was implemented as part of a comprehensive means of changing immigration rules, which included the Department of Justice's ("DOJ") ordering immigration judges to ignore rulings from former Attorneys General William Barr and Jeff Sessions, and to revert to previous precedent.²⁵ Simultaneously, the DOJ established a Joint Task Force Alpha to

235(B)(2)(C) OF THE IMMIGRATION AND NATIONALITY ACT AND THE MIGRANT PROTECTION PROTOCOLS (Jan. 28, 2019), <https://www.uscis.gov/sites/default/files/document/memos/2019-01-28-Guidance-for-Implementing-Section-35-b-2-C-INA.pdf> (quoting SEC'Y HOMELAND SEC., *supra*, note 19) (internal citations omitted).

21. See, e.g., Daniel Gonzalez, *The 2019 Migrant Surge is Unlike any We've Seen Before*, USA TODAY (Sept. 23, 2019), <https://www.usatoday.com/in-depth/news/nation/2019/09/23/immigration-issues-migrants-mexico-central-america-caravans-smuggling/2026215001/>.

22. Ken Bredemeier, *Biden Signs Executive Orders Reversing Trump Immigration Policies*, VOA NEWS (Feb. 3, 2021, 2:42 AM), https://www.voanews.com/a/usa_biden-signs-executive-orders-reversing-trump-immigration-policies/6201520.html. See also Exec. Order No. 14,011, 86 Fed. Reg. 8273 (Feb. 2, 2021) (establishing a Task Force on the Reunification of Families separated under the "Zero-Tolerance policy" for offenses under 8 U.S.C. § 1325(a), which prohibits both attempted illegal entry and illegal entry into the United States by an alien); U.S. ATT'Y GEN., MEMORANDUM FOR FEDERAL PROSECUTORS ALONG THE SOUTHWEST BORDER (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download>.

23. Exec. Order No. 14,011, 86 Fed. Reg. 8273 (Feb. 2, 2021). See also U.S. DEP'T OF STATE, JOINT STATEMENT BY THE U.S. DEPARTMENT OF STATE AND U.S. DEPARTMENT OF HOMELAND SECURITY ON THE EXPANSION OF ACCESS TO THE CENTRAL AMERICAN MINORS PROGRAM (June 15, 2021), <https://www.state.gov/joint-statement-by-the-u-s-department-of-state-and-u-s-department-of-homeland-security-on-the-expansion-of-access-to-the-central-american-minors-program/>.

24. Exec. Order No. 14,011, 86 Fed. Reg. 8273 (Feb. 2, 2021). See also Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017) (terminating special consideration for parole of certain individuals denied refugee status in El Salvador, Guatemala, and Honduras under the Central American Minors ("CAM") Parole Program). The Obama administration established the CAM program in December 2014 and subsequently expanded the categories of eligible relatives that could apply as a refugee. DEPT. OF HOMELAND SEC., U.S. EXPANDS INITIATIVES TO ADDRESS CENTRAL AMERICAN MIGRATION CHALLENGES (July 26, 2016), <https://www.dhs.gov/news/2016/07/26/us-expands-initiatives-address-central-american-migration-challenges>.

25. DEPT. HOMELAND SEC., JOINT STATEMENT BY THE U.S. DEPARTMENT OF HOMELAND SECURITY AND THE U.S. DEPARTMENT OF STATE ON THE EXPANSION OF ACCESS TO THE CENTRAL AMERICAN MINORS PROGRAM (June 15, 2021), <https://www.dhs.gov/news/2021/06/15/joint-statement-us-department-homeland-security-and-us-department-state-expansion>. See generally, Matter of Cruz-Valdez, 28 I. & N. Dec. 326 (A.G. 2021) (reversing Trump-era immigration decisions that narrowed qualification for asylum, including an opinion that removed some protections for victims of domestic violence and gang violence, therefore vacating Attorney General Sessions' opinion in *Castro v. Tum*, 27 I. & N. Dec. 271 (A.G. 2018)).

prosecute smuggling and trafficking of groups operating in México and in the “Northern Triangle” countries of Guatemala, El Salvador, and Honduras.²⁶ Task Force Alpha was also charged with enforcement initiatives and asset recoveries relating to corruption in the Northern Triangle countries through its Foreign Corrupt Practices Act enforcement program.²⁷

Other administrative actions that impacted the border included policies and practices for enforcing civil immigration laws,²⁸ a 100-day pause on “certain removals to enable focusing the Department’s resources where they [were] most needed,” and rescinding previous enforcement policies that possibly discriminated or targeted anyone who could be deported.²⁹ Biden also sought preservation of the Deferred Action for Childhood Arrivals (“DACA”) policy,³⁰ terminated the declaration of a national emergency on the southern border, halted construction on the border wall,³¹ and ended the Remain-in-Mexico program.³² By late-Spring 2021, the slow process of policy implementation had failed to discourage migration, while transnational cartels continued to lure migrants from Latin America to cross the United States-México border.³³ Labeled as a “crisis at the border,”³⁴ the infighting within the Biden Administration over migration policies led to a showdown in October 2021. Numerous officials managing the surge of immigrants resigned over the lack of a coherent immigration policy, all while a Haitian migrant caravan gathered on the other side of the border from Del Rio, Texas.³⁵ Though Biden

26. U.S. DEPT. JUST., ATTORNEY GENERAL ANNOUNCES INITIATIVES TO COMBAT HUMAN SMUGGLING AND TRAFFICKING AND TO FIGHT CORRUPTION IN CENTRAL AMERICA (June 7, 2021), <https://www.justice.gov/opa/pr/attorney-general-announces-initiatives-combat-human-smuggling-and-trafficking-and-fight>.

27. *Id.*

28. Exec. Order No. 13,993, 86 Fed. Reg. 7051 (Jan. 20, 2021).

29. U.S. DEPT. HOMELAND SEC., REVIEW OF AND INTERIM REVISION TO CIVIL IMMIGRATION ENFORCEMENT AND REMOVAL POLICIES AND PRIORITIES (Jan. 20, 2021), https://www.dhs.gov/sites/default/files/publications/21_0120_enforcement-memo_signed.pdf.

30. Preserving and Fortifying Deferred Action for Childhood Arrivals, 86 Fed. Reg. 7053 (Jan. 20, 2021) (hereinafter DACA).

31. Proclamation No. 10,142, 86 Fed. Reg. 7225 (Jan. 20, 2021). *See also* Proclamation No. 9,844, 84 Fed. Reg. 4949 (Feb. 15, 2019) (the Trump Administration’s version of the policy).

32. U.S. DEPT. HOMELAND SEC., DHS STATEMENT ON THE SUSPENSION OF NEW ENROLLMENTS IN THE MIGRANT PROTECTION PROTOCOLS PROGRAM (Jan. 20, 2021), <https://www.dhs.gov/news/2021/01/20/dhs-statement-suspension-new-enrollments-migrant-protection-protocols-program>.

33. *See* Quinn Owen, *Crisis at the Border: How it Happened and What is Being Done*, ABC NEWS (June 17, 2021, 5:00 AM), <https://abcnews.go.com/US/crisis-border-happened/story?id=78312099>; Priscilla Alvarez, *Biden Administration Announces New Operation to Crack Down on Human Smuggling*, CNN POL. (Apr. 27, 2021, 1:00 PM), <https://www.cnn.com/2021/04/27/politics/human-smuggling-border/index.html> (noting that “human smugglers . . . in some cases have marketed their services on Facebook.”).

34. *See, e.g.*, Gabrielle Fonrouge & Aaron Feis, *US Government Imposing Severe Restrictions on News Outlets Covering Border Crisis*, N.Y. POST (Mar. 22, 2021), <https://nypost.com/2021/03/22/news-outlets-battling-restrictions-to-cover-border-crisis/>. *But cf.*, Tom K. Wong et al., *The Migrant ‘Surge’ at the U.S. Southern Border is Actually a Predictable Pattern*, WASH. POST (Mar. 25, 2021, 2:29 PM), <https://www.washingtonpost.com/politics/2021/03/23/theres-no-migrant-surge-us-southern-border-heres-data/>.

35. Edwin Mora, *Biden’s Deputies Resign Over Chaotic Immigration Policy: ‘Complete Lack of Direction’*, BREITBART (Oct. 15, 2021), <https://www.breitbart.com/politics/2021/10/15/bidens-deputies-resign-chaotic-immigration-policy-complete-lack-direction/>. *See also*, Hamed Aleaziz, *Biden’s Approach to Immigration Is Causing a Huge Internal Rift and Leading to a Lot of Confusion*, BUZZFEED NEWS (Sept. 23, 2021, 8:54 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/biden-immigration-policy-internal-frustration>.

seemed adverse to Trump's polices, his actions in the early stages of his administration may have contributed to fighting as expulsion remained an option to deter asylum seekers and others from gathering at various pathways along the southern border.³⁶ First, Title 42, a provision from the 1944 Public Health Act invoked by the Trump Administration to suspend entries of persons,³⁷ was initially one of Biden's options to expel aliens in response to criminal cartels herding migrants to the border region.³⁸ Moreover, Biden's riding roughshod on border issues by keeping expulsion in place contributed to courts limiting the impact of 42 U.S.C. § 265 and, instead, considering asylum applicants under established standards.³⁹

A. Wrangling Over the Remain-in-Mexico Policy

Initial judicial resistance to ending the Trump-era Remain-in-Mexico policy caused the Biden Administration to restore the program while continuing with the appeals process.⁴⁰ A prior issue was the January 8, 2021 agreement between the Trump Administration's Department of Homeland Security ("DHS") and Texas which ensured that the state would provide assistance and information to DHS.⁴¹ In return, DHS agreed to consult with Texas officials before making decisions impacting the state, including immigration enforcement or removal of inadmissible aliens.⁴² DHS elected to terminate the MPP program on June 1, 2021 and gave notice to Texas that it would no longer consult state officials, causing a resurgence of illegal aliens and disinformation to convince migrants that the U.S. borders were open.⁴³ Texas documented the detrimental impact of terminating the MPP, noting that it would be required to issue driver's licenses to undocumented aliens, provide public education for their children, burden the state's

36. Priscilla Alvarez, *Biden to extend Trump-era expulsion policy as 'record numbers' of migrants cross border*, CNN POL. (Aug. 2, 2021, 6:44 PM), <https://www.cnn.com/2021/08/02/politics/aclu-title-42/index.html>.

37. 42 U.S.C. §§ 265, 365. *See also*, Notice of Order Under Sections 362 and 365 of the Public Health Service Act Suspending Introduction of Certain Persons From Countries Where a Communicable Disease Exists, 85 Fed. Reg. 17060 (Mar. 26, 2020); Control of Communicable Diseases, Foreign Quarantine: Suspension of the Right To Introduce and Prohibition of Introduction of Persons Into United States From Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 56424 (Sept. 11, 2020) (finalizing the interim final rule to expel persons arriving from foreign counties, effective October 13, 2020); *and* Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 85 Fed. Reg. 65806 (Oct. 13, 2020).

38. Public Health Reassessment and Order Suspending the Right To Introduce Certain Persons From Countries Where a Quarantinable Communicable Disease Exists, 86 Fed. Reg. 42828 (Aug. 5, 2021) (replacing and superseding 85 Fed. Reg. 65806).

39. *Huisha-Huisha v. Mayorkas*, 560 F. Supp. 3d 146, 169–70 (D.C. Cir. 2021) (granting a preliminary injunction that Section 265 does not authorize DHS to expel persons "already present" in the United States). The power of the CDC is limited by the plain wording of Title 42 to quarantine and containment, not expulsion of persons from the United States. *Id.*

40. Tierney Sneed, *Federal judge says Biden can't yet end Trump-era 'Remain in Mexico' immigration policy*, CNN POL. (Dec. 16, 2022, 5:22 PM), <https://www.cnn.com/2022/12/15/politics/remain-in-mexico-immigration/index.html>; Yang Liu & Brandon Vines, *Federal Judge Orders Biden Administration to Continue Title 42*, LAWFARE (June 27, 2022, 1:33 PM), <https://www.lawfareblog.com/federal-judge-orders-biden-administration-continue-title-42>.

41. *Texas v. Biden*, 554 F. Supp. 3d 818, 834–37 (N.D. Tex. 2021).

42. *Id.* Missouri is also a party to the lawsuit and notes similar facts and financial burdens. *Id.* at 818.

43. SEC'Y HOMELAND SEC., TERMINATION OF THE MIGRANT PROTECTION PROTOCOLS PROGRAM (June 1, 2021), https://www.dhs.gov/sites/default/files/publications/21_0601_termination_of_mpp_program.pdf.

healthcare services, and increase public safety costs, especially in combatting human trafficking.⁴⁴ State officials sued the Biden Administration for failure to comply with the Administrative Procedure Act (“APA”) in terminating the MPP, thus inviting judicial intervention to “set aside agency action . . . [that is] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁴⁵

The states’ main argument was that the Biden Administration’s termination of the MPP without doing a cost-benefit analysis or considering alternatives was an arbitrary and capricious act that violated the APA.⁴⁶ Specifically, the Biden Administration’s June 1, 2021 Memorandum dictated that the MPP would be set aside until the program complied “with the APA and until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention . . . without releasing any aliens because of a lack of detention resources.”⁴⁷ Wrangling between the Biden Administration and states like Texas appeared to be resolved when the Supreme Court ruled in favor of ending the Trump-era immigration policy and allowed thousands of asylum seekers waiting south of the border to enter the country while awaiting the adjudication of their claims.⁴⁸ However, prior to ending the Title 42 immigration policy, the Court issued a stay to temporarily halt the termination of the policy, thus giving states a window of opportunity to challenge the decision in February 2023.⁴⁹ In response, the Department of Homeland Security issued a statement that Title 42 would remain in effect, and “individuals who attempt to enter the United States unlawfully will continue to be expelled to Mexico.”⁵⁰ The Department stated that it would wait for Congress to provide funding “for border security and management and advance the comprehensive immigration measures,” as requested by the Biden Administration.⁵¹

To make matters worse, Texas Governor Greg Abbott claimed unilateral authority to “secure the border.”⁵² Abbott signed an executive order declaring “that the surge of individuals unlawfully crossing the Texas-Mexico border poses an ongoing and imminent

44. *Texas*, 554 F. Supp. 3d at 838–39.

45. *Id.* at 840 (quoting 5 U.S.C. § 706). It should be noted that Biden transition officials were briefed on and warned by officials from the Trump administration of consequences that would follow a suspension of MPP, made aware of the binding agreement with Texas and Missouri, and should have known APA requirements prohibiting “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* at 847.

46. *Id.* at 836–37.

47. *Id.* at 857. Since the agreement ended August 1, 2021, any further action does not apply to any new agency action. *Texas*, 554 F. Supp. 3d at 853.

48. *Biden v. Texas*, 142 S. Ct. 2528, 2547–48 (2022) (holding that “the Government’s rescision of MPP did not violate section 1225 of the INA . . .”).

49. *See generally*, *Arizona v. Mayorkas*, 143 S. Ct. 478 (2022) (mem.).

50. DEPT. HOMELAND SEC., STATEMENT BY THE DEPARTMENT OF HOMELAND SECURITY ON SUPREME COURT TITLE 42 ORDER (Dec. 19, 2022), <https://www.dhs.gov/news/2022/12/19/statement-department-homeland-security-supreme-court-title-42-order>.

51. *Id.*

52. Governor Abbott’s predecessor, Rick Perry, sent 1,000 Texas National Guard troops to secure the Texas border with México in Summer 2014 and claimed credit for a subsequent decline in illegal immigration. Bradley Saacks, *Rick Perry Says 74 Percent Drop in Border Apprehensions Shows Texas Surge Worked*, POLITIFACT (June 4, 2015), <https://www.politifact.com/factchecks/2015/jul/26/rick-perry/rick-perry-says-74-percent-drop-border-apprehensio/> (rating Governor Perry’s claim as “mostly false”). *See also* DURANT FRANTZEN & MARSHALL B. LLOYD, *TEXAS’S CRIMINAL JUSTICE SYSTEM*, 263–78 (2018).

threat of disaster for certain counties and agencies in the State.”⁵³ The Governor noted a potential for spreading COVID-19 from the Biden Administration’s failure to enforce Title 42 by admitting migrants who could carry the disease across the border.⁵⁴ With this justification in hand, Abbott issued an order prohibiting anyone other than law enforcement from providing ground transportation to migrants detained by Customs and Border Protection.⁵⁵ This order instructs Texas Department of Public Safety (“DPS”) troopers “to stop any vehicle upon reasonable suspicion of a violation of [the order], and to reroute such a vehicle back to its point of origin or a port of entry . . . [or] impound a vehicle that is being used to transport migrants in violation of [the order], or that refuses to be rerouted.”⁵⁶ In response, the U.S. DOJ secured a temporary restraining order against Abbott’s executive order to enjoin state officials from prohibiting the transportation of migrants until a resolution of the case on the merits.⁵⁷ The DOJ cited the Supremacy Clause of the U.S. Constitution and the related doctrine of intergovernmental immunity to successfully establish a substantial likelihood of success on the merits that the order stood as an obstacle to federal immigration enforcement.⁵⁸

Subsequently, Governor Abbot announced a “10-Point Plan” to combat the border crisis that attracted other governors’ commitment to “securing the border and keeping Americans safe.”⁵⁹ Abbott is undeterred in securing the border despite the Federal Emergency Management Agency’s (“FEMA”) denial of Texas’ Federal Emergency Declaration, vowing to appeal the request for supplemental federal assistance to respond to the thousands of illegal crossings along the border.⁶⁰ Abbott sent a letter to President Biden outlining the millions of dollars in costs for the state and local jurisdictions and requested additional federal assistance using similar justifications in support of his executive order.⁶¹ The request was met with silence, as only months prior to sending the

53. Exec. Order No. GA 37, Relating to the Transportation of Migrants During the COVID-19 Disaster (Texas, July 28, 2021), <https://lrl.texas.gov/scanned/govdocs/Greg%20Abbott/2021/GA-37.pdf>. See also Proclamation, Gov. Abbott, Disaster Declaration in Response to Border Crisis in Texas (May 31, 2021), https://gov.texas.gov/uploads/files/press/DISASTER_border_security_IMAGE_05-31-2021.pdf (requesting federal funds citing in part arrests of human smugglers and other border-related crimes requires expenditures for new migrant detention facilities) (hereinafter Disaster Declaration).

54. Exec. Order No. GA 37, *supra* note 53, at ¶ 1. The executive order references an ongoing “surge of individuals unlawfully crossing the Texas-México border poses an ongoing and imminent threat of disaster for certain counties and agencies in the State of Texas, including the potential for the spread of COVID-19.” *Id.* at ¶ 3.

55. See generally *id.*

56. *Id.* ¶ 2.

57. United States v. Texas, 557 F. Supp. 3d 810 (W.D. Tex. 2021); Tierney Sneed, *Judge issues injunction against Texas governor’s directive targeting migrant transport*, CNN POL. (Aug. 26, 2021, 5:30 PM), <https://www.cnn.com/2021/08/26/politics/doj-texas-migrant-transport-abbott-order-blocked/index.html>.

58. *Texas*, 557 F. Supp. 3d at 819–20.

59. OFF. TEX. GOV., GOVERNOR ABBOTT, STATE GOVERNORS OUTLINE 10-POINT PLAN TO COMBAT BORDER CRISIS (Oct. 6, 2021), <https://gov.texas.gov/news/post/governor-abbott-state-governors-outline-10-point-plan-to-combat-border-crisis>.

60. OFF. TEX. GOV., GOVERNOR ABBOTT ANNOUNCES INTENTION TO APPEAL FEMA DENIAL OF FEDERAL EMERGENCY DECLARATION IN RESPONSE TO BORDER CRISIS (Sept. 29, 2021), <https://gov.texas.gov/news/post/governor-abbott-announces-intention-to-appeal-fema-denial-of-federal-emergency-declaration-in-response-to-border-crisis>.

61. Letter from Greg Abbott, Gov. Tex., to Pres. Joseph R. Biden Jr. (Sept. 20, 2021), <https://gov.texas.gov/uploads/files/press/O-BidenJoseph202109190000.pdf>.

letter, Abbott signed legislation authorizing \$100 million to fund the Operation Lone Star (“OLS”) Grant Program to boost interagency border security operations and “encourage local governments to apply for these funds to enhance . . . ongoing collaborative efforts to deter illegal immigration and prevent the smuggling of people, drugs, weapons, and other contraband into [the] state.”⁶²

The OLS funds have been spent on shipping containers placed on riverbanks fortified with barbed wire fencing in the border town of Eagle Pass, Texas, as well as armored vehicles and a second line of defense consisting of Texas National Guard and DPS state troopers to stop migrants from illegally crossing the river.⁶³ Hundreds of state troopers and National Guard soldiers are deployed at other parts of the border to display a “show of force” in an attempt to physically intimidate migrants from crossing in high-traffic areas.⁶⁴ In La Jolla, Texas, boats blockaded part of the Rio Grande in another creative measure to enhance border security.⁶⁵ Despite having no authority to arrest and confine migrants in state prisons for violating federal immigration laws, some aliens are charged with trespassing on private property as part of Abbott’s border security initiative in rural Kinney County.⁶⁶ In response, members of the U.S. Congress, led by Congressman Joaquin Castro, have requested that the Justice Department open an investigation into OLS, alleging that the state’s border policy violates the Supremacy Clause of the U.S. Constitution.⁶⁷ Programs funded by OLS, according to Castro, establish a separate, state-immigration policy allowing for arrest, prosecution, and jailing of migrants by state and local officials on the basis of criminal trespass.⁶⁸ Additionally, the programs have led to the separation of families and denial of basic constitutional rights as migrants are confined for weeks in state prisons or county jails.⁶⁹

Senator Ted Cruz, dismayed with the situation at the border, is considering a modern Texas secessionist movement, despite a lack of legal authority.⁷⁰ Thus far, no action has

62. OFF. TEX. GOV., GOVERNOR ABBOTT ANNOUNCES OPERATION LONE STAR GRANT PROGRAM TO ENHANCE BORDER SECURITY OPERATIONS (Sept. 20, 2021), <https://gov.texas.gov/news/post/governor-abbott-announces-operation-lone-star-grant-program-to-enhance-border-security-operations> (allocating \$1.8 billion for border security). See also H.B. 9, 2021 Leg., 87th Sess. (Tex. 2021).

63. Sandra Sanchez, ‘Operation Steel Curtain’: Shipping Containers set up Along South Texas Border to Stop Illegal Crossings, KXAN (Nov. 19, 2021, 3:34 PM), <https://www.kxan.com/border-report/operation-steel-curtain-shipping-containers-set-up-along-south-texas-border-to-stop-illegal-crossings/>; Texas Gov. Abbott Continues Quest to Build ‘Border Wall’, NEWSNATION (Dec. 1, 2021, 10:04 AM), <https://www.newsnationnow.com/morninginamerica/texas-gov-abbott-continues-quest-to-build-border-wall/>.

64. *Show of Force by Texas Military and DPS at Eagle Pass*, HONEST AUSTIN TEAM (Nov. 18, 2021), <https://www.honestaustin.com/2021/11/18/operation-steel-curtain/>.

65. Alex Caprariello & Tom Palmer, *Texas using Boats to Block Border Along Rio Grande*, NEWSNATION (Dec. 9, 2021, 11:01 AM), <https://www.newsnationnow.com/us-news/immigration/texas-boats-rio-grande/>.

66. See, e.g., Jolie McCullough, *Hundreds of Migrants Accused of Trespassing Languish in Texas Prisons: A County Judge’s New Approach Might Prolong Their Detention*, TEX. TRIB. (Dec. 10, 2021, 5:00 AM), <https://bit.ly/414Z40j> (the article refers to OLS, describing the delayed hearings for migrants consisting of wrongful arrests and detentions for weeks without charges filed or assigned a lawyer).

67. Letter from Hon. Joaquin Castro et al. to Alejandro Mayorkas, Sec’y Dept. Homeland Sec., and Merrick B. Garland, U.S. Att’y Gen. (Oct. 29, 2021), <https://bit.ly/42umgG5>.

68. *Id.*

69. *Id.*

70. Alexandra Hutzler, *Ted Cruz Wants Texas to Secede if U.S. Comes to a ‘Point Where It’s Hopeless’*, NEWSWEEK (Nov. 8, 2021, 10:53 AM), <https://www.newsweek.com/ted-cruz-wants-texas-secede-if-us-comes-point-where-its-hopeless-1646981>. Texas cannot legally secede from the Union under a joint resolution of

been taken to intercede against OLS as Governor Abbott has expressed a willingness to “die standin’ up” and expend billions of dollars to defend Texans.⁷¹ Abbott’s bravado of tough talk has drawn armed militias to the border in coordination with county sheriffs to help patrol the border and arrest migrants for trespassing as part of a modern-day posse.⁷² Abbott has authorized construction of a border wall on state property as a “go it alone” approach using \$3 billion in state allocations, and he has appealed for public donations.⁷³ He has requested federal funding to complete the wall, while at the same time litigating against the federal government for reimbursement to offset costs already incurred.⁷⁴

The Texas border wall, already under construction,⁷⁵ is a response born out of Abbott’s declaration of a state of disaster for counties along the border to protect landowners’ private property and enforce criminal laws during the ongoing migration surge.⁷⁶ Construction has required lassoing the state’s General Land Office, led by Commissioner George P. Bush,⁷⁷ into a partnership with DPS and the Texas Facilities Commission, which manages state-owned properties and all facets of constructing public projects.⁷⁸ Commissioner Bush and the Texas General Land Office have also filed suit against the Biden Administration, asserting challenges to the federal government’s border policies and raising numerous common questions of law and fact in an effort to consolidate the action with similar litigation by Missouri.⁷⁹ Bush, a former candidate for Texas

Congress passed in the wake of Texas’ joining the United States. Joint Resolution Annexing Texas, 28th Cong., Res. No. 8, 5 Stat. 797 (Mar. 1, 1845). See also *Texas v. White*, 74 U.S. 700 (1869) (holding that Texas never ceased to be a state during the Civil War).

71. Barbara Koepfel, *Exclusive: Texas Governor Greg Abbott Used Covid Aid to Pay for a Border Wall*, NATION (Oct. 6, 2022), <https://www.thenation.com/article/politics/texas-covid-money-operation-lone-star/>. “Die standin’ up” is a phrase common in Texas, where the author lives and is a fourth-generation Texan. See, e.g., LOU HUDSON, *SPEAK TEXAN IN 30 MINUTES OR LESS* (2009); HELEN BRYANT, *FIXIN’ TO BE TEXAN* (1998), and RAMON F. ADAMS, *WESTERN WORDS: A DICTIONARY OF THE RANGE, COW CAMP AND TRAIL* (1946).

72. See, e.g., Elizabeth Findell, *In a Texas Border Town, Armed Groups Arrive to Look for Migrants*, WALL ST. J. (Dec. 16, 2021, 10:36 AM), <https://www.wsj.com/articles/in-a-texas-border-town-armed-groups-arrive-to-look-for-migrants-11639668989>.

73. Alex J. Rouhandeh, *Greg Abbott Says He Can Build the Border Wall in Texas for Less Money than Trump*, NEWSWEEK (Dec. 17, 2021, 4:28 PM), <https://www.newsweek.com/greg-abbott-says-he-can-build-border-wall-texas-less-money-trump-1660733>.

74. *Id.*; *Texas v. United States*, 524 F. Supp. 3d 598, 663 (S.D. Tex. 2021).

75. Ariana Garcia, *Texas Officially Starts Construction on Border Wall, Gov. Greg Abbott Says*, CHRON (Dec. 17, 2021, 10:56 AM), <https://www.chron.com/politics/article/Texas-starts-construction-on-its-own-border-wall-16710994.php>.

76. Disaster Declaration, *supra* note 53. The proclamation cites the Texas Disaster Act, which empowers the governor to declare a state of disaster, suspend “any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency,” and “commandeer or use any private property if the governor finds it necessary to cope with a disaster.” TEX. GOV’T CODE §§ 418.011, 418.014(a)(b), 418.016(a), 418.017(c).

77. TEX. GEN. LAND OFF., COMMISSIONER GEORGE P. BUSH ANNOUNCES AGREEMENT AUTHORIZING CONSTRUCTION OF BORDER WALL ON STATE-OWNED LAND (Nov. 29, 2021), <https://www.glo.texas.gov/the-glo/news/press-releases/2021/november/commissioner-george-p-bush-announces-agreement-authorizing-construction-of-border-wall-on-state-owned-land.pdf>.

78. *Mission*, TEX. FACILITIES COMM’N, <https://bit.ly/42b2HCL> (last visited Apr. 6, 2023). See also *Texas Border Wall Construction Status*, TEX. FACILITIES COMM’N, <https://www.tfc.texas.gov/wall/> (last visited Apr. 6, 2023) (the Texas Facilities Commission maintains a website on the border wall progress).

79. TEX. GEN. LAND OFF., GENERAL LAND OFFICE, TEXAS PUBLIC POLICY FOUNDATION SUE BIDEN ADMINISTRATION OVER LATEST ATTACK ON TEXAS PUBLIC LANDS (Jan. 12, 2022), <https://www.glo.texas.gov/the-glo/news/press-releases/2022/january/general-land-office-texas-public-policy->

Attorney General, discussed the idea of private landholders shooting illegal immigrants,⁸⁰ even though the state Court of Criminal Appeals makes clear that the Attorney General has limited prosecutorial powers.⁸¹ According to state law, the Attorney General can only “assist, upon request of the local prosecutor, in the prosecution of [specific] types of cases,” which do not include aliens trespassing on public or private lands.⁸² Put another way, unless there is a request from the local district attorney, the Attorney General of Texas does not have authority to institute a criminal prosecution, considering the legislature restricts the Attorney General’s authority to representing the State in any criminal proceeding.⁸³

Governor Abbott’s executive order in response to illegal immigrants entering the state includes a two-track means of removing apprehended immigrants: first “authoriz[ing] and empower[ing] the Texas National Guard and the Texas Department of Public Safety to apprehend[] immigrants who cross the border between ports of entry or commit other violations of federal law,” and, second, “return[ing] those illegal immigrants to the border at a port of entry.”⁸⁴ Abbott’s letter to DPS officials, asserting his power as Governor of Texas and commander-in-chief of its military forces, has ordered the Director of DPS “to repel immigrants from attempting to [illegally] cross [the border]”—a situation that he characterizes as an invasion of Texas.⁸⁵ Abbott further targets illegal border crossings by ordering the Texas Division of Emergency Management (“TDEM”) to coordinate the voluntary transportation by land or air of migrants to other locations outside the state of Texas.⁸⁶

Abbott’s transportation of migrants outside of the state is yet another facet of Operation Lone Star, a program which some criticize as lacking legal authority⁸⁷ and which has had questionable success considering the increase in the state’s budget for border security to more than \$4 billion through 2023.⁸⁸ The Governor’s power to redirect funding for a multibillion-dollar border operation is based on a disaster declaration which allows the use of available resources to respond to the disaster associated with illegal

foundation-sue-biden-administration-over-latest-attack-on-texas-public-lands.html.

80. Colby Hall, *George P. Bush Floats the Idea of Private Landholders Shooting Illegal Immigrants to Fox & Friends*, MEDIAITE (Dec. 21, 2021, 8:05 AM), <https://www.mediaite.com/tv/george-p-bush-floats-the-idea-of-private-landholders-shooting-illegal-immigrants-to-fox-friends/>.

81. *Texas v. Stephens*, No. PD-1032-20, 2021 WL 5917198 (Tex. Crim. App. Dec. 15, 2021) (holding that the state attorney general has no authority under the Texas Constitution to represent the state in criminal prosecutions of an individual). *Stephens* concerned an election code violation. TEX. ELEC. CODE ANN. § 273.021.

82. *Stephens*, 2021 WL 5917198, at *9–10.

83. *Saldano v. Texas*, 70 S.W.3d 873, 878–82 (Tex. Crim. App. 2002).

84. Exec. Order No. GA 41, Relating to Returning Illegal Immigrants to the Border (Texas, July 7, 2022), <https://irl.texas.gov/scanned/govdocs/Greg%20Abbott/2022/GA-41.pdf>.

85. Letter from Tex. Gov. Greg Abbott to Col. McCraw and Maj. Gen. Suelzer (Nov. 16, 2022), https://gov.texas.gov/uploads/files/press/Colonel_Steven_McCraw_Major_General_Thomas_Suelzer.pdf.

86. Letter from Tex. Gov. Greg Abbott to W. Nim Kidd, Chief, Tex. Div. of Emergency Mgmt. (April 6, 2022), https://gov.texas.gov/uploads/files/press/O-KiddW.Nim202204062216_.pdf.

87. Lydia O’Connor, *Gov. Greg Abbott Says Texas Will Bus Undocumented Immigrants to D.C.*, HUFFPOST (April 6, 2022), <https://news.yahoo.com/gov-greg-abbott-says-texas-003604411.html>.

88. Mary Ann Martinez, *Texas Spends \$4B on Border Security, Busing Immigrants to NYC and Other Cities*, N.Y. POST (Oct. 28, 2022, 2:39 PM), <https://nypost.com/2022/10/28/texas-spends-4b-on-border-security-includes-nyc-travel/>.

immigration at the Texas-México border.⁸⁹ Other complaints from civil liberty organizations note the involvement of federal Border Protection agents in targeting migrants for arrest on state misdemeanor trespass charges and transferring detainees to Texas DPS custody for prosecution as part of the state's OLS coordination.⁹⁰ Civil liberties groups assert collusion between DPS officers and Border Protection in OLS trespass arrests “circumvent[s] federal jurisdiction over immigration law” by locking up migrants, arrested on private ranches, in Texas prisons.⁹¹ In response to criticism from civil liberties groups and others, Abbott has requested Texas Attorney General Ken Paxton to investigate whether non-governmental organizations (“NGOs”) have assisted migrants to enter the country illegally, including transportation of illegal immigrants across the border.⁹² This investigation will likely surprise NGOs that have partnered with Abbott to support Operation Lone Star by bussing migrants to other cities beyond Texas.⁹³

B. Showdown at the Border

Presently, the Biden Administration is taking part in discussions with Mexican officials to overhaul security initiatives and preserve successes in regard to “the rule of law, human rights, and other crime-fighting strategies” as part of a comprehensive security arrangement.⁹⁴ While cooperation will require a substantial commitment, federal prosecutors in border districts continue to combat Mexican criminal organizations,⁹⁵ as the President of México—Andrés Manuel López Obrador (“López Obrador”)—seeks less confrontational methods to combat human rights violations in his country.⁹⁶ Unlike the United States, México did not have anti-trafficking laws prior to 2007, which may explain

89. *Id. See, e.g.,* James Barragán & Cassandra Pollock, *Gov. Greg Abbott Is Using a Disaster Declaration to Help Fund a Border Wall. Democrats Say It's an Overreach of Executive Powers*, TEX. TRIB. (June 23, 2021, 3:00 PM), <https://www.texastribune.org/2021/06/23/texas-greg-abbott-border-wall/>; *see also* Disaster Declaration, *supra* note 53.

90. Letter from ACLU Texas to Alejandro Mayorkas, Sec'y Homeland Sec., et al. (Dec. 2, 2022), https://static.texastribune.org/media/files/c7b90d91cada0fd9268a2cb7e78b357a/ACLUTX_DHS_Complaint_OLS.pdf.

91. Jolie McCullough, *Feds Often Hand Migrants over to State Police Rather Than Process Immigration Claims, Complaint Says*, TEX. TRIB. (Dec. 4, 2022, 2:00 PM), <https://www.expressnews.com/news/border-mexico/article/Feds-migrants-trespassing-17630382.php>.

92. OFF. TEX. GOV., LETTER FROM TEX. GOV. GREG ABBOTT TO ATT'Y GEN. KEN PAXTON (Dec. 14, 2022), https://gov.texas.gov/uploads/files/press/Ken_Paxton_OAG_.pdf.

93. *See, e.g.,* James Barragán, *Without Evidence, Gov. Greg Abbott Asks Whether Nonprofits Are Helping Migrants Enter Texas*, TEX. TRIB. (Dec. 15, 2022, 12:00 PM), <https://www.texastribune.org/2022/12/15/greg-abbott-texas-migrants-border-nonprofits/>.

94. *See, e.g.,* Tracy Wilkinson & Cecilia Sanchez, *Biden Administration Is Expected to Enter into a New Security Agreement with Mexico*, L.A. TIMES (Oct. 7, 2021, 12:55 PM), <https://www.latimes.com/politics/story/2021-10-06/biden-administration-expected-to-launch-new-security-agreement-with-mexico>.

95. *See, e.g.,* United States v. Vasquez, 899 F.3d 363, 368–69, 377–78 (5th Cir. 2018) (affirming conviction of a sicario (hit man) for the Los Zetas crime syndicate for weapons and drug smuggling under a United States law that reaches extraterritorially); Trevino-Morales v. United States, No. A-16-CR-210(3), 2017 WL 1535234, at *3 (W.D. Tex. Apr. 26, 2017) (denying motions by defendant, who was convicted of acting in a conspiracy to launder money for the Zeta cartel).

96. *See, e.g.,* Maureen Meyer & Gina Hinojosa, *Mexico's Human Rights Landscape during President López Obrador's First Year in Office*, WASH. OFF. ON LATIN AM. (Nov. 26, 2019), <https://www.wola.org/analysis/mexico-human-rights-lopez-obrador/>.

in part why cartels are able to exploit migrants with minimal concern that Mexican law enforcement have the resources to intervene in human trafficking.⁹⁷ For decades, allegations have persisted that Mexican cartels operate in partnership with corrupt regional officials, leading to minimal risks of prosecution in Mexico.⁹⁸ A 2012 U.S. State Department report indicates that “the Government of Mexico did not fully comply with the minimum standards for the elimination of trafficking,”⁹⁹ as migrants lured to Mexico originated from other regions such as the Caribbean, Eastern Europe, Asia, and Africa, with some en route to the United States.¹⁰⁰ Since the report’s publication, the U.S. State Department notes marginal progress has taken place, including no prosecution of public officials who are complicit in trafficking crimes.¹⁰¹ Progress, however, is overshadowed by organized smugglers’ advancements during the past decade, as Mexico has become a transit hub for criminal cartels attracted by substantial profits and minimal risks of prosecution.¹⁰²

The end of Remain-in-Mexico could paradoxically decrease humanitarian groups’ aid to migrants, as many migrants face slightly improved conditions waiting in the United States.¹⁰³ Participation of humanitarian groups opposing Biden’s reversal on immigration policies is also compounded by the Tactical Terrorism Response Team unit of Customs and Border Protection (“CBP”), which engages in surveillance and the interrogation of activists and journalists “suspected of organizing or being associated” with migrant caravans.¹⁰⁴ Moreover, DHS Secretary Alejandro Mayorkas is requesting that the Department of Defense (“DoD”) send more troops (active-duty service members and National Guard troops), aerostats (large blimps), and other surveillance equipment to the

97. Guadalupe Correa-Cabrera & Arthur Sanders Montandon, *Reforming Mexico’s Anti-trafficking in Persons Legislation*, 11 MEX. L. REV. 1, 7, 9–11 (2018).

98. David Agren, *Mexico Drug Cartel’s Grip on Politicians and Police Revealed in Texas Court Files*, GUARDIAN (Nov. 10, 2017, 6:00 PM), <https://www.theguardian.com/world/2017/nov/10/mexico-drug-cartels-grip-on-politicians-and-police-revealed-in-texas-court-files>.

99. U.S. DEP’T. STATE, 2012 TRAFFICKING IN PERSONS REPORT – MEXICO 247 (2012), <https://2009-2017.state.gov/j/tip/rls/tiprpt/2012/index.htm>.

100. *Id.*; Néstor Jiménez, *Insuficiente, Mecanismo de Protección a Defensores de DH y Periodistas: SG*, LAJORNADA (Dec. 2, 2021, 6:00 AM), <https://www.jornada.com.mx/notas/2021/12/02/politica/insuficiente-mecanismo-de-proteccion-a-defensores-de-dh-y-periodistas-sg/> (criticizing the insufficient mechanisms within Mexico to protect the rights of migration populations).

101. U.S. DEP’T STATE, 2021 TRAFFICKING IN PERSONS REPORT 388–92 (2021), <https://www.state.gov/reports/2021-trafficking-in-persons-report/>.

102. Anne-Marie O’Connor, *Mexican Cartels Move into Human Trafficking*, WASH. POST (July 27, 2011), <https://wapo.st/3p9kfAF>. See also Nicole Sganga & Camilo Montoya-Galve, *U.S. Launches Operation Targeting Migrant-Smuggling Gangs*, CBS NEWS (Apr. 27, 2021), <https://cbsn.ws/3ARlrdv> (describing “Operation Sentinel,” a collaborative mission by the DHS, State Department, and DOJ targeting criminal gang members and transnational criminal groups by cutting off their sources of funding and making it more difficult for them to travel).

103. See, e.g., Ana Campoy, *The Many Ways Trump has Made the Situation at the US-Mexico Border Worse*, QUARTZ (Apr. 8, 2019), <https://qz.com/1585758/trumps-immigration-policy-is-worsening-the-border-crisis/> (the author notes humanitarian groups and individuals on both sides of the border were inspired to assist, whether by providing food, clothes, or legal help, during the Trump administration).

104. Arturo Garcia, *DHS Report Confirms Border Officials’ Surveillance Against Journalists and Activists*, TRUTHORFICTION? (Sept. 27, 2021), <https://www.truthorfiction.com/dhs-cbp-surveillance-journalists/>. See also Dara Lind, *A Secretive Counterterrorism Team Interrogated Dozens of Citizens at the Border*, GOVERNMENT REPORT FINDS, PROPUBLICA (Oct. 11, 2021, 5:00 AM), <https://www.propublica.org/article/a-secretive-counterterrorism-team-interrogated-dozens-of-citizens-at-the-border-government-report-finds>.

southern border.¹⁰⁵

Secretary Mayorkas, consistent with Biden's pledge to use funds diverted from military projects by the Trump Administration for constructing a border wall,¹⁰⁶ terminated all border-wall projects and redirected remaining, unobligated funds to their original sources.¹⁰⁷ Regardless, some border projects approved by Congress have been prioritized by DHS to "remediate urgent life, safety, and environmental issues resulting from the previous administration's border wall construction."¹⁰⁸ New wall construction has been terminated in preference to environmental planning activities consistent with existing appropriated purposes, and Biden has urged "Congress to cancel remaining border wall funding [to support] smarter border security measures, like border technology and modernization of land ports of entry that are proven to be more effective at improving safety and security at the border."¹⁰⁹ Consistent with previous announcements for the use of border funds,¹¹⁰ the U.S. Army Corps of Engineers ("USACE"), on behalf of the DoD, cancelled existing construction contracts and transferred over unfinished projects to DHS to undertake remediation activities required to protect border communities.¹¹¹

Political bickering over wall construction should not be surprising given the divergence on border security policies, drug smuggling by cartels, and the number of illegal crossings that some attribute to a lack of adequate physical barriers along the border.¹¹² The dilemma, however, remains primarily in México and elsewhere to confront cartels who smuggle humans throughout the immediate region with minimum enforcement within the countries of origin or transit. México's persistence in "mañana" as a response to human smuggling contributes to a moribund system of governance, uninterested in

105. Rose L. Thayer, *Homeland Security Wants More Troops at the US-Mexico Border to Help Operate Blimps, Congressman Says*, STARS & STRIPES (Nov. 18, 2021), <https://www.stripes.com/theaters/us/2021-11-18/troops-blimps-mexico-border-homeland-security-pentagon-3668370.html> (these troops are in addition to DPS and the Texas National Guard personnel sent by Gov. Abbott prior to and remain deployed at the border under the Biden administration); Rose L. Thayer, *Texas Sending Additional 1,500 National Guard Troops to the Mexico Border in October*, STARS & STRIPES (Sept. 30, 2021), <https://www.stripes.com/theaters/us/2021-09-30/national-guard-texas-troops-southwest-border-del-rio-3080900.html>.

106. Proclamation No. 10,142, 86 Fed. Reg. 7225 (Jan. 20, 2021).

107. Adam Shaw, *DHS Chief Mayorkas Approves Border Wall Projects to Fill Gaps, Replace Gates*, FOX NEWS (June 2, 2022), <https://www.foxnews.com/politics/dhs-chief-mayorkas-border-wall-projects-gaps-replace-gates> (Secretary Mayorkas continues to authorize projects across the southern border to fill in gaps in the border wall and replace gates).

108. DEP'T HOMELAND SEC., DHS RELEASES PLAN FOR USE OF BORDER BARRIER FUNDS (June 11, 2021), <https://www.dhs.gov/news/2021/06/11/dhs-releases-plan-use-border-barrier-funds>.

109. DEP'T HOMELAND SEC., DHS TO TERMINATE BORDER BARRIER CONTRACTS IN LAREDO AND RIO GRANDE VALLEY (Oct. 8, 2021), <https://bit.ly/3HFq4fn>. See also U.S. GOV'T ACCOUNTABILITY OFF., PAUSE OF BORDER BARRIER CONSTRUCTION AND OBLIGATIONS (June 15, 2021), <https://bit.ly/3NNFtOy> (delays in use of obligated funds appropriated in previous fiscal years for border fence or barrier construction projects are programmatic delays associated with performing environmental reviews and consult with various stakeholders, as required by law, not impoundments).

110. DEP'T HOMELAND SEC., DHS ANNOUNCES STEPS TO PROTECT BORDER COMMUNITIES FROM WALL CONSTRUCTION (Apr. 30, 2021), <https://bit.ly/3HHQhtY>.

111. DEP'T HOMELAND SEC., DHS TO ADDRESS LIFE, SAFETY, ENVIRONMENTAL, AND REMEDIATION REQUIREMENTS FOR BORDER BARRIER PROJECTS PREVIOUSLY UNDERTAKEN BY DOD (Dec. 20, 2021), <https://bit.ly/3LVtm0B>.

112. See, e.g., Adam Shaw, *Border Patrol chief says he disagrees with Biden move to stop wall construction*, FOX NEWS (Mar. 15, 2023, 6:07 PM), <https://fxn.ws/3NBFpb1>.

problem solving to confront menacing criminal cartels.¹¹³ Resolving the present stalemate may require some cooperation with the Government of México and efforts to reach an agreement with Mexican officials.

III. ENFORCEMENT TO COMBAT HUMAN SMUGGLING

The foregoing discussion illustrates why the United States must pursue aggressive domestic prosecutions and regional involvement to corral human smuggling and other illicit businesses throughout the hemisphere. What follows is a starting point for the Biden Administration that extends beyond squabbling over existing proposals to fortify border security among policymakers who are “all hat and no cattle.”¹¹⁴

A. Congress has the Power to Regulate Immigration Violations

Those unfamiliar with human smuggling should note that 8 U.S.C. § 1324(a) prohibits any person from bringing in, harboring, transporting, or encouraging the entry of an alien into the United States.¹¹⁵ The statute has withstood numerous constitutional challenges on grounds of vagueness in several categories of conduct involving means of transportation, concealing, harboring or shielding of aliens unlawfully with the purpose of smuggling aliens into the United States.¹¹⁶ According to a recent analysis by the Transactional Records Access Clearinghouse (“TRAC”), violations of 8 U.S.C. § 1324(a) are the second most common charge in U.S. District Courts.¹¹⁷ TRAC’s analysis links recent § 1324(a) prosecutions in part to a 2017 directive from former Attorney General Jeff Sessions encouraging federal prosecutors to increase prosecutions for harboring undocumented aliens.¹¹⁸ The DOJ under Sessions emphasized a “zero tolerance policy” to prioritize prosecution of certain criminal immigration offenses,¹¹⁹ with most of the immigration crimes occurring along the southern border.¹²⁰ During the Trump Administration, the DOJ logged a record-breaking number of immigration

113. Agren, *supra* note 98; 2021 TRAFFICKING IN PERSONS REPORT, *supra* note 101.

114. *all hat and no cattle*, FREE DICTIONARY, <https://idioms.thefreedictionary.com/All+Hat+No+Cattle> (last visited Apr. 6, 2023) (an idiom describing a person that is all talk and no substance, a person who is a fake; a pretender).

115. 8 U.S.C. § 1324(a)(1)(A).

116. *See, e.g.,* Herrera v. United States, 208 F.2d 215 (9th Cir. 1953) (“[T]he verbal arrangement of the statute may be thought awkward, [but] a reading of it as a whole in light of the congressional declaration of purpose leaves no rational doubt as to what was intended.”). Note that the Tenth Circuit Court of Appeals recently found one subsection of this provision unconstitutional. United States v. Hernandez-Calvillo, 39 F.4th 1297, 1308–13 (10th Cir. 2022).

117. *Prosecutions for October 2021*, TRAC REPORTS (Dec. 3, 2021), <https://trac.syr.edu/tracreports/bulletins/hsaa/monthlyoct21/fil/> (immigration accounted for 73.5 percent of prosecutions).

118. U.S. ATT’Y GEN., MEMORANDUM FOR ALL FEDERAL PROSECUTORS (Apr. 11, 2017), <https://www.justice.gov/opa/press-release/file/956841/download>. *See also, Along the US-Mexico Border Prosecutions for Harboring Immigrants Continue to Climb*, TRAC REPORTS (Apr. 13, 2020), <https://trac.syr.edu/tracreports/crim/603/>.

119. U.S. ATT’Y GEN., MEMORANDUM FOR FEDERAL PROSECUTORS ALONG THE SOUTHWEST BORDER (Apr. 6, 2018), <https://www.justice.gov/opa/press-release/file/1049751/download>.

120. TRAC REPORTS, *supra* note 118.

prosecutions.¹²¹ Most immigration enforcement occurs along the border or within the “interior,” a term defined by the U.S. Attorney General that empowers Customs and Border Protection officers to conduct searches:

within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States.¹²²

A reasonable distance is defined by regulations as not exceeding “100 air miles from any external boundary of the U.S.”¹²³ and “extending 12 nautical miles from the baselines of the United States determined in accordance with international law,”¹²⁴ unless an agency official sets a shorter distance.¹²⁵ CBP officers typically arrest aliens without a warrant based on a reasonable belief that the person is an alien and is “in violation of any law or regulation made in pursuance of law regulating the admission, expulsion, or removal of aliens.”¹²⁶ CBP officers can conduct investigative detentions and warrantless searches in a geographical area that includes about 200 million people—roughly two-thirds of the U.S. population.¹²⁷ The procedural rules, regulations, and statutes applicable to human smuggling grant extraordinary authority to CBP agents, as federal courts broadly apply criminal liability by way of statutory interpretation.¹²⁸

While Congress’ legislative actions on alien smuggling grant definitive enforcement powers allowing CBP officers to corral undocumented aliens at or near the border, the courts have supplied definitions for some statutory terms in § 1324 with respect to the phrase “conceals, harbors, or shields.”¹²⁹ For example, courts have held that these terms import ordinary, plain language with independent meanings “and thus a conviction can result from committing (or attempting to commit) any one of . . . three [separate, independent] acts.”¹³⁰ The application of a plain language analysis, however, led the Seventh Circuit to interpret harboring as an act of “affording shelter” to an unauthorized alien, in violation of § 1324(a)(3), that is intended “to keep unauthorized aliens from entering or *remaining* in the country.”¹³¹ The act of harboring is different from simple

121. DEPT. JUST., DEPARTMENT OF JUSTICE PROSECUTED A RECORD-BREAKING NUMBER OF IMMIGRATION-RELATED CASES IN FISCAL YEAR 2019 (Oct. 17, 2019), <https://www.justice.gov/opa/pr/department-justice-prosecuted-record-breaking-number-immigration-related-cases-fiscal-year>.

122. 8 U.S.C. § 1357(a)(3).

123. 8 C.F.R. § 287(b).

124. *Id.* (a)(1).

125. *Id.* (a)(1), (a)(2), (b).

126. 8 U.S.C. § 1357(a)(2).

127. ACLU, *The Constitution in the 100-Mile Border Zone*, <https://www.aclu.org/other/constitution-100-mile-border-zone> (last visited Apr. 6, 2023) (the source shows a map of the United States and how some states are completely within the 100-mile zone).

128. See generally “Julie” Yihong Mao & Jan Collatz, *Legal Memorandum: Understanding the Federal Offenses of Harboring, Transportation, Smuggling, and Encouraging under 8 U.S.C. § 1324(a)*, NAT’L IMM. PROJECT (Dan Kesselbrenner & Paromita Shah eds., 2017), <https://bit.ly/2JAQBKQ>.

129. *United States v. Ye*, 588 F.3d 411, 414–16 (7th Cir. 2009) (quoting 8 U.S.C. § 1324(a)(1)(A)(iii)).

130. *Id.* at 414 (a district court’s supplemental jury instruction defining “conceals,” “harbors,” “shields” and other terms was not erroneous given the purpose of the statute is communicated by ordinary, plain language).

131. *United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976) (emphasis added).

sheltering, and is “more than cohabit[ing] with a boyfriend who happened to be . . . an illegal immigrant.”¹³² The term “conceal” involves hiding and preventing discovery of an illegal alien, as in the case of hiding in a basement to avoid detection when federal agents conduct a search of premises.¹³³ Shielding is interpreted more expansively and applies to “the use of any means to prevent the detection of illegal aliens in the United States by the Government.”¹³⁴ Conduct described as shielding can include making false statements or falsifying documents with the identity of an alien to avoid detection by the government.¹³⁵

Another critical aspect of the statute penalizes anyone who “transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law.”¹³⁶ In cases where facts demonstrate a defendant knew or acted recklessly while transporting a noncitizen, courts have held that

a factfinder may consider any and all relevant evidence bearing on the “in furtherance of” element (time, place, distance, reason for trip, overall impact of trip, defendant’s role in organizing and/or carrying out the trip). Naturally, the relevant evidence will vary from case to case.¹³⁷

Interpretation of the “in furtherance of” element, not limited to transportation involving smuggling operations, is broadly applied to any person “regardless of profit motive or close relationship” that aids an alien’s illegal entry or continued illegal presence in the United States.¹³⁸ Liability for transporting aliens illegally present in the United States includes defendants earning financial profits for transporting aliens,¹³⁹ as well as payment for merely arranging transportation.¹⁴⁰ Elaborate efforts of planning and participation in the transportation of illegal aliens satisfies culpability that is more than merely incidental furtherance of an individual’s unlawful presence in the United States.¹⁴¹

B. Extraterritorial Jurisdiction is Available to Combat Human Smuggling

The authority of Congress to enact criminal laws is typically guided by its limited police powers that confine federal laws to territorial jurisdiction. A fundamental rule limiting the territorial application of American criminal law is “the general and almost

132. *United States v. Costello*, 666 F.3d 1040, 1049–50 (7th Cir. 2012).

133. *Id.* at 1052 (Manion, J., dissenting).

134. *Ye*, 588 F.3d at 415.

135. *United States v. Shum*, 496 F.3d 390, 392 (5th Cir. 2007).

136. 8 U.S.C. § 1324(a)(1)(A)(ii).

137. *United States v. Hernandez*, 327 F.3d 1110, 1114 (10th Cir. 2003) (quoting *United States v. Barajas-Chavez*, 162 F.3d 1285, 1288–89 (10th Cir. 1999)).

138. *Barajas-Chavez*, 162 F.3d at 1288.

139. *See, e.g., United States v. Perez-Gomez*, 638 F.2d 215, 216–17 (10th Cir. 1981).

140. *See United States v. Alvillar*, 575 F.2d 1316, 1318 (10th Cir. 1978) (illegal aliens paid defendant to personally charter a flight and take them to the airport).

141. *Compare United States v. Velasquez-Cruz*, 929 F.2d 420, 421–24 (8th Cir. 1991) (defendant occupied “a key role in buying [a vehicle for transportation], met the illegal aliens in a safe house, told them to wait for her in a specific room, and was the only person who drove the car.”), *with United States v. Moreno*, 561 F.2d 1321 (9th Cir. 1977) (defendant’s transportation of “aliens as part of the ordinary and required course of his employment as a foreman [is] only incidentally connected to the furtherance of violation of law . . . [and is] too attenuated to” be regarded unlawful transportation of illegal aliens).

universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”¹⁴² The origin of a presumption against extraterritoriality is based on the premise that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”¹⁴³

Despite the presumption against extraterritoriality,¹⁴⁴ Congress has constitutional powers to extend territorial limits of the United States to prosecute violations of piracy, felony crimes, and enforcement of immigration laws,¹⁴⁵ including the power to override the judicial interpretation of statutes applying the presumption against extraterritoriality in several aspects of law.¹⁴⁶ The nexus between criminal law and immigration violations¹⁴⁷ should not be surprising considering the implications for national security inherent in immigration from México and other Central American nations.¹⁴⁸ Enforcement of immigration laws implicates national security in removing foreign nationals attempting to lawfully enter U.S. jurisdiction, but who have committed an act considered “alien smuggling” while assisting another foreign national, most often a friend or relative, to enter the United States illegally.¹⁴⁹

Human smuggling regularly occurs beyond our territorial jurisdiction, as cartels arrange for transportation across the United States-México border.¹⁵⁰ The globalization of smuggling and piracy has encouraged nation-states to assert jurisdiction absent the traditional territorial or national links to specific crimes or criminal cartels.¹⁵¹ Therefore,

142. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909).

143. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

144. *See, e.g.*, *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 440–41 (1989); *Sale v. Haitian Ctr. Council, Inc.*, 509 U.S. 155, 173–74 (1993); *and* *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325 (2016).

145. U.S. CONST. art. I, § 8, cl. 10. *See also* Anthony J. Colangelo, *What is Extraterritorial Jurisdiction*, 99 CORNELL L. REV. 1303 (2014) (noting the application of U.S. law to pursue foreign parties for drug crimes, human rights violations, terrorism, and other actions occurring beyond our territory).

146. *See, e.g.*, *SEC v. Traffic Monsoon, LLC*, 245 F. Supp. 3d 1275, 1291–93 (D. Utah 2017). *See also* CHARLES DOYLE, CONG. RSCH. SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 42–67 (2023) (noting various statutes subjecting federal crimes of extraterritorial scope to federal prosecution).

147. *See, e.g.*, Archive of Columns by Cesar Cuauhtémoc Garcia Hernández, CRIMMIGRATION (Oct. 30, 2018, 4:35 PM), <https://perma.cc/5ERM-S8MY> (discussing the intersection of criminal law and immigration in several publications).

148. *See* Kareem W. Shora, *A Twenty-Year Lesson: The Role of Civil Rights in Securing Our Nation*, 12 J. NAT’L SEC. L. & POL’Y 187, 189 (2021); Julie López, *Jalisco Cartel Sets Off Alarm Bells Along Mexico-Guatemala Border*, INSIGHT CRIME (Sept. 23, 2021), <https://insightcrime.org/news/jalisco-cartel-alarm-bells-mexico-guatemala-border/> (noting collusion at the México-Guatemala border between authorities and drug trafficking groups linked to human smuggling).

149. *See, e.g.*, *Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 747 (9th Cir. 2007) (citizen of México agreeing to pay a smuggler to transport his brother committed an illegal act of alien smuggling and was therefore barred from entering the United States); *Duran-Solano v. Immigr. & Naturalization Serv.*, No. 98-70903, 2000 U.S. App. LEXIS 7266, at *3 (9th Cir. 2000) (a permanent resident alien of the United States concealed an undocumented alien in the trunk of his vehicle in order to bring him into the country illegally). *But c.f.*, *Altamirano v. Gonzales*, 427 F.3d 586, 595 (9th Cir. 2005) (interpreting 8 U.S.C.S. § 1182(a)(6)(E)(i)’s provision that “[a]ny alien who at any time knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law” does not include the mere presence of an undocumented alien in a vehicle, with knowledge of a smuggling plan, does not constitute alien smuggling).

150. O’Connor, *supra* note 102.

151. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 34, cmt. b (1965).

it is foreseeable that Congress invokes its police powers and applies extraterritorial jurisdiction to curtail human smuggling.¹⁵² Descriptions of human smuggling as a form of modern slavery are fitting in light of the modes of transportation smugglers use, which include crossing the high seas to transport migrants.¹⁵³ An illustration of human smuggling's linkage to modern slavery is *United States v. Delgado-Garcia*, involving the transportation of 191 Ecuadorians located by U.S. Coast Guard officials about 170 nautical miles south of Guatemala and México aboard a ship in international waters.¹⁵⁴ The investigation led to the indictment of the ship's crew for conspiring to induce or attempting to bring illegal aliens into the United States.¹⁵⁵ On appeal, the defendants alleged their conduct did not implicate 8 U.S.C. § 1324(a) because the statute did not specify extraterritorial conduct with respect to human smuggling.¹⁵⁶ Rejecting this argument, the court held that a contextual reading of § 1324(a) and its subsections leads to a presumption that the statute "protects the borders of the United States against illegal immigration."¹⁵⁷ The court's emphasis on the proscription against bringing aliens to the United States includes incomplete attempts occurring outside the United States—a strong endorsement of extraterritorial application to punish offenders operating ships abroad.¹⁵⁸

Delgado-Garcia recognizes that human smuggling transportation includes a myriad of vessels, vehicles, and aircrafts to transport illegal migrants from one country to another.¹⁵⁹ Moreover, the decision is important for what is not explicated, namely, an analysis of extraterritorial jurisdiction and the interaction between United States domestic and international law. Additionally, the opinion does not mention theories of criminal jurisdiction applicable to extraterritorial crimes.¹⁶⁰ The analysis which follows explains extraterritorial jurisdiction over human smuggling and advocates for aggressive enforcement of 8 U.S.C. § 1324 offenses to combat cartels operating beyond the border region.

C. *Vaqueros Roaming South of the Border*

Prosecution of criminal acts committed beyond territorial limitations, particularly crimes occurring on foreign soil, is antithetical to principles of criminal law.¹⁶¹ Human

152. See, e.g., Efthymios Papastavridis, *Interception of Human Beings on the High Seas: A Contemporary Analysis Under International Law*, 36 SYRACUSE J. INT'L L. & COM. 145, 163–78 (2009).

153. *United States v. Delgado-Garcia*, 374 F.3d 1337 (D.C. Cir. 2004), cert. denied, 544 U.S. 950 (2005) (ruling that the text of 8 U.S.C. § 1324 permits extraterritorial application despite a silent legislative history).

154. 374 F.3d 1337 (2004), cert. denied, 544 U.S. 950 (2005).

155. *Id.* at 1340.

156. *Id.* at 1341.

157. *Id.* at 1345.

158. *Id.* at 1345–47.

159. *Delgado-Garcia*, 374 F.3d at 1347.

160. See Colangelo, *supra* note 145 (explaining the theoretical application of extraterritorial jurisdiction to specific facts regarding crimes committed beyond US borders).

161. *Claramont v. United States*, 26 F.2d 797, 797 (5th Cir. 1928) (holding the defendant criminally liable under the predecessor to 8 USCS § 1324(a)(1); reasoning that "though he was not physically present in the United States when the alleged unlawful transaction was begun and consummated," extraterritorial help was still a violation of U.S. immigration law). See also *Emmanuel v. United States*, 24 F.2d 905, 906 (5th Cir. 1928) (where defendant participated in bringing an alien into the United States from Cuba by means of a vessel).

smuggling, however, invites extraterritorial jurisdiction by the terms of 8 U.S.C. § 1324(a)(i), which states, “[a]ny person [who], knowing that a person is an alien, *brings to or attempts to bring to* the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner” commits an offense punishable under Title 18 of the United States Code.¹⁶²

A primary basis for extraterritorial jurisdiction is the “subjective territorial principle,” by which “a state has jurisdiction to prescribe law with respect to . . . conduct that, wholly or in substantial part, takes place within its territory, [or occurs] outside its territory that has or is intended to have substantial effect within its territory.”¹⁶³ The elements of 8 U.S.C. § 1324 establish “personal jurisdiction over a defendant charged with violating . . . immigration laws,” including crimes of conspiracy.¹⁶⁴ While legislation is meant to apply only within the territorial jurisdiction of the United States, the courts have inferred extraterritorial jurisdiction from the language of statutes like 8 U.S.C. § 1324(a), which uses the phrase “brings to . . . the United States,” rather than “brings into . . . the United States.”¹⁶⁵ Moreover, failed attempts to bring aliens to the United States may include crimes occurring wholly outside United States jurisdiction and involve foreign nationals arrested by federal law enforcement outside of United States territory.¹⁶⁶ Crimes occurring beyond “[U.S.] jurisdiction, but intended to produce and producing detrimental effects within it,”¹⁶⁷ support the exercise of territorial jurisdiction when there is a sufficient nexus between the crime committed and a nation’s territory.¹⁶⁸

In *United States v. Villanueva*, the court interpreted 8 U.S.C. § 1324(a)(2)(B)(ii), emphasizing that in conspiracies to smuggle undocumented aliens the government needs to establish five elements:

[E]ach defendant (1) brought or attempted to bring an alien into the United States; (2) knew the person was an alien; (3) either knew or acted in reckless disregard of the fact that the alien had not received prior official authorization to come to, enter, or reside in the United States; (4) intended to commit a criminal act by bringing or attempting to bring an alien to the United States; and (5) committed the offense for commercial advantage or private financial gain.¹⁶⁹

Courts examining the language and legislative history of the statute conclude that “Congress intended extraterritorial application because [the statute] shows that Congress

162. 8 U.S.C. § 1324(a)(1)(A)(v)(I) (emphasis added) (a conspiracy to bring illegal aliens to the United States must involve facts that, at a minimum, occur at any point within a state’s territory).

163. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(a)(c) (1987).

164. *United States v. Best*, 304 F.3d 308, 310–11 (3d Cir. 2002).

165. *United States v. Villanueva*, 408 F.3d 193, 198 (5th Cir. 2005).

166. *Id.* at 196–97, 199 (the defendants were stopped and arrested by Mexican police, assisted by investigators in El Salvador).

167. *United States v. Ayes*, 762 F. Supp. 2d 832, 836 (E.D. Va. 2011).

168. *Id.* at 841. “[I]nternational law generally permits the exercise of extraterritorial criminal jurisdiction by a nation where otherwise justified by any of five general principles: (i) the objective territorial principle, (ii) the nationality principle, (iii) the universality principle, (iv) the passive personality, and (v) the protective principle.” *Id.* (citing *United States v. Alomia-Riscos*, 825 F.2d 769, 771 (4th Cir. 1987); *United States v. Yousef*, 327 F.3d 56, 91 n.24 (2d Cir. 2003)).

169. 408 F.3d 193, 201 n.8 (5th Cir. 2005).

was concerned about activity taking place outside of the United States.”¹⁷⁰ Although *Villamueva* is silent on a general principle of extraterritorial criminal jurisdiction, the court references *United States v. Perez-Herrera*¹⁷¹ and analogizes drug smuggling laws where “Congress has power to regulate the extra-territorial acts of our citizens,” whose attempts to bring marijuana into the United States “had real and significant effects within this country.”¹⁷² This invokes the nationality principle or protective principle in which international law generally permits the exercise of extraterritorial criminal jurisdiction by a nation.¹⁷³

Human smuggling and illicit drug enforcement differ over whether the government must substantiate a “sufficient nexus” in prosecutions involving a conspiracy in foreign jurisdictions.¹⁷⁴ Drug smuggling statutes, such as the Maritime Drug Law Enforcement Act (“MDLEA”), are silent on extraterritorial application, though it can be inferred from the nature of the offense that the Act applies extraterritorially.¹⁷⁵ Some courts’ interpretations of the MDLEA consider the nexus requirement to be a judicial gloss that “serves the same purpose as the ‘minimum contacts’ test in personal jurisdiction.”¹⁷⁶ The nexus requirement ensures that a United States court will assert jurisdiction only over a defendant who “‘should reasonably anticipate being haled into court’ in this country.”¹⁷⁷ Although MDLEA contains no nexus requirement, courts continue to insist that the government has the burden of proving a nexus, thus allowing the defendant an opportunity to rebut the government’s proof.¹⁷⁸

Pertinent to smuggling cases, the nexus requirement is satisfied when prosecutors demonstrate that drugs in a foreign country were destined for the United States.¹⁷⁹ Courts applying the nexus test in a criminal prosecution may consider “a wide range of factors,” such as:

- (1) the defendant’s actual contacts with the United States, including his citizenship or residency;
- (2) the location of the acts allegedly giving rise to the alleged offense;
- (3) the intended effect a defendant’s conduct has on or within the United States; and
- (4) the impact on significant United States interests.¹⁸⁰

170. *Id.* at 198.

171. 610 F.2d 289 (5th Cir. 1980).

172. *Id.* at 289, 292.

173. *Id.* See also *United States v. Baker*, 609 F.2d 134, 136 (5th Cir. 1980). The *Baker* Court held that extraterritorial application may be “inferred from the nature of the offenses and Congress’ other legislative efforts to eliminate the type of crime involved.” *Id.* The Court also noted that a nation’s “power to secure itself from injury may certainly be exercised beyond the limits of its territory,” thus implicating the protective principle to permit the exercise of extraterritorial criminal jurisdiction. *Id.* (quoting *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 234 (1804)).

174. *United States v. Vasquez-Velasco*, 15 F.3d 833, 840 (9th Cir. 1994).

175. *United States v. Wilchcombe*, 838 F.3d 1179, 1186 (11th Cir. 2016) (finding no nexus requirement to establish a violation of the MDLEA, even though the act may be committed outside of the territorial jurisdiction of the United States).

176. *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998).

177. *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

178. *Id.*

179. *United States v. Brehm*, No. 1:11-CR-11, 2011 WL 1226088, at *5–6 (E.D. Va. Mar. 30, 2011).

180. *Id.*

An assessment of these and other factors in a drug conspiracy case demand, whether the circumstances include the high seas or conduct in a foreign country, proof beyond merely planning to smuggle drugs.¹⁸¹ Rather, the prosecution must show that the defendants “intended to distribute controlled substances within the United States,” otherwise there is no violation.¹⁸²

Prosecution of non-citizens who conspire to traffic drugs internationally is justified under the “protective principle” theory, which invokes extraterritorial jurisdiction over the illegal activity of non-citizens when their crimes affect the state’s security or financial integrity.¹⁸³ Some appellate courts have rejected similar arguments, holding that a sufficient nexus under the MDLEA is not required, “even though the act is committed outside the territorial jurisdiction of the United States,” because the statute specifically targets traffickers of a controlled substance.¹⁸⁴ Abandoning the nexus requirement, however, is limited to fact patterns involving stateless vessels¹⁸⁵ and vessels registered in other countries that provide a “statement of no objection,”¹⁸⁶ which empowers federal trial courts with jurisdiction.¹⁸⁷ The MDLEA comparison illustrates the principle that, in order to satisfy the nexus requirement in cases concerning human smuggling, the government must establish that the defendant brought or attempted to bring an alien into the United States for commercial advantage or private financial gain. Thus, prosecution of non-citizens conspiring to smuggle aliens is premised on the protective principle, which requires that the defendant knowingly encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of human smuggling statutes.¹⁸⁸

181. *United States v. Lopez-Vanegas*, 493 F.3d 1305, 1313 (5th Cir. 2007).

Under 21 U.S.C. §§ 841 and 846, Congress has not stated its intent to reach discussions held in the United States in furtherance of a conspiracy to possess controlled substances *outside* the territorial jurisdiction of the United States, with intent to *distribute* those controlled substances *outside* of the territorial jurisdiction of the United States.

Id. (emphasis in original).

182. *Id.*

183. KENNETH S. GALLANT, INTERNATIONAL CRIMINAL JURISDICTION: WHOSE LAW MUST WE OBEY? 409–40 (2022). *See also* *United States v. Lawrence*, 727 F.3d 386, 395 (5th Cir. 2013). *Contra* *United States v. Wilchcombe*, 838 F.3d 1179, 1186 (11th Cir. 2016) (due process does not require a nexus for the MDLEA to apply outside the territorial jurisdiction of the United States); *United States v. Campbell*, 743 F.3d 802, 810 (11th Cir. 2014) (rejecting required proof of a nexus between the United States and a defendant); *and* *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. 1999) (“due process does not require the government to prove a nexus between a defendant’s criminal conduct and the United States in a prosecution under the MDLEA when the flag nation has consented to the application of United States law to the defendants.”).

184. *See, e.g., Wilchcombe*, 838 F.3d at 1186; *Campbell*, 743 F.3d at 810; *and Cardales*, 168 F.3d at 553.

185. *United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1055 (3d Cir. 1993) (a vessel without nationality is subject to federal jurisdiction “even if there was not a nexus between [a defendant’s] activities and the United States.”).

186. *Wilchcombe*, 838 F.3d at 1184.

187. *United States v. Suerte*, 291 F.3d 366, 369–72 (5th Cir. 2002). *See also Cardales*, 168 F.3d at 553 (“because Congress has determined that all drug trafficking aboard vessels threatens our nation’s security . . . due process is satisfied when the foreign nation . . . authorizes the application of United States law to the persons on board the vessel.”).

188. 8 U.S.C. § 1324.

IV. IN SEARCH OF AN INSTITUTIONAL REMEDY TO HUMAN SMUGGLING

Clearly there is no immediate solution that can address human smuggling in light of the ubiquitous and powerful cartels that control smuggling operations. The United States and its partners in the hemisphere must form a coherent strategy that is compatible with traditional law enforcement programs. The traditional response to combatting cartels—strengthening existing law enforcement—is inadequate.¹⁸⁹ Rather, a robust institutional response is needed.¹⁹⁰ The following discussion suggests just such an institutional response: one designed to combat the corrosive effects of criminal cartels involved in asymmetrical use of violence, corruption practices, and innovative means to smuggle humans across shared borders. While the following proposal may not generate a consensus among all existing stakeholders, it offers an initial starting point to combat human smuggling and other crimes threatening the ability of officials to govern within their nation-states' borders.

A. An Inter-American Court of Criminal Justice Would Adequately Address Cartel Smuggling

Establishing an independent, regional tribunal as part of the Organization of American States (“OAS”) with the power to preside over a range of transnational crimes will go a long way towards combatting human smuggling.¹⁹¹ Establishing regional courts in the Western Hemisphere is not a new concept, as it dates back to the early 1900s.¹⁹² An example of a recent regional court is the sub-regional tribunal called the Court of Justice of the Andean Community.¹⁹³ There are no proposals within the OAS or other sub-regional organizations to create a permanent regional tribunal to combat transnational crimes in the Western Hemisphere. OAS Members, however, may want to consider a dialogue to explore the possibility of empowering a court with broad jurisdiction over transnational crimes. Formation of an Inter-American Court of Criminal Justice (“IACCJ”) is a viable response to combat human trafficking in all its forms.¹⁹⁴ Existing commitments

189. See, e.g., Vanda Felbab-Brown, *Mexico's Out-of-Control Criminal Market*, BROOKINGS (Mar. 2019), https://www.brookings.edu/wp-content/uploads/2019/03/FP_20190322_mexico_crime-2.pdf (hypothesizing that violence in México can decline if either a single cartel wins territorial control of drug trafficking or the state augments its capacity to combat organize crime and win public support).

190. See generally Mary Speck, *Great Expectations and Grim Realities in AMLO's Mexico*, 8 PRISM 1 (Feb 26, 2019), <https://bit.ly/3Km8q0Y>.

191. *Who We Are*, ORG. AM. STATES, oas.org/en/about/who_we_are.asp (last visited Mar. 23, 2023). The Organization of American States is a regional organization in the Western Hemisphere, with the intent of establishing “an order of peace and justice” among its member states. *Id.*

192. See, e.g., Convention for the Establishment of a Central American Court of Justice, art. II (Dec. 20, 1907), <https://english.dipublico.org/182/convention-for-the-establishment-of-a-central-american-court-of-justice-1907/> (the tribunal is authorized to adjudicate disputes involving “violation[s] of treaties or conventions, and other cases of an international character.”). The Central American Court of Justice was reconfigured under the Central American Integration System (Sistema de Integración Centroamericana or “SICA”). See Convention on the Statute of the Central American Court of Justice, art. XXII (Dec. 10, 1992), <https://treaties.un.org/doc/Publication/UNTS/Volume%201821/volume-1821-I-31191-English.pdf>.

193. *About Us*, CT. JUST. ANDEAN CMTY., <https://www.tribunalandino.org.ec/index.php/nosotros/> (last visited Apr. 7, 2023).

194. See, e.g., Fernando A. Iglesias, Comments, *The Latin American Criminal Court: an Approach for Regional Integration Against Transnational Organized Crime*, FEDERALIST DEBATE (Mar. 2022),

require stakeholders to criminalize specific behaviors that are recognized as both transnational and domestic crimes.¹⁹⁵ Furthermore, member-states are already amenable to this kind of tribunal, given that enforcement strategies against transnational crimes are a fundamental part of OAS policy for security in the Western Hemisphere.¹⁹⁶ If OAS members establish an IACCJ, they should address the following pertinent aspects.¹⁹⁷

i. Jurisdictional and Substantive Issues

Jurisdiction of the IACCJ should be limited to the most serious transnational crimes, defined as “offences whose inception, prevention, and/or direct or indirect effects involve more than one country,”¹⁹⁸ taking special consideration of an offender’s involvement in an organized criminal group.¹⁹⁹ The following, with one exception (“The Operation of a Submersible Vessel”), are broad definitions of crimes that OAS Members are already required to prosecute if a nexus exists involving more than one country.²⁰⁰ This statutory language mirrors extant international agreements, and could be included in the IACCJ’s protocols.

a. *Illicit Drug Trafficking*

The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances forbids:

- i) The production, manufacture, extraction; preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;
- ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and the 1961 Convention as amended;
- iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in [part i] above;

<https://bit.ly/3UkxMAN>. As Vice President of Global Democracy, an independent organization that promotes democratic institutions, Iglesias outlines the branches of a proposed regional court, advocating ratification of a treaty to establish a regional court empowered to combat criminal organizations involved in human trafficking and drug trafficking. *Id.*

195. See, e.g., Erin Creegan, *Permanent Hybrid Court for Terrorism*, 26 AM. U. INT’L L. REV. 237, 265–66 (2011).

196. *Id.* at 262–65 (discussing obstacles confronting other tribunals that impede establishing a tribunal that may intrude on a nation-state’s sovereignty).

197. *Id.*

198. U.N. CONG. ON PREVENTION CRIME & TREATMENT OF OFFENDERS, ACTION AGAINST NATIONAL AND TRANSNATIONAL ECONOMIC AND ORGANIZED CRIME, AND THE ROLE OF CRIMINAL LAW IN THE PROTECTION OF THE ENVIRONMENT (Mar. 30, 1995), <https://bit.ly/3ZJDRb6>.

199. Special consideration can be evidence of the offender’s influence, control, or domain of a TOC group. See U.N. Convention Against Transnational Organized Crime art. V, Nov. 15, 2000, T.I.A.S. 13127, 2225 U.N.T.S. 209, <https://bit.ly/3MpLU9R>.

200. Org. Am. States Gen. Ass’y Res. 2621, Hemispheric Plan of Action on Drugs 2011–2015 (June 8, 2011), http://www.cicad.oas.org/Main/Template.asp?File=/main/aboutcicad/basicdocuments/plan-action_eng.asp (hereinafter Hemispheric Plan of Action on Drugs).

- iv) The manufacture, transport or distribution of equipment . . . knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;
- v) The organization, management or financing of any of the offences enumerated in [parts i, ii, iii, or iv] above.²⁰¹

Inclusion of this provision would extend IACCJ jurisdiction over crimes committed with intent, knowledge, or purpose required as an element of an offense pertaining to illicit drug trafficking, criminalizing production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery manufacturing, possession, and distribution, for the purpose of the production of narcotic drugs.²⁰² This kind of power is necessary to effectively combat cartel activity across international borders.

b. Operation of Submersible Vessel or Semi-submersible Vessel without Nationality

United States law provides that:

Whoever knowingly operates, or attempts or conspires to operate, by any means, or embarks in any submersible vessel or semi-submersible vessel that is without nationality and that is navigating or has navigated into, through, or from waters beyond the outer limit of the territorial sea of a single country or a lateral limit of that country's territorial sea with an adjacent country, with the intent to evade detection.²⁰³

OAS states, with the obvious exception of the United States, do not have an existing obligation to enforce this statute.²⁰⁴ However, the IACCJ would need authority against cartels that regularly use makeshift submarines in their operations.²⁰⁵

c. Illicit Manufacturing of Weapons

The Convention Against Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials defines "illicit manufacturing" of weapons as:

[T]he manufacture or assembly of firearms, ammunition, explosives, and other related materials:

- a. from components or parts illicitly trafficked; or
- b. without a license from a competent governmental authority of the State Party where the manufacture or assembly takes place; or

201. U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. III, Dec. 20, 1988, 1582 U.N.T.S. 95 (hereinafter U.N. Convention Against Illicit Traffic in Narcotic Drugs). Illicit drug trafficking means cultivation or trafficking in drugs contrary to the provisions of the United Nations Single Convention on Narcotic Drugs of 1961 art. I(1), Mar. 30, 1961, 520 U.N.T.S. 151 (hereinafter Single Convention on Narcotic Drugs of 1961).

202. U.N. Convention Against Illicit Traffic in Narcotic Drugs, *supra* note 201.

203. 18 U.S.C. § 2285. *See also* Org. Am. States, Model Legislation on Self-Propelled Submersible and Semi-Submersible Vessels (June 30, 2011), <http://www.cicad.oas.org/apps/Document.aspx?Id=1124> (advocating promulgation of domestic laws regarding submersible, semi-submersible vessels reflective of U.S. law).

204. Hemispheric Plan of Action on Drugs, *supra* note 200.

205. Michael Kaplan, *How drug runners use 'narco submarines' to traffic cocaine, money & more*, N.Y. POST (Mar. 12, 2022, 8:19 AM), <https://nypost.com/2022/03/12/how-drug-runners-use-narco-submarines-to-traffic-cocaine/>.

- c. without marking the firearms that require marking at the time of manufacturing.²⁰⁶

The Convention further defines the “illicit trafficking of weapons” as “the import, export, acquisition, sale, delivery, movement, or transfer of firearms, ammunition, explosives, and other related materials from or across the territory of one State Party to that of another State Party, if any one of the States Parties concerned does not authorize it.”²⁰⁷ These working definitions are already recognized by OAS states,²⁰⁸ and could empower the IACCJ to prosecute trafficking crimes more effectively.

d. Human Trafficking

The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons defines human trafficking as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. 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.²⁰⁹

This comprehensive definition is already recognized by OAS Members.²¹⁰ The IACCJ protocols should mirror this provision to ensure compatibility with other international organizations.

e. Human Smuggling

The United Nations defines human 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.”²¹¹ According to the U.S. Department of State, human smuggling is different from human trafficking in that it involves “the facilitation, transportation, attempted transportation or

206. Org. Am. States, Inter-American Convention Against Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials art. I(1), July 1, 1998, 2029 U.N.T.S. 55, <https://bit.ly/3ZRGXKi> (hereinafter CIFTA).

207. *Id.* art. I(2). CIFTA defines firearms as:

- (a) any barreled weapon which will or is designed to or may be readily converted to expel a bullet or projectile by the action of an explosive, except antique firearms manufactured before the 20th Century or their replicas; or (b) any other weapon or destructive device such as any explosive, incendiary or gas bomb, grenade, rocket, rocket launcher, missile, missile system, or mine.

Id. art. I(3).

208. CIFTA, *supra* note 206.

209. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. III(a), Nov. 15, 2000, 2237 U.N.T.S. 319, <https://www.ohchr.org/en/instruments-mechanisms/instruments/protocol-prevent-suppress-and-punish-trafficking-persons> (hereinafter Trafficking Protocol).

210. *Status of Treaties: A Protocol to Prevent, Suppress and Punish Trafficking in Persons*, U.N. TREATY COLLECTION, <https://bit.ly/3TKLOvh> (showing signatories to the Protocol) (last visited Mar. 23, 2023).

211. Protocol against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the United Nations Convention against Transnational Organized Crime, art. III, Dec. 12, 2000, GA Res 55/25, https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf.

illegal entry of a person(s) across an international border, in violation of one or more countries' laws, either clandestinely or through deception, such as the use of fraudulent documents."²¹² The IACCJ's protocols should consolidate these definitions to ensure differentiation between human smuggling and human trafficking.

f. Money Laundering

The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances holds signatory states accountable for prosecuting:

The conversion or transfer of property, knowing that such property is derived from any [drug trafficking] offense or offenses or from an act of participation in such offense or offenses, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offense or offenses to evade the legal consequences of his actions, . . . [and t]he concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offense or offenses or from an act of participation in such an offense or offenses and conversion or transfer of property derived from any offence or offences committed.²¹³

These offenses constitute money laundering in the drug context. This is particularly relevant for the IACCJ to combat international criminal financing.²¹⁴

g. Terrorism

The United Nations High-Level Panel on Threats, Challenges and Change defines terrorism as:

[A]ny action . . . that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.²¹⁵

Considering the significant political pressure that cartels currently exert on, for example, the Mexican government, a provision against terrorism is appropriate for the IACCJ.²¹⁶ An international tribunal designed to combat cartel activity, including human

212. *Fact Sheet: Distinctions Between Human Smuggling and Human Trafficking 2006*, U.S. DEP'T. STATE (Jan. 1, 2006), <https://2009-2017.state.gov/m/ds/hstcenter/90434.htm>.

213. U.N. Convention Against Illicit Traffic in Narcotic Drugs, *supra* note 201, art. III.

214. *See, e.g.*, Jim Dinkins & Peter Vincent, *Money-laundering methods of drug cartels and the capture of El Chapo*, THOMSON REUTERS (Sept. 14, 2016), <https://legal.thomsonreuters.com/en/insights/white-papers/money-laundering-methods-of-drug-cartels-and-the-capture-of-el-chapo> (describing cartels' money-laundering methods and their relation to drug trafficking crimes).

215. *A more secure world: Our shared responsibility*, REPORT OF THE HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, at 52 (2004), https://www.un.org/peacebuilding/sites/www.un.org.peacebuilding/files/documents/hlp_more_secure_world.pdf. *See also* Org. Am. States G.A. Res. 1840 art. II (June 3, 2002), <http://www.cicte.oas.org/rev/en/documents/conventions/ag%20res%201840%202002%20english.pdf>.

216. *See* John Daniel Davidson, *Lessons from the Border's Volatile History*, CANNON (June 14, 2019), <https://thecannononline.com/lessons-from-the-borders-volatile-history/> (noting that "international drug cartels . . . control vast swaths of territory in norther México. In some places these cartels operate with impunity, if not the cooperation of government officials"); JUNE S. BEITTEL, CONG. RSCH. SERV., R41576, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS 6–11 (2022).

smuggling, should necessarily have the power to prosecute terrorism to be effective.

These categories, some lacking specificity that is necessary in domestic penal codes, serve as a starting point for discussions to establish the IACCJ. Limiting jurisdiction to serious transnational crimes with an emphasis on organized criminal enterprises will alleviate fears that peripheral offenders will be the target of a dragnet by the IACCJ investigative body. Over-empowering prosecutors “so [that they] cometh as a thief in the night”²¹⁷ against common criminals, with states striving to protect their nationals, has not been a substantial problem for other tribunals with jurisdiction over international crimes.²¹⁸

ii. Enforcement, Power, and Capacity of the IACCJ

The IACCJ’s effectiveness will depend on the willingness of OAS Members to recognize the legitimacy of the court’s powers, and would be evidenced by financial support beyond the normal program budget.²¹⁹ However, cooperation with the IACCJ will involve more than simply acknowledging the court’s power or funding it. Independent prosecutors—essential to respect for the rule of law²²⁰—require the ability to investigate and submit charges *ex proprio motu* to the IACCJ.²²¹ Absent deferral of investigations or prosecution of offenders, prosecutors could honor requests of individual states or the General Assembly of the OAS similarly to the International Criminal Court (“ICC”).²²² Otherwise, prosecutors may be reluctant to pursue investigations if OAS members try “gaming” the inter-American system to the detriment of OAS’ democratic norms.

Advocates for the IACCJ should expect the court to encounter problems of capacity unless a centralized law enforcement authority can compel states to collaborate with investigations.²²³ For obvious reasons, issues of sovereignty prevent the formation of a separate enforcement agency that would be acceptable to OAS Members.²²⁴ Consequently, domestic enforcement officials must be willing to assist with investigations, arrests, and prosecution of offenders.²²⁵ The United States has a track record of leading

217. *See 1 Thessalonians 5:2* (King James) (“For yourselves know perfectly that the day of the Lord so cometh as a thief in the night.”).

218. *Cf.* Ewelina U. Ochab, *As the International Criminal Court Faces More Challenges, We Need It More Than Ever*, FORBES (Sept. 13, 2020, 2:49 PM), <https://bit.ly/3VFApPe> (noting that the International Criminal Court is “often criticized for being inefficient, excessively expensive, and ineffective.”).

219. Org. Am. States Charter arts. LIV(e), LV. The General Assembly approves the program-budget of the Organization and determines the quotas of the member-states to contribute to the maintenance of the Organization. *Id.* Decisions on budgetary matters require the approval of two thirds of the Member-States. The OAS has a regular fund, which supports the General Secretariat, and a special fund (voluntary country contributions), for specific programs and initiatives. *Id.*

220. Org. Am. States, Inter-American Democratic Charter arts. III, IV, Sept. 11, 2001, 40 I.L.M. 1289, https://www.oas.org/en/democratic-charter/pdf/demcharter_en.pdf.

221. *Ex proprio motu*, BLACK’S LAW DICTIONARY (11th ed. 2019). Black’s Law Dictionary defines *ex proprio motu* as “of one’s own accord.” *Id.*

222. Rome Statute of the International Criminal Court arts. XII–XVI, Jul. 17, 1998, 2187 U.N.T.S. 90 (hereinafter Rome Statute).

223. *See generally* Bruce Zagaris, *Developments in the Institutional Architecture and Framework of International Criminal and Enforcement Cooperation in the Western Hemisphere*, 37 U. MIAMI INTER-AM. L. REV. 421 (2006).

224. *Id.* at 197.

225. *Id.* at 198.

regional enforcement plans to combat threats from criminal organizations that have the potential to destabilize the Western Hemisphere.²²⁶ Furthermore, the United States is the largest contributor to the OAS, including support for coordinated action plans against transnational organized crime (“TOC”).²²⁷ Giving budget priority to the IACCJ to apprehend and prosecute offenders could be used to persuade Congressional leaders to support a regional tribunal that broadens the United States’ extraterritorial jurisdiction.²²⁸ External agencies such as the International Criminal Police Organization (“INTERPOL”) can serve in a subsidiary role providing intelligence and surveillance to assist with enforcement actions.²²⁹ INTERPOL already targets illicit drugs, weapons, and other crimes across the Americas.²³⁰ Accordingly, the IACCJ could complement national criminal justice systems, and should not threaten states’ sovereignty given the narrowly tailored definitions of serious transnational crimes, desperate need for enforcement, and capacity of OAS Members to finance the court.

B. The Long-Arm of the IACCJ: Jurisprudence and Due Process of Law

Because a transnational criminal tribunal is a novel concept, proponents may want to consider empowering the IACCJ with an established norm of law that grants universal jurisdiction. Bestowing universal criminal jurisdiction to a tribunal has been a concern dating back to the early years of the United Nations,²³¹ as well as a topic of polarization among states.²³² Universal jurisdiction is commonly associated with international crimes,²³³ though some consider empowering national courts with universal jurisdiction a necessity due to practical limitations of international tribunals to prosecute crimes involving mass atrocities.²³⁴

Although some states disfavor granting universal jurisdiction to tribunals,²³⁵ the

226. *Id.*

227. *See, e.g.*, PETER J. MEYER, CONG. RSCH. SERV., R42639, ORGANIZATION OF AMERICAN STATES: BACKGROUND AND ISSUES FOR CONGRESS 57 (2018).

228. KRISTIN M. FINKLEA, CONG. RSCH. SERV., R40525, ORGANIZED CRIME IN THE UNITED STATES: TRENDS AND ISSUES FOR CONGRESS 8–13 (2010). *But cf.* Julian Pecquet, *Panel Votes to Cut Funding to Organization of American States*, THE HILL (Jul. 24, 2013), <http://thehill.com/blogs/global-affairs/americas/313157-panel-votes-to-cut-funding-to-organization-of-american-states>.

229. *What is INTERPOL?*, <http://www.interpol.int/en/who-we-are/what-is-interpol> (last visited May 5, 2023).

230. *See, e.g.*, *Drugs worth Nearly One Billion Dollars Seized in INTERPOL-led Operation across Central America and the Caribbean*, INTERPOL (July 2, 2013), <http://www.interpol.int/News-and-media/News-media-releases/2013/PR079>; *see also* *INTERPOL-led Operation Targets Methamphetamine Production and Trafficking across Americas*, INTERPOL (Feb. 5, 2013), <http://www.interpol.int/en/News-and-media/News-media-releases/2013/PR008>.

231. *See* UN G.A. Res. 260 B (III), *Study by the International Law Commission of the Question of an International Criminal Jurisdiction* (Dec. 9, 1948), <http://www.un-documents.net/a3r260b.htm>.

232. *See generally* Bernhard Graefrath, *Universal Criminal Jurisdiction and an International Criminal Court*, 1 EUR. J. INT’L L. 67 (1990).

233. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402 & cmts. c–g, 404, cmts. a–b, 423 (1987) (the crimes of genocide, crimes against humanity, war crimes, and the crime of aggression fall under tribunal jurisdiction once committed, without any further nexus required).

234. Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT’L L. 1, 4–5 (2011).

235. Article 12(2) of the Rome Statute enables the ICC to exercise jurisdiction over nationals of non-consenting, non-state parties, but the United States asserts that only states can invoke universal jurisdiction. *See* INT’L CRIM. CT., SECOND REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT TO THE U.N.

IACCJ would be distinct for a number of reasons. First, the crimes and categories identified in Section III.A are already the basis for criminal prosecutions among most states in the region.²³⁶ Affirming the Hemispheric Plan of Action on Drugs obligates states to adopt domestic legislation criminalizing offenses listed in the 1988 Convention.²³⁷ Secondly, the cost of prosecuting offenders is a powerful incentive for states challenged by TOC to grant the IACCJ universal jurisdiction.²³⁸ Discussions at the OAS General Assembly's Forty-Third Regular Session on the regulation and legalization of illicit drugs indicate that some states are overwhelmed by transnational crimes, resulting in prioritizing domestic concerns above enforcement against transnational criminal organizations.²³⁹ Because of TOC, states in the region are overwhelmed; accordingly, states should be eager to accept the IACCJ exercising universal jurisdiction and demonstrate a willingness to combat criminal cartels.²⁴⁰

United States Congressmembers have shown interest in the past in establishing a treaty-based tribunal with jurisdiction over drug trafficking and other transnational crimes.²⁴¹ Numerous legislative responses have authorized extraterritorial jurisdiction in reaction to illicit drugs transported from South America to the United States on the high seas.²⁴² This legislation aims to combat criminal cartels throughout the Western Hemisphere—a seven-million square-mile area about twice the size of the continental United States.²⁴³ Similar legislation regarding human trafficking²⁴⁴ has withstood challenges under prescriptive jurisdiction and due process theories.²⁴⁵ U.S. courts have ruled that criminal cartels engaged in human smuggling by land or sea originating beyond the border can be prosecuted, even if the offenders have no physical or financial nexus to the United States.²⁴⁶ Crimes of weapons trafficking, money laundering, and terrorism are also subject to extraterritorial jurisdiction under U.S. law.²⁴⁷ All of this indicates federal

SECURITY COUNCIL (Dec. 13, 2005), http://www.icc-cpi.int/NR/rdonlyres/2CFC1123-B4DF-4FEB-BEF4-52E0CAC8AA79/0/LMO_UNSC_ReportB_En.pdf. See also David Scheffer, *Staying the Course with the International Criminal Court*, 47 CORNELL INT'L L.J. 47, 65 (2002) (arguing that universal jurisdiction is exercised by states, not by a permanent tribunal).

236. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402 & cmts. c-g, 404, cmts. a-b, 423 (1987).

237. Hemispheric Plan of Action on Drugs, *supra* note 200, at 15. The other major treaties and protocols previously mentioned are listed in the Action Plan, and have been ratified by most of the OAS Members. *Id.*

238. Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 6-7 (2011) (the author's assessment of universal jurisdiction for international crimes is applicable to transnational crimes).

239. See generally *Draft Annotated Agenda for the Forty-Third Regular Session of the General Assembly*, ORG. AM. STATES (May 21, 2013), <https://www.oas.org/en/43ga/>.

240. M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT'L & COMP. L. REV. 1, 17-19 (1991) (indicating the acceptance among Latin American nations of a regional court to prosecute international trafficking in drugs and terrorism).

241. *Id.* at 14-17 (noting the support of many members of Congress for an international criminal tribunal).

242. GOV'T ACCOUNTABILITY OFF., COAST GUARD: RESOURCES PROVIDED FOR DRUG INTERDICTION OPERATIONS IN THE TRANSIT ZONE (Jun. 16, 2014), <https://www.gao.gov/products/gao-14-527> (the Transit Zone includes the Caribbean Sea, the Gulf of México, and the Eastern Pacific Ocean).

243. See *id.*

244. See, e.g., 18 U.S.C. § 1596(a)(2).

245. See *United States v. Baston*, 818 F.3d 651, 669-70 (11th Cir. 2016).

246. See generally *id.*; *United States v. MacAllister*, 160 F.3d 1304, 1308 n.8 (11th Cir. 1998).

247. See, e.g., CHARLES DOYLE, CONG. RSCH. SERV., RL33658, FEDERAL EXTRATERRITORIAL CRIMINAL

courts' willingness to routinely infer "congressional intent to provide for extraterritorial jurisdiction over foreign offenses that cause domestic harm," consistent with general principles of international law.²⁴⁸ Congress has closed other loopholes for offenders in a tailored response to the inherent global nature of drug trafficking.²⁴⁹ While legislation will undoubtedly face challenges in applying extraterritorial jurisdiction,²⁵⁰ the IACCJ's universal jurisdiction avoids creating safe havens for traffickers whose crimes take place within as well as outside the region. Circumstances involving transient actors engaged in serious transnational crimes can avoid having to navigate domestic jurisdictional pitfalls by transferring cases to the IACCJ.²⁵¹

Subjecting other states' citizens to the IACCJ's jurisdiction, however, raises questions concerning the fundamental right to due process of law.²⁵² For example, Article 3 of the 1988 U.N. Convention established subject-matter jurisdiction over international drug trafficking and related offenses.²⁵³ A treaty-based tribunal will require OAS Members to adopt legislation recognizing the IACCJ's jurisdiction over offenses occurring in their respective territory.²⁵⁴ Review in national courts is necessary to ensure that prosecution of crimes before the IACCJ establishes a nexus with serious internationally organized criminal activities, thus complying with the fundamental right to due process.²⁵⁵ Some OAS Members may object to the denial of a right to trial by jury at the IACCJ.²⁵⁶ The right to a jury trial, however, is by no means ubiquitous outside of the United

JURISDICTION: LEGISLATION IN THE 109TH CONGRESS 5–13 (2007).

248. *See, e.g., MacAllister*, 160 F.3d at 1308 n.8.

249. *See, e.g.,* The Drug Trafficking Safe Harbor Elimination Act, H.R. 313, 112th Cong. (2011). The Safe Harbor Elimination Act, which the Senate failed to act on, proposed to amend Section 846 of the CSA to clarify that persons who enter into a conspiracy within the United States to traffic illegal controlled substances outside the United States, or engage in conduct within the United States to aid or abet drug trafficking outside the United States, may be criminally prosecuted in the United States. *Id.*

250. *See, e.g.,* John O'Neil Sheehy, Note, *False Perceptions on Limitation: Why Imposing A Nexus Requirement Under the Maritime Drug Law Enforcement Act Would Not Significantly Discourage Efforts To Prosecute Maritime Drug Trafficking*, 43 CONN. L. REV. 1677, 1694–1700 (2011) (illustrating the practical considerations of satisfying the statutory jurisdiction requirements and extradition agreements in relation to the MDLEA).

251. *See, e.g.,* United States v. Lopez-Vanegas, 493 F.3d 1305, 1313 (11th Cir. 2007) (overturning the conviction of individuals who had conspired to acquire and traffic drugs outside of the United States).

252. *See, e.g.,* Patricia M. Wald, *International Criminal Courts: A Stormy Adolescence*, 46 VA. J. INT'L L. 319, 345 (2006). Professor Wald explains the development of international criminal courts and her experience as a judge on one of three courts. *Id.* at 319. Having sat on the Yugoslav Tribunal in the Hague, she acknowledges that, while some fundamental due process guarantees are not included in the procedures of the ICC such as "rights of jury trial, protection against double jeopardy, and the rejection of hearsay evidence," these same rights are not "granted to defendants in the rules for U.S. military tribunals authorized for non-citizen perpetrators of war crimes since 9/11." *Id.* at 345.

253. U.N. Convention Against Illicit Traffic in Narcotic Drugs, *supra* note 201.

254. *Id.* art. III(1).

255. *See, e.g.,* Sheehy, *supra* note 250, at 1686.

256. William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 701, 712 (2004) (noting that among the "feeble" arguments cited as part of official policy, the absence of a jury trial is of concern among legal commentators); Chenyu Wang, Comment, *Rearguing Jury Unanimity: An Alternative*, 16 LEWIS & CLARK L. REV. 389, 402 (2012) (noting that most foreign jurisdictions do not conduct jury trials and, where they are utilized, a less than unanimous verdict is the norm); Amy Powell, Note, *Three Angry Men: Juries in International Criminal Adjudication*, 79 N.Y.U. L. REV. 2341 (2004) (extolling the virtues of jury trials and suggesting that inclusion of a jury ought to be considered "where the State of the accused and/or the State where the crime was committed have a tradition of juries.").

States.²⁵⁷ Appeals of IACCJ convictions could be limited to avoid delayed prosecution and promote national security and public safety.²⁵⁸ In addition, empowering the IACCJ with universal jurisdiction includes the authority to compel states to cooperate with the arrest and surrender of offenders.²⁵⁹ Those states that choose to not recognize the IACCJ's jurisdiction would be prohibited from entering bilateral agreements with other states to avoid extradition of their nationals.²⁶⁰

Finally, the issue of where to confine defendants during pre- and post-trial stages of litigation presents security problems for countries throughout the hemisphere.²⁶¹ A possible solution is the use of existing facilities at Guantánamo Bay Naval Base (“Gitmo”), despite the controversies surrounding the facilities. These controversies have generally concerned the detainees’ fundamental rights.²⁶² However, conditions at Gitmo have improved.²⁶³ More importantly, leasing Gitmo facilities to the OAS would not lead to conflict among states over judicial and enforcement personnel or detainees under the jurisdiction of the IACCJ.²⁶⁴ The remoteness, fortification of detention units, and the absence of external jurisdiction over inmates makes Gitmo a viable means to incarcerate detainees that have committed a range of transnational crimes.²⁶⁵

V. CONCLUSION

Despite modern border issues, the United States-México border remains largely the same as the time of vaqueros driving cattle North to market.²⁶⁶ Today, coyotes occupy the

257. Wang, *supra* note 256, at 402 (noting that in arguing for unanimity jury verdicts, most foreign jurisdictions do not conduct jury trials).

258. See, e.g., 8 U.S.C. § 1103(c)(2)(A)(C). This statute gives district courts of the United States exclusive jurisdiction to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to waiver of environmental laws limiting appellate review only upon petition for a writ of certiorari to the Supreme Court of the United States. *Id.* See also Rome Statute, *supra* note 222, arts. LXXXVIII–XCII.

259. Rome Statute, *supra* note 222, arts. LXXXVI, LXXXIX.

260. See generally David A. Tallman, Note, *Catch 98(2): Article 98 Agreements and the Dilemma of Treaty Conflict*, 92 GEO. L.J. 1033 (2004).

261. *Hamdan v. Rumsfeld*, 548 U.S. 557, 645–46 (2006) (explaining that considerations of practicability must support departures from court-martial practice in the context of a military commission by the President to try specific persons without express congressional authorization).

262. *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004) (while no bar exists to detaining citizens as enemy combatants, “the writ of habeas corpus remains available to every individual detained within the United States.”); *Hamdan*, 548 U.S. at 591.

263. See, e.g., Ben Fox, *Guantanamo Bay Chief Moves to Ease Conditions for Detainees: Movie Night for Good Behavior*, CHRON (July 4, 2007), <https://www.chron.com/news/nation-world/article/Guantanamo-Bay-chief-moves-to-ease-conditions-for-1837301.php>.

264. Org. Am. States Charter arts. CXXXIII–CXXXV (expressing the legal capacity, privileges, and immunities of the OAS, representatives, and juridical status of the Specialized Organizations and their personnel while in the territory of each Member); 22 U.S.C. § 288a. See also William M. Berenson, *Immunity for International Organizations? Squaring the Concept of Immunity with The Fundamental Right to a Fair Trial: The Case of the OAS*, in 3 THE WORLD BANK LEGAL REVIEW: INTERNATIONAL FINANCIAL INSTITUTIONS AND GLOBAL LEGAL GOVERNANCE 133–45 (Hassane Cissé et al. eds., 2012).

265. Carol Rosenberg, *At Millions Per Detainee, Guantanamo Prison Stuck in a Cycle of Costly Delays*, N.Y. TIMES (Sept. 16, 2022, 4:18 PM), <https://www.nytimes.com/2022/09/16/us/politics/guantanamo-bay-prison-cost.html> (noting that Guantanamo is a “remote outpost” where there are “41 guards and civilians for each detainee.”).

266. See generally Tim Lehman, *The Making of the Cowboy Myth*, SATURDAY EVENING POST (Jan. 21, 2020),

border region, driving humans in caravans or small groups across the border as governments on both sides adjust enforcement practices to combat them.²⁶⁷ The Mexican government is experiencing internal problems of corruption indicative of an asymmetric war zone,²⁶⁸ and the globalization of Mexico's criminal cartels threatens the rule of law within its borders and other Latin American countries.²⁶⁹ Problems associated with criminal cartels are not provincial, as Mexican cartels have extensive international networks that cannot be ignored by policymakers.²⁷⁰ If policymakers fail to compromise and implement solutions, cartels will continue operating and expanding beyond the border region.²⁷¹ At some point, the public may lose their mind over the borderline²⁷² as lawmakers fail to combat smugglers who exploit migrants fleeing their country of origin.²⁷³ National leaders in the Western Hemisphere are already joining together to address the crisis of human smuggling and cartel criminality.²⁷⁴ Reaching a cooperative agreement to stem the flow of migrants benefits all governments in our hemisphere, as well as communities in the border regions.²⁷⁵ The alternatives suggested above are a starting point to address human smuggling, as well as other transnational crimes that challenge policymakers.

<https://www.saturdayeveningpost.com/2020/01/the-making-of-the-cowboy-myth/>.

267. Damià S. Bonmatí, *A Day in the Life of a Coyote: Smuggling Migrants from Mexico to the United States*, UNIVISION NEWS (Dec. 21, 2016, 6:02 PM), <https://www.univision.com/univision-news/immigration/a-day-in-the-life-of-a-coyote-smuggling-migrants-from-mexico-to-the-united-states> (describing the business of smugglers and coyotes in “one of the last stages of the journey—when migrants cross the border.”).

268. John Daniel Davidson, *Lessons from the Border's Volatile History*, CANNON (June 14, 2019), <https://thecannononline.com/lessons-from-the-borders-volatile-history/> (noting that illegal immigration is contributing to “a toxic combination of instability, violence, and poverty, along with the promise of employment in the U.S.” in Central American countries).

269. JUNE S. BEITTEL, CONG. RSCH. SERV., R41576, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS 6–11 (2020).

270. *Id.* at 10, 36–37.

271. *Id.* at 5, 20, 22, 28.

272. MADONNA, BORDERLINE (Sire Records 1983).

273. Beittel, *supra* note 269, at 5–6.

274. See *FACT SHEET: Key Deliverables for the 2023 North American Leaders' Summit*, THE WHITE HOUSE (Jan. 10, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/10/fact-sheet-key-deliverables-for-the-2023-north-american-leaders-summit/> (noting the issue of “transnational criminal organizations trafficking and smuggling people and illicit drugs” for discussion between President Biden, President Lopez Obrador, and Prime Minister Trudeau); see generally CIFTA, *supra* note 206.

275. *FACT SHEET: U.S.–Mexico Bilateral Cooperation*, THE WHITE HOUSE (Mar. 1, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/01/fact-sheet-u-s-mexico-bilateral-cooperation/>.