

BIDEN'S BORDER CRISIS: EXAMINING POLICIES THAT ENCOURAGE ILLEGAL MIGRATION



United States Senate Committee on Foreign Relations
Minority Report
June 2022

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LETTER OF TRANSMITTAL

U.S. Senate Committee on Foreign Relations

June 2022


Dear Colleagues,

As we all know, illegal migration to the United States has been on the rise for decades, but it has reached astronomical and record-breaking levels since the Biden Administration entered office. Years of work and billions of dollars spent in foreign assistance in Mexico and the northern Central American countries of El Salvador, Guatemala, and Honduras have failed to build sustained political will and local capacity to manage migration through their national territories. The Biden Administration's immigration and foreign policy priorities exacerbate the crisis and incentivize vulnerable individuals to put themselves at the mercy of violent criminal organizations to illegally migrate to the United States. The Biden Administration must take action to reverse this dangerous course.

In particular, President Biden must establish sound migration controls within our own national territory, while building political will and capacity in Mexico and northern Central America to effectively disrupt criminal organizations enabling illegal migration and manage migrants arriving in their countries.

In this report, we lay out a number of areas in which the United States should collaborate with the governments of Mexico and the northern Central American countries to reduce the massive waves of illegal migrants arriving at the U.S. southern border. By pursuing the forthcoming recommendations in this report, the United States could make headway in addressing the true root causes of illegal migration that continue to destabilize our borders and the region.

Sincerely,



James E. Risch
Ranking Member,
SFRC



John Barrasso
Member, SFRC



Rob Portman
Member, SFRC



Marco Rubio
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Ted Cruz
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EXECUTIVE SUMMARY

INTRODUCTION

The illegal migration crisis at the U.S. southern border presents a grave security threat to the United States and a humanitarian catastrophe for the vulnerable people involved. Illegal migration to the United States has reached astronomical levels since the Biden Administration entered office in January 2021.¹ The sheer number of illegal migrants, combined with the evolving tactics that transnational criminal organizations (TCOs) employ to smuggle and traffic individuals, presents an untenable security and humanitarian situation.

Weak U.S. border security and enforcement of immigration laws undermines U.S. efforts to improve the rule of law and humanitarian conditions in the region, takes a mental and physical toll on U.S. law enforcement personnel, and challenges their ability to defend our nation's borders. The prevailing conditions benefit dangerous criminals and expose vulnerable populations to unspeakable dangers and abuse. The Biden Administration's failure to secure our nation's borders is worsening this crisis. Further, it undermines efforts to address inadequate law enforcement as well as asylum processing policies and capabilities in Mexico and the northern Central American countries of El Salvador, Guatemala, and Honduras.

This report puts forward concrete ideas to:

- Establish effective migration controls in the United States;
- Strengthen border security and migration management capacities in the region; and
- Target TCOs smuggling and trafficking migrants.

TRANSNATIONAL CRIMINAL ORGANIZATIONS

TCOs benefit from and prolong the illegal migration crisis by facilitating and profiting off the smuggling and trafficking of migrants or victimizing vulnerable people along the dangerous journey to the United States. TCOs exploit the porous borders, rough terrain, and weak law enforcement throughout the region to advance their criminal agendas at the expense of migrant populations. Further, criminals have infiltrated the United States through these nefarious activities, which gravely threatens the safety and security of our communities.

U.S. POLICY & FOREIGN ASSISTANCE EFFORTS

In response to the illegal migration crisis, three successive U.S. administrations under the leadership of Presidents Barack Obama, Donald Trump, and Joe Biden have adopted various policy and foreign assistance responses, to varying degrees of success. President Biden is worsening this crisis by doubling down on the Obama Administration's failed policies and undoing helpful Trump Administration policies.

A number of the Biden Administration's policies have incentivized illegal migration, eroded the security of our borders, and undermined U.S. efforts to build effective law enforcement and asylum processing mechanisms across Mexico and northern Central America. Lax enforcement of U.S. immigration policies here at home weakens the incentives among governments to address challenges posed by illegal migration in their own countries. In fact, years ago, Mexican officials coached immigrants about how to enter the United States illegally.² Current policies only encourage a return to this approach.

Meanwhile, over the last decade, the United States has focused foreign assistance efforts in Mexico, El Salvador, Guatemala, and Honduras on addressing economic, governance, and security challenges. Despite years of work and billions of dollars spent in foreign assistance, these efforts have failed to build sustained political will among regional partners to meaningfully address border security and migration management through their national territories.

INTERNATIONAL MIGRATION OBLIGATIONS IN MEXICO AND NORTHERN CENTRAL AMERICA

The governments in Mexico, El Salvador, Guatemala, and Honduras are falling short on their own domestic and international obligations to address transnational organized crime and illegal migration issues. While a variety of factors have inhibited the political will in these countries – such as corruption and poor financing mechanisms – the governments must do all they can to adhere to these obligations. The Biden Administration must also hold them accountable. Promoting sustainable political will in the region to enforce these obligations will go a long way in tackling the mass illegal migrant waves undermining U.S. security and destabilizing large parts of Latin America and the Caribbean.

CONCLUSION

The illegal migration crisis at the U.S. southern border has worsened under President Biden and is the result of a variety of domestic and foreign policy factors. The crisis will not abate until we build sustainable political will among partners to develop, implement, fund, and enforce sound policies aimed at countering transnational organized crime, increasing border security, and managing migration. This report offers recommendations for how the United States can work with our neighbors to advance these mutually beneficial goals. Failure to do this would:

- Weaken the capacity of U.S. law enforcement to protect our borders and communities;
- Undermine U.S. programs to strengthen regional law enforcement capacity to effectively combat TCOs;
- Strengthen the capacity of violent criminal groups to cause serious harm to vulnerable populations; and
- Promote regional instability and create a humanitarian crisis that undermines democratic governance and economic prosperity.



INTRODUCTION

The illegal migration crisis at the U.S. southern border presents a national security threat and a humanitarian catastrophe for the vulnerable people involved. Illegal migration to the United States has reached monumental levels since the Biden Administration entered office.³ Since January 2021, U.S. law enforcement has encountered over 2.6 million migrants trying to enter the United States illegally from Mexico, northern Central America, and countries beyond.⁴ On average, over 171,840 migrants have sought to enter the United States illegally per month during this period, with the highest monthly total reaching 234,088 in April 2022.⁵

Historically, the majority of illegal migrants arriving in the United States have come from Mexico, El Salvador, Guatemala, and Honduras. While this remains true today, 2021 and 2022 marked significant increases in illegal migrant arrivals from outside those four countries. From January 2021 to March 2022, the numbers of illegal migrants from outside Mexico and northern Central America has increased almost nine times from 9,672 to 88,110 in just over a year.⁶ In this cohort, more than nine out of 10 illegal migrants came from Ecuador, Brazil, Haiti, Cuba, Nicaragua, and Venezuela.⁷ The U.S. southern border is also seeing illegal migrants coming from places as far away as Bangladesh, Cameroon, China, Eritrea, and India.⁸ This new reality of increased illegal migration, including from outside the traditional source countries, demonstrates the need for governments in Mexico and northern Central America to better enforce their borders and manage migration.

While a variety of factors have contributed to the current crisis, the Obama Administration's immigration policies set the context for a massive influx of illegal migrants to the United States. In 2014, President Barack Obama took a series of executive actions which ultimately incentivized illegal migration. These initiatives included expanding the Deferred Action for Childhood Arrivals program; creating a Deferred Action for Parents of Americans and Lawful Permanent Residents program; and expanding use of provisional waivers for unlawful presence.⁹ In effect, these policies incentivized waves of illegal migration to the United States. In the years that followed, President Obama presided over a calamitous illegal migration crisis involving thousands of unaccompanied children. The Obama Administration ignored years of warnings and mounting evidence about the impending crisis, and then ineffectively responded as it rushed to minimize the political cost of the tragic situation.

In the wake of this bad policy, the Trump Administration took a series of actions to effectively stem the flow of illegal migration and build political will in neighboring countries to improve their law enforcement and asylum processing capacity. Unfortunately, the Biden Administration prematurely dismantled these measures, failed to put in place workable alternatives, and doubled down on the reckless policies

of the Obama Administration responsible for earlier surges in illegal migration. These policies send a potent signal of lawlessness at the southern border of the United States. Such dangerous signals overwhelm already weak border security and migration management capabilities in Mexico and northern Central America and discourage our neighbors from taking action to improve these critical functions across their own national territories.

Worsening an already bad situation, transnational criminal organizations (TCOs) have identified and capitalized on weak U.S. and regional enforcement of border security and migration controls. TCOs actively participate in, benefit from, and perpetuate the illegal migration trade at the heart of this crisis. These criminal groups rely on lax border security and law enforcement to victimize vulnerable populations along the dangerous journey to the U.S. southern border and to increase their own presence within our country.

The Biden Administration's disastrous immigration and border policies, combined with the growing numbers of outward migration from the Western Hemisphere and TCOs' evolving human smuggling and trafficking tactics, have a detrimental impact on the safety and security of the United States. This reality takes a physical and mental toll on U.S. law enforcement personnel and limits their ability to defend the nation's borders. Tragically, in April 2022, a National Guardsman on the southern border drowned while trying to rescue illegal migrants attempting to cross the Rio Grande River into the United States.¹⁰ This story unfortunately is representative of far too many cases where U.S. law enforcement personnel risk their lives for the benefit of others who illegally try to enter our country.

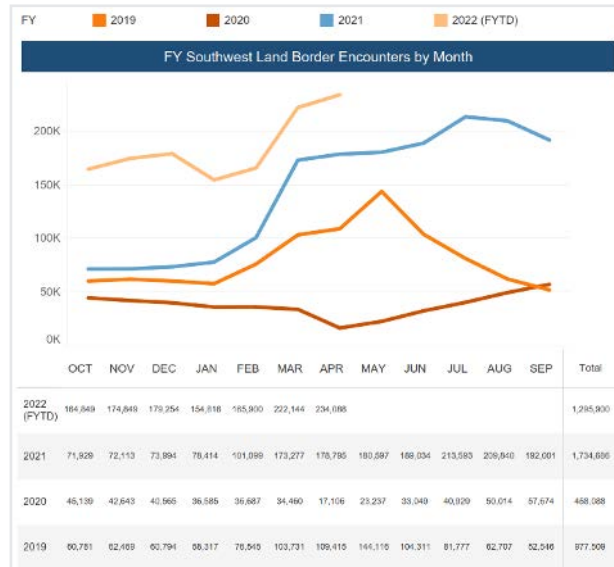
This report offers recommendations to improve migration controls in the United States; strengthen regional political will to improve border security and migration management; and effectively target TCOs involved in illegal migration. Failure to make meaningful progress in these areas will severely undermine the capacity of U.S. law enforcement to protect our nation's borders and the safety of communities; needlessly expose countless more vulnerable individuals to ruthless predatory behavior by criminal groups; and erode internationally-recognized human rights and democratic governance across Latin America and the Caribbean.



CHAPTER 1

CRISIS AT THE SOUTHERN BORDER

The number of migrants who have attempted to enter the U.S. illegally through the southern border has reached its highest point in decades,¹¹ and shows no signs of abating. In 2021, U.S. law enforcement encountered more than 1.7 million migrants at the southern border – the highest annual total the United States has ever seen. Last year’s number is 3.7 times greater than the 458,088 total for 2020, 1.7 times greater than the 977,509 total for 2019, and 3.3 times greater than the 521,090 total for 2018.¹²



Source: U.S. Customs and Border Protection, Southwest Land Border Encounters, <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters>, accessed May 19, 2022

In the first few months of 2022, over 1.2 million migrants have already tried to enter the United States illegally. April 2022 saw the highest monthly total of illegal migrants at the U.S. southern border, with over 234,000 attempted illegal entries. Of this number, over 28% had at least one prior encounter in the previous 12 months, indicating that recidivism is on the rise.¹³ These troubling trends indicate that the number of illegal migrant encounters at the southern border will only further increase in 2022 and in years to come, especially if President Biden terminates Title 42.

The Biden Administration’s announced plan to terminate the Title 42 public health order will drastically worsen this crisis. Title 42 of the Public Health Service Act of 1944 provides U.S. Border Patrol agents the authority to block illegal migrants from entering the United States if they pose a public health risk.¹⁴ President Trump issued this order in March 2020 in response to the COVID-19 pandemic. Officials within President Biden’s own administration and a bipartisan group of senators have

expressed concern about the detrimental impact ending this authority would have – warnings which President Biden continues to ignore.

An internal Customs and Border Protection (CBP) document from Biden's own administration in 2021 warned of the “significant security implications” of ending the order, and noted that criminal organizations control “large swaths” of Central America.¹⁵ The document also highlights concerns about the Biden Administration's earlier termination of removal pathways such as the Migrant Protection Protocols, Asylum Cooperative Agreements, and Prompt Asylum Claim Review, which further impacts U.S. law enforcement's ability to remove illegal migrants through the Title 42 order and process or remove those in the United States.¹⁶

The easing of travel restrictions related to the COVID-19 pandemic will bring an increase in illegal migration to the United States. Beyond CBP projections, public surveys conducted in 2020 found that nearly 60% of potential migrants cancelled or postponed planned movements until governments lifted travel restrictions.¹⁷ These findings raise questions about the main drivers of illegal migration affecting the region.


CBP officials also warn that primary factors drawing migrants to the border include economic opportunities and perceptions of U.S. immigration policy, among others. Illegal migration flows to the United States are enabled by transnational criminal organizations (TCOs) and will likely increase “as economic opportunities emerge and migrant perceptions of U.S. immigration policies shift.”¹⁸ Smuggling networks are “very active in promoting the flow of migrants through Mexico as drug trafficking organizations maintain control of the primary trafficking corridors in the United States.”¹⁹ Given these concerns, terminating Title 42 now – when the number of illegal migrants at the U.S. southern border has already reached the highest point in decades – severely threatens U.S. national security.

Further, criminals themselves are capitalizing on the Biden Administration's weak immigration and border policies to enter the United States illegally. The number of criminals entering the United States illegally is on the rise.²⁰ CBP defines these individuals as foreigners “who have been convicted of a crime, whether in the United States or abroad, so long as the conviction is for conduct which is deemed criminal by the United States.”²¹

Many of these criminals are members of the region's most dangerous gangs. U.S. law enforcement has encountered, in large numbers, members of 18th Street Gang, Mara Salvatrucha (MS-13), Paisas, Sureños (Sur 13), and Tango Blast, among others. Since 2015, U.S. law enforcement encountered 4,970 gang members trying to enter the United States illegally through the southwestern border.²²

In 2020, Immigration and Customs Enforcement and Removal Operations conducted 103,603 administrative arrests, of which 90% had criminal convictions or pending criminal charges at the time of arrest. Those arrested had criminal histories including more than 1,800 homicide-related offenses, 1,600 kidnappings, 3,800 robberies, 37,000 assaults, and 10,000 sex crimes. In total, there were more than 374,000 criminal convictions and pending charges – an average of four per arrest.²³

In 2021, U.S. law enforcement at the southwestern border encountered 10,763 criminal noncitizens, compared to 2,438 in 2020.²⁴ In the first few months of 2022, U.S. law enforcement arrested over 5,985 criminals trying to enter the United States illegally,²⁵ putting the numbers on track to exceed those in 2021. The most violent criminals in the world are exploiting U.S. immigration policies and lack of border security to enter the United States illegally, which threatens the safety and security of communities at home.



CHAPTER 2
U.S. POLICY AND
FOREIGN ASSISTANCE EFFORTS

In response to the illegal migration crisis, three successive U.S. administrations under the leadership of Presidents Barack Obama, Donald Trump, and Joe Biden have adopted various policy and foreign assistance responses, to varying degrees of success.

Policies under the Democrat administrations of Presidents Obama and Biden have created and exacerbated the illegal migration crisis by establishing “pull-factors” or incentives through disastrous domestic immigration policy changes. Then, in response to the man-made problem, both administrations offered solutions by throwing billions of dollars in U.S. assistance to governments in the region that have struggled to manage migration. In order to clean up the mess presented by the Obama Administration, President Trump was forced to take significant measures to reduce the historic numbers of illegal migrants arriving at the U.S. southern border.

To do so, the Trump Administration took a series of actions to stem the flow of illegal migration and build political will in neighboring countries to improve their law enforcement and asylum processing capacity. The Biden Administration prematurely dismantled these measures, failed to put in place workable alternatives, and instead doubled down on the reckless policies of the Obama Administration responsible for earlier surges in illegal migration.

PRESIDENT OBAMA

The Obama Administration’s immigration policies set the context for a massive influx of illegal migrants to the United States. In 2014, President Barack Obama took a series of executive actions which directly incentivized illegal migration. These initiatives include expanding the Deferred Action for Childhood Arrivals (DACA) program, creating a Deferred Action for Parents of Americans and Lawful Permanent Residents program, and expanding use of provisional waivers for unlawful presence.²⁶

DACA

President Obama expanded the population eligible for the DACA program to people of any age who entered the United States before the age of 16 and lived in the United States continuously since January 1, 2010, and extended the period of DACA and work authorization from two years to three years.²⁷ DACA allows the United States to use prosecutorial discretion to prevent the deportation of illegal immigrants who arrived in the United States as children and allowed them to get work permits to extend their stay.²⁸ In effect, limiting the prospect for deportation of children incentivized massive waves of unaccompanied minors to migrate illegally

to the United States, overwhelming U.S. law enforcement and creating challenging humanitarian conditions.

Deferred Action for Parents of Americans and Lawful Permanent Residents

The Obama Administration also allowed parents of U.S. citizens and permanent residents to request deferred action and employment authorization.²⁹ This effectively allowed any parent of a foreigner who gained citizenship to reside in the United States without fear of being deported. This action incentivized increased illegal migration to the United States in order to meet this status.

Provisional waivers

Similarly, the Obama Administration expanded the use of provisional waivers of illegal migrants to include spouses, sons and daughters of permanent residents.³⁰

In essence, through these executive actions, the Obama Administration suspended deportation for unaccompanied minors as well as parents, spouses, and children of permanent residents. This allowed and incentivized additional groups of foreigners to come to the United States illegally without fear of deportation.

In response to its own policy blunders that created the surge in illegal migration, the Obama Administration provided foreign assistance to the northern Central American countries. The administration developed the U.S. Strategy for Engagement in Central America (the Strategy), which sought to reduce illegal migration by promoting economic prosperity through regional integration, deepening security cooperation to reduce gang violence and the influence of organized crime, and providing technical assistance to promote good governance and fiscal management.³¹

One of the major assumptions under President Obama's 2014 Strategy was that "Central American governments will continue to demonstrate leadership and contribute significant resources to address challenges" if they are supported by international partners.³² In other words, continued U.S. assistance to Central American countries rests on those countries' willingness to invest and act to address illegal migration.

Since its inception, the Strategy has required over \$3.6 billion to implement,³³ but it remains difficult to determine its success. While there have been programmatic successes in individual countries, illegal migration to the United States has continued to rise to alarming levels, raising concerns that the programs have not aligned with the objectives the Strategy sought to address.

During the years of the Strategy's implementation, administration officials highlighted these very concerns. In a 2019 Senate Foreign Relations Committee hearing, Acting Assistant Secretary of State for Western Hemisphere Affairs Mike Kozak testified on the Strategy, that "despite some significant programmatic successes, however, this approach failed. U.S. Customs and Border Protection encountered an average of 115,000 illegal migrants per month at the U.S. border from March to June of this year, and over 140,000 in May alone. Something had to change."³⁴ Ambassador Kozak continued, "What is clear is we have had these programs going for years and years and years, and the migration numbers have gone up, up, up. So we were being programmatically successful on a lot of these things. We had all assessed that if we could make a dent in the murder rate, if we could make an improvement on food security, that it would reduce migration. But it was not having that effect."³⁵

Further, the Government Accountability Office cautioned in a September 2019 report, "Limited information is available about how U.S. assistance [has] improved prosperity, governance, and security" in northern Central America.³⁶ The report highlights that agencies reported mixed results for projects and little information on overall progress; and, while the implementing agencies had plans to assess the programs, they didn't include all of the agencies activities.³⁷

President Obama's 2014 Strategy failed to significantly reduce illegal migration to the United States and improve local migration management and refugee processing capacity among the governments in the region. When the United States provides billions of dollars in foreign assistance without concrete expectations or mechanisms to measure tangible results, countries in the region are not incentivized to take meaningful action to address their own internal challenges. Further, this may create reliance on external assistance or efforts, primarily through the generosity of the American taxpayer.

Despite efforts to address economic, governance, and security challenges in northern Central America, the Obama Administration left office in 2017 with a significant illegal migration crisis at the U.S. southern border, forcing the incoming Trump Administration to take significant action to reverse course.

PRESIDENT TRUMP

To address the illegal migration crisis, the Trump Administration took significant executive action to reduce the "pull-factors," and worked to garner political will among governments in Mexico and northern Central America to address migration management and border security within and through their national territories.

Title 42

At the U.S. southern border, the Trump Administration enhanced border security and immigration enforcement through several executive actions. Additionally, in response to the COVID-19 pandemic, in March 2020, the Trump Administration invoked Title 42 of the 1944 Public Health Service Act, allowing Border Patrol agents the authority to block illegal migrants from entering the United States if they pose a public health risk.³⁸ The order mandated that all foreign nationals without authorization to enter the United States be returned to Mexico, Canada, or their home countries.

At the same time, the Trump Administration worked to increase political will in Mexico and northern Central America by pursuing bilateral agreements with the governments to manage migration. To do so, the administration pursued Migrant Protection Protocols (MPP) with Mexico and Asylum Cooperative Agreements (ACAs) with the individual governments in El Salvador, Guatemala, and Honduras. These agreements established a process by which governments in the region could improve migration management capacities and work more cooperatively with the United States on the issue of illegal migration.

The MPP

In 2019, the United States and Mexico established the MPP and reached follow-on agreements to improve migration capacity. These efforts served to incentivize Mexico to take accelerated and stronger action to address migration capacity issues and their corresponding challenges.

Under the MPP, Mexico agreed to accommodate new border and asylum policy changes that more equitably shared the burden of interdicting migrants and hosting asylum seekers transiting through Mexico.³⁹ Through the MPP, Mexico authorized the temporary entrance of foreign individuals returned from the United States, allowed certain foreigners to “stay for humanitarian reasons,” and coordinated measures at the technical and operational level.

In June 2019, the United States and Mexico signed a follow-on framework to work together to manage migration of asylum seekers from northern Central America. Mexico also agreed to increase enforcement efforts and to expand the MPP along the U.S.-Mexico border. The government of Mexico agreed to deploy its National Guard to its borders in an effort to provide personnel to disrupt and counter human smuggling networks.⁴⁰

When fully implemented, the MPP effectively ended the practice of catch and release in the United States and undermined transnational criminal organizations’

(TCOs) smuggling operations that depended on promises the migrants would stay in the United States. The U.S. Department of Homeland Security notes that many illegal migrants that pass through this process fail to appear for their final hearings before an immigration judge, or fail to comply with removal hearings. In 2017, before implementation of the MPP, more than half of the 89% of those claiming asylum from northern Central American countries never actually applied for asylum after being released or failed to show for their initial hearing. Only 9% of those who applied for asylum from these countries actually qualified before a judge.⁴¹ MPP effectively ended this by bringing the asylum system back to the core function of providing asylum, and undercut TCOs' business model.

The ACAs

In 2019, the Trump Administration reached bilateral agreements with the individual countries of El Salvador, Guatemala, and Honduras to facilitate their governments' actions to stem the flow of illegal migrants and improve overall migration management. These agreements, known as the ACAs, sought to improve the local capacity of partner governments to enforce their own domestic laws and international obligations related to refugees and asylum seekers, including by expanding their systems for offering humanitarian protections.⁴² The ACAs were critical in garnering the political will in the northern Central American countries to take meaningful steps to stem the flow of illegal migrants.

The Trump Administration's bilateral efforts through the MPP and ACAs proved critical in building the political will among governments to address migration management issues. However, before these agreements had the opportunity to take full effect and reach their intended potential, the Biden Administration terminated them immediately upon entering office.

PRESIDENT BIDEN

Since entering office, the Biden Administration has made a number of misguided and dangerous policy decisions, which have incentivized illegal migration and undermined the ability of U.S. law enforcement to secure our borders. These disastrous policies include, but are not limited to, the termination of the MPP with Mexico; the termination of the ACAs with the countries of northern Central America; the announced revocation of Title 42 authorities; and changes to prosecutorial discretion in the enforcement of U.S. immigration laws.

The MPP

In January 2021, the Biden Administration terminated the MPP program with Mexico.⁴³ An August 2021 Supreme Court order forced the administration to reinstate the MPP, but the administration remains committed to terminating the program for good.⁴⁴ The administration's efforts to dismantle the MPP have created deep confusion for U.S. authorities, as well as for the people and governments in the region.

The ACAs

In February 2021, the Biden Administration terminated the ACAs with El Salvador, Guatemala, and Honduras.⁴⁵ The ACAs allowed migrants to seek protection within the region by facilitating cooperation between the United States and host nation governments or international organizations to expand their systems for offering humanitarian protections.⁴⁶ By dismantling the program, the administration undermined early efforts to incentivize those governments to take increased action to manage migration. This policy also discouraged migrants from making the dangerous journey to the U.S. southern border that exposed many of them to TCOs.

Title 42

In April 2022, the Biden Administration announced it would terminate Title 42, the authority allowing the United States to suspend the entry of illegal migrants through COVID-19 public health orders.⁴⁷ The rescission, which was initially expected to take effect in May 2022, would result in massive new arrivals at the southern U.S. border.⁴⁸ The Department of Homeland Security is preparing for as many as 18,000 migrants per day after the lifting of Title 42,⁴⁹ reflecting unprecedented numbers that will put severe strain on U.S. Customs and Border Protection enforcement personnel and the country as a whole. Further creating policy confusion, just days after the announcement, a federal court temporarily blocked the administration from removing the order after several states filed a lawsuit to keep it in place. Despite the court's ruling, the Biden Administration continues to fight for the title's removal, placing a priority on illegal migrants over the well-being and safety of American citizens.

Prosecutorial Discretion

In September 2021, the Biden Administration issued guidelines unreasonably expanding prosecutorial discretion. This allows law enforcement to only target undocumented immigrants who pose a threat to the safety and security of communities, instead of working to remove over 11 million immigrants residing

illegally in the United States.⁵⁰ This severely limits the effectiveness of U.S. law enforcement, undermines the rule of law, and serves as an incentive for individuals to illegally enter and reside in the United States. Guidelines like this amount to selective enforcement of the law, and changing U.S. law by administrative action.

Unsurprisingly, these policies have caused concern and confusion in Mexico and northern Central America. In March 2021, Mexico's President Andrés Manuel López Obrador said, "Expectations were created that with the Government of President Biden there would be better treatment of migrants. And this has caused Central American migrants, and also from our country, wanting to cross the border thinking that it is easier to do so."⁵¹ In June 2021, President Giammattei of Guatemala warned that human smugglers were taking advantage of the mixed messages from the Biden Administration to target and convince minors and teenagers to take the dangerous journey north.⁵²

The Biden Administration's wavering on and reversal of key policies have widespread implications in the countries that are both sources of outward migration and those that deal with significant flows of migration through their national territories.

The Biden Administration's premature termination of the MPP and the ACAs, before they had the opportunity to fully take effect, inhibited all progress made by the Trump Administration to build political will to manage migration in those countries. The Biden Administration has not engaged in any similar efforts to form bilateral or multilateral migration management agreements.

Root Causes Strategy

The Biden Administration has responded to the illegal migration crisis and corresponding humanitarian disaster by increasing U.S. foreign assistance expenditures and abandoning meaningful efforts to incentivize the countries in the region to strengthen their own migration management and border security policies. Instead of learning lessons from the Obama Administration's 2014 Strategy, it re-branded the initiative, made marginal changes, and widened the aperture to focus on challenges not directly tied to illegal migration.

In July 2021, the Biden Administration proposed \$4 billion in additional foreign assistance on top of the previously allocated \$3.6 billion to implement the new "U.S. Strategy for Addressing the Root Causes of Migration in Central America." This strategy ostensibly would seek to address all of the same issues the Obama-era policies pursued. The strategy's primary areas of focus include: addressing economic insecurity

and inequality; combatting corruption, strengthening democratic governance, and advancing the rule of law; promoting respect for human rights, labor rights, and a free press; countering and preventing violence, extortion, and other crimes perpetrated by criminal gangs, trafficking networks, and other organized criminal organizations; and, combatting sexual, gender-based, and domestic violence.⁵³

In practical terms, the Biden strategy is nearly identical to the failed 2014 Strategy proposed by President Obama. Equally important, the Biden strategy for Central America is not accompanied by measures to strengthen enforcement of U.S. migration and border security policies. It is clear the Biden Administration has learned no lessons from the past.

Bicentennial Framework

In Mexico, the Biden Administration renegotiated the 2008 Merida Initiative (Merida), a joint security cooperation framework designed to address shared security concerns. Since 2008, the United States has provided over \$3.3 billion to advance the initiative with Mexico.⁵⁴ In 2011, Merida expanded to prioritize institution building under four pillars: combatting transnational criminal organizations; institutionalizing rule of law while protecting human rights; creating a 21st century U.S.-Mexican border; and, building strong and resilient communities. Merida has helped build a new paradigm of security cooperation between our countries, but it has failed to meaningfully improve Mexican institutions responsible for law enforcement and migration management.

In October 2021, the United States and Mexico announced “The U.S.-Mexico Bicentennial Framework for Security, Public Health, and Safe Communities” (the Bicentennial Framework or Bicentenario). Despite its connection to the security conditions the new framework purports to revamp, the Bicentennial Framework does not directly address migration management and border security cooperation.

Importantly, the current context demonstrates that the crisis can no longer be solved through U.S. foreign assistance efforts. As illegal migration to the United States extends beyond Mexico, El Salvador, Guatemala, and Honduras, simply providing foreign assistance to these countries to address the root causes of migration is no longer sufficient. Further, the Biden Administration must reverse course in its rhetoric and policy changes that incentivize illegal migration to the United States. Removing Title 42 and expanding prosecutorial discretion would only further incentivize illegal migration to the United States.



CHAPTER 3
TRANSNATIONAL CRIMINAL
ORGANIZATIONS

Transnational criminal organizations (TCOs) exploit weak U.S. and regional enforcement of border security and migration controls to advance their criminal agendas at the expense of vulnerable populations. The relatively unmonitored borders throughout Mexico and northern Central America facilitate these criminal activities. Hundreds of miles of borders running through mountains, jungles, and rivers are unmarked.⁵⁵ These open borders make it significantly easier for criminals to facilitate illegal migration through the region to the United States without being stopped, or even detected.

In this context, TCOs and other criminal elements actively participate in, benefit from, and perpetuate the illegal migration trade at the heart of this crisis. They are involved at every stage of the process, from facilitating migrants' dangerous journeys to victimizing them along the way.⁵⁶ Individuals are increasingly turning to illegal and criminal means, with more than 55% of those traveling illegally using a smuggler.⁵⁷

Throughout Mexico and northern Central America, as well as at the U.S. southern border, various types of criminal entities take advantage of the illegal migration trade and the worsening crisis. Local criminals, gangs, and TCOs have identified niche roles, and work collectively to advance illegal migration to the United States.

TYPES OF CRIMINAL ENTITIES

Local criminals are one important type of criminal actor perpetuating illegal migration from Mexico and northern Central America to the United States. Local criminals are individuals or small groups of criminals along the migration route that capitalize on illegal migration by engaging in individual crimes such as robbery, extortion, assault, sexual assault, and sometimes murder.⁵⁸ These actors tend to be unorganized and opportunistic, but their activities still place vulnerable populations in danger. Due to the ad hoc and sporadic nature of their criminal activities, local criminals are difficult to detect and track down. Local law enforcement throughout the region has struggled to respond to these activities due to a variety of factors, but most notably due to corruption and the fact that these actors may be family members or children in small communities.

Gangs are another criminal entity benefiting from the wave of illegal migration provoked by the policies of the Biden Administration. Violent gangs or “maras” routinely victimize vulnerable migrants, and are increasing their presence through migrant routes in the region. Barrio 18 and MS-13 are well established throughout El Salvador, Guatemala, and Honduras, and are expanding their footprint in Mexico.⁵⁹ The Lorenzas and the Mendozas gangs remain prominent in Guatemala, while the Hernandez clan and the Valles gang are concentrated in Honduras.⁶⁰ Gangs

violently target migrants along the journey to the United States through extortion, robbery, and assault.⁶¹

Most importantly, TCOs actively fuel and benefit from illegal migration. Mexico is home to some of the hemisphere's largest, most sophisticated, and violent organized criminal groups, and serves as a gateway for illicit activity including human smuggling and trafficking.⁶² TCOs such as the Sinaloa, Zetas, Juarez, Jalisco, Gulf, and Tijuana cartels run paramilitary-style operations.⁶³ They are well-funded, sophisticated criminal enterprises that primarily traffic narcotics to the United States, in addition to human smuggling and trafficking.⁶⁴

To control their operations, these groups bribe or coerce Mexican officials, and threaten violence against perceived opponents or rivals. TCOs exploit illegal migrants by charging fees for their passage, running migrant kidnapping rings, and committing violence against those traveling through Mexico.⁶⁵

TCOs also commit predatory crimes such as extortion, robbery, assault, sexual assault, and abandonment, and “regularly interact with and victimize migrants.”⁶⁶ Cartels and local gangs kidnap families, torture children for information on who to ask for ransom, and dismember those who do not pay.⁶⁷ Kidnappings often happen before an attempted crossing into the United States. At least 6,356 illegal migrants traveling through Mexico and northern Central America between January and August 2021 were victims of kidnappings and related abuses,⁶⁸ and those with families in the United States are most commonly targeted for ransoms.⁶⁹

TYPES OF CRIMINAL ACTIVITIES

Local criminals, gangs, and TCOs engage in widespread illicit activity, including drug trafficking, human smuggling, and human trafficking, which prolongs the illegal migration trade at the heart of the crisis and puts vulnerable populations at risk. First, it is important to understand that human trafficking and human smuggling are distinct criminal activities. Human trafficking centers on exploitation and/or the use of coercion, fraud, or force for the subjugation of involuntary servitude or slavery; whereas human smuggling centers on the illegal transportation of migrants.⁷⁰

TCOs use illegal migration to advance the trafficking of narcotics and other contraband, using the same routes for trafficking or smuggling migrants. Most of these routes exist in border areas with a limited or nonexistent law enforcement presence. In many of these communities, criminal organizations often control access to the border.⁷¹

Beyond actively smuggling or trafficking migrants, drug trafficking TCOs profit from charging migrants taxes or “pisos.” A handful of drug trafficking organizations such as the Sinaloa, Gulf, and Tijuana cartels⁷² maintain control of the primary trafficking corridors into the United States, which allows them to regulate and tax illicit trade through territory under their control.⁷³

Drug trafficking TCOs also coordinate illegal border crossings to divert attention from other illicit activities and to recruit or coerce migrants to carry drugs. TCOs make migrants carry drugs across the U.S.-Mexico border in exchange for reduced smuggling fees or payments.⁷⁴ Drug trafficking TCOs may force a migrant to engage in drug trafficking by either becoming a mule or tending to marijuana and poppy fields.⁷⁵

The deadly scourge of fentanyl in the United States is directly connected to illegal migration, and failure to stem the flow of both is dangerous to Americans. TCOs are increasingly turning to illegal migrants to smuggle drugs, including the hyper-lethal fentanyl. In an interview, U.S. Chief Border Patrol Agent Gloria Chavez said, “For the first time, we’re starting to see these tactics where fentanyl is being smuggled between ports of entry.” She continued, “Cartels are very creative. They find ways to intimidate migrants and find ways to illegally have them transport that narcotic into the United States.”⁷⁶

Sources with the Drug Enforcement Agency say that fentanyl is becoming a drug of choice for the cartels because it’s highly profitable, extremely potent, and easier to smuggle into the U.S. because of its small size.⁷⁷ Federal agents in El Paso, Texas say they’ve seen a 4,000% increase in fentanyl seizures over the last three years, and that the rising amount is increasingly found in the desert where smugglers exploit stretched federal resources to transport it into the United States.⁷⁸

Human smuggling remains a significant problem in Mexico and northern Central America, and gravely contributes to the illegal migration crisis. Moreover, some of these criminal organizations facilitating illegal migration engage in and profit from human smuggling and trafficking. Immigration and Customs Enforcement (ICE) notes, human smuggling involves “importation of people into the United States involving deliberate evasion of immigration laws,” and this offense includes bringing illegal migrants into the country, as well as the unlawful transportation and harboring of illegal migrants in the United States.⁷⁹

TCOs engaging in human smuggling are involved at every stage of the illegal migration process, including by incentivizing migrants to leave their homes, providing security along the smuggling routes through Mexico, and facilitating mechanisms for undetected entry into the United States.⁸⁰ Specifically, they provide facilitation and coordination services to identify and recruit migrants, transportation along the

route, logistical support for lodging or “stash houses,” fraudulent documents, and foot guides to avoid detection.⁸¹ Smugglers have local ties that they leverage in order to gain customers, and smugglers are motivated largely by profit and the low risk of prosecution.⁸² Smugglers abuse and exploit migrants, and in some cases, they raise prices mid-journey or abandon them in unsafe conditions.⁸³

Individuals are increasingly turning to smugglers to transport them illegally to the United States. Costs associated with contract smuggling are not only significantly higher than the costs of utilizing legal migration mechanisms, but also comprise the majority of annual migration costs. Analysts estimate that illegal migrants from El Salvador, Guatemala, and Honduras spent \$1.7 billion USD in 2021 using a smuggler and \$230 million with a caravan. In the same year, migrants only spent \$240 million on legal migration mechanisms.⁸⁴ Not only does this demonstrate the preference for illegal migration means, but the significant illicit economy associated with illegal migration.

Human smuggling is extremely lucrative for criminals. One report estimates that revenues accrued to smugglers transporting illegal migrants from Guatemala, Honduras, and El Salvador combined ranges from about \$200 million to roughly \$2.3 billion in 2017.⁸⁵ Smugglers require illegal migrants to pay for their illicit services, costing between \$6,000 to \$10,000 for an “all inclusive” or “end-to-end” package that covers travel from their point of origin to their final destination in the United States.⁸⁶

Other means to contract human smugglers include, “pay-as-you-go” arrangements, where migrants pay criminal facilitators smaller sums of money for services as needed along the route. These services include, for example, \$1-\$4 to cross a river on a boat, or \$1,000 for a guaranteed crossing of the Mexico-Guatemala border beyond immigration checkpoints on the Mexican side.⁸⁷ Arrangements vary in price based on the nature of services the human smugglers provide.

Beyond what illegal migrants pay up front, many of those who initially contract smugglers can be kidnapped, tortured, and held for ransom “until they reveal the phone numbers of relatives in the United States.”⁸⁸ TCOs engaged in drug trafficking regulate human smuggling and trafficking movements in order to ensure these other smuggling activities do not disrupt their main drug trafficking business.⁸⁹

TCOs are increasingly leading caravans comprised of large groups of migrants, to illegally gain entry into the United States. Migrant caravans in northern Central America have been developing over the years, but have increased in size and frequency since 2018.⁹⁰ The U.S. Department of Homeland Security (DHS) noted that several irregularities in the Central American caravans suggest they are not a spontaneous movement. Of particular concern to DHS, Special Interest Aliens (SIAs) were found moving within and around the various caravans.⁹¹ SIAs are a foreign “person who,

based on an analysis of travel patterns, potentially poses a national security risk to the United States or its interests. Often, such individuals are employing travel patterns, known or evaluated to possibly have a nexus to terrorism.”⁹²

In these caravans, it is difficult to differentiate between illegal migrants and the criminal and terrorist elements that seek to exploit them. Reports note, “There are subversive elements mixed within the Central American caravans comprising its integrity, this includes extra-continental migrants from South Asia and Africa, and possibly some from the Middle East.”⁹³ This shows individuals from any nationality can use the cover of a caravan to migrate illegally to the United States, without detection.

SIAs entering the United States have increased in recent years. U.S. Customs and Border Patrol apprehended 3,028 SIAs in 2018 compared to 1,105 SIAs in 2017. Honduras detected 3,861 irregular migrants passing through its territory in 2018, and in the same year, Guatemala detected 157 migrants from 13 countries outside of the Western Hemisphere in caravans.⁹⁴

Further, there is an immense degree of logistical organization around the composition of the Central American caravans. Caravans move along “a specific route developed by NGOs, some of which have more political objectives than a humanitarian mission.”⁹⁵ These caravans form strategically engineered migration unrelated to regular migrant flows, which undermines the safety of migrants and exposes them to more significant risks.⁹⁶

While TCOs organize illegal caravans, they also exploit and target them. More than 270 individuals who have targeted migrant caravans along the route have criminal histories, including known gang membership and prior charges of “aggravated assault with a deadly weapon, armed robbery, sexual assault on a child, and assault on a female.”⁹⁷ Mexican officials have publicly warned about criminal groups infiltrating and traveling with illegal migrant caravans heading to the United States. DHS has noted that these caravans may include individuals from as many as 20 other countries for which the agency has no identifying information.⁹⁸

TCOs infiltrating migrant caravans often employ ruthless and dangerous tactics, including pushing women and children to the front of the caravans “to act as human shields as the caravan pushes against its military forces.”⁹⁹ Further, reports also note a “small subgroup within the caravans appears to be aimed at causing disruption and violence at border crossings to create a chaotic atmosphere for border security officials.”¹⁰⁰

In October 2018, Mexico’s Interior Minister confirmed some criminal groups have infiltrated illegal migrant caravans, saying: “I have videos from Guatemala that show men dressed in identical clothing, sporting the same haircuts, handing out money to women to persuade them to move to the front of the caravan...We know, for a fact,

that some members of the caravan threatened [Mexican] Migration Institute personnel and we have images showing many of them preparing Molotov cocktails.”¹⁰¹

In February 2020, an El Salvador-based Joint Border Intelligence Group found migrants with criminal backgrounds from El Salvador, Guatemala, and Honduras infiltrated the migrant caravans to evade arrest from their home country and to commit further crimes in Mexico and the United States. Further, the criminals identified at the borders of Guatemala, Honduras, and the United States posed as regular migrants or victims of human trafficking in order to continue traveling north. Many of the criminal migrants were wanted for homicide, kidnapping, extortion, and terrorism, and some of the felons were known members of MS-13 and 18th Street.¹⁰²

Human smuggling can turn into, or fuel, other transnational criminal activity, including human trafficking,¹⁰³ and it remains a significant challenge in Mexico and northern Central America. ICE notes, human trafficking involves “sex trafficking in which a commercial sex act is induced by force, fraud or coercion, or in which the person induced to perform such act has not attained 18 years of age; or recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjugation to involuntary servitude, peonage, debt bondage or slavery.”¹⁰⁴ TCOs also forcibly recruit illegal migrants to work for them in criminal activities. Violence, abuse, and the risk of exploitation are widespread characteristics of human trafficking. Often times, traffickers use violence or fraudulent employment agencies and false promises of education and job opportunities to trick and coerce their victims.¹⁰⁵

Further, President Biden’s own State Department notes how these problems compound. The 2021 Trafficking in Persons (TIP) Report highlights the dire threat human trafficking poses throughout Mexico and northern Central America. Key points made in the 2021 TIP Report include:

Mexico

Human traffickers exploit domestic and foreign victims in Mexico. Groups considered most at risk for trafficking in Mexico include unaccompanied children, asylum seekers and migrants, and children in gang-controlled territory, among others. The vast majority of foreign victims of forced labor and sex trafficking in Mexico are from Central America, particularly El Salvador, Guatemala, and Honduras. Traffickers exploit some of these victims along Mexico’s southern border. TCOs profit from sex trafficking and force Mexican and foreign adults and children to engage in illicit activities, including assassinations, lookouts, and in the production, transportation, and sale of drugs. The report notes, “Increasingly, organized crime groups – both large

and small – participate in the trafficking of migrants, who are highly vulnerable to exploitation due to their transient nature, frequent reliance on smugglers, and fear of reporting abuses to authorities.”¹⁰⁶ Further, trafficking-related corruption remains a concern. Some government officials in Mexico “collude with traffickers or participate in trafficking crimes. Corrupt officials reportedly participate in sex trafficking, including running sex trafficking operations.” Some immigration officials allegedly accept payment from traffickers to facilitate the illegal entry of foreign trafficking victims into Mexico.¹⁰⁷

El Salvador:

Human traffickers exploit Salvadoran nationals as well as adults and children from neighboring countries, particularly Honduras, Guatemala, and Nicaragua, forcing them into sex trafficking and forced labor. TCOs and gangs “recruit, abduct, train, arm, and subject children to forced labor in illicit activities – including assassinations, extortion, and drug trafficking.”¹⁰⁸ Additionally, transnational traffickers exploit Salvadorans who illegally migrate to the United States in forced labor, forced criminal activity, and sex trafficking, while en route and upon arrival. Human traffickers also force some Central and South American, African, and Asian migrants who transit El Salvador to Guatemala and North America into sex trafficking.¹⁰⁹

Guatemala

In Guatemala, human traffickers exploit some Latin American migrants, including women and children, transiting Guatemala while en route to Mexico and the United States, forcing them into sex trafficking or forced labor in Mexico, the United States, or Guatemala.¹¹⁰ Human traffickers have even exploited victims in migrant shelters.

Honduras:

In Honduras, human traffickers particularly target migrants, children whose parents have migrated, and individuals living in areas controlled by criminal groups, among others. The TIP Report notes, “Migrants from Africa, Asia, the Caribbean, Central America, the Middle East, and South America who transit Honduras en route to the United States are vulnerable to being exploited in trafficking.”¹¹¹

Between local criminals, gangs, and transnational criminal groups, there is a wide array of actors participating in and benefiting from the illegal migration trade. These groups’ drug trafficking, human smuggling, and human trafficking efforts are horrific,

and only serve to benefit their criminal agendas at the expense of the populations involved. Unfortunately, governments in Mexico and northern Central America have struggled to combat these transnational criminal activities, and these dangerous actors have turned their activities into an extremely lucrative business, which has promulgated the crisis throughout the region and in the United States.

An aerial satellite-style image of Central America and the Caribbean Sea. The landmasses are shown in shades of green and brown, indicating vegetation and terrain. The Caribbean Sea is a large, deep blue body of water in the center. The text is overlaid on the image in white, bold, sans-serif font.

CHAPTER 4

INTERNATIONAL OBLIGATIONS OF MEXICO, EL SALVADOR, GUATEMALA, AND HONDURAS

While the United States has offered countless strategies and billions of dollars in foreign assistance, the United States is not responsible for solving the transnational crime, migration management, and border security issues in Mexico and northern Central America. Governments in the region must take responsibility for their own actions to effectively respond to the illegal migration trade causing a crisis at the U.S. southern border.

In fact, Mexico, El Salvador, Guatemala, and Honduras have signaled their intent to address these very issues through international commitments; however, they have struggled to adequately implement or enforce many of the provisions. These governments also have international obligations to counter transnational organized crime, including human trafficking and human smuggling, as well as commitments to strengthen migration management and border security systems.

To counter transnational organized crime, governments in Mexico and northern Central America have signed and ratified the United Nations Convention against Transnational Organized Crime (UNTOC) and agreed to the Organization of American States' (OAS) Hemispheric Plan of Action against Transnational Organized Crime (The Plan of Action). To improve asylum and migration management systems, governments acceded to the 1951 Convention Relating to the Status of Refugees, and adopted the 1984 Cartagena Declaration as well as OAS resolutions and regional frameworks.

The inability of these governments to enforce their international obligations to counter transnational organized crime, improve migration management, and create effective border security, undermines U.S. foreign assistance efforts and effectively pushes all immigration enforcement to the U.S. southern border. Further, the Biden Administration's border and immigration policies only worsen and exacerbate the illegal migration crisis at the border and allow transnational criminal organizations to strengthen their criminal enterprises. Therefore, it is important to examine countries' adherence to international obligations to address the very issues allowing the illegal migration crisis to continue.

COUNTERING TRANSNATIONAL ORGANIZED CRIME

UNTOC

One of the most prominent instruments in the fight against transnational organized crime is UNTOC. Signed in December 2000 and entered into force in 2003, the convention signifies the recognition by member states of the major problems posed by transnational organized crime, as well as the need to foster and enhance closer international cooperation to tackle those problems. States that ratify this

instrument commit themselves to taking a series of measures against transnational organized crime.¹¹²

Signatories of UNTOC must establish, fund, coordinate, and provide organizational structures for government agencies to effectively counter transnational organized crime. The measures include “the creation of domestic criminal offences (participation in an organized criminal group, money laundering, corruption and obstruction of justice); the adoption of new and sweeping frameworks for extradition, mutual legal assistance and law enforcement cooperation; and the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities.”¹¹³

Supplementing this convention, two protocols commit signatories to take additional steps to target key areas in transnational organized crime, including human smuggling and human trafficking. These efforts, commonly referred as “The Palermo Protocols,” include the Protocol against the Smuggling of Migrants by Land, Sea and Air, and The Protocol to Prevent, Suppress and Punish Trafficking in Persons.

Signatories of the Protocol against the Smuggling of Migrants by Land, Sea and Air agree specifically to address the growing problem of organized criminal groups who smuggle migrants, often at high risk to the migrants and at a great profit for the offenders. This protocol commits signatories to “preventing and combatting the smuggling of migrants, as well as promoting cooperation among States parties, while protecting the rights of smuggled migrants and preventing the worst forms of their exploitation which often characterize the smuggling process.”¹¹⁴

Signatories of the Protocol to Prevent, Suppress and Punish Trafficking in Persons agree to “facilitate convergence in national approaches with regard to the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting trafficking in persons cases” as well as “protect and assist victims of trafficking in persons with full respect for their human rights.”¹¹⁵ This protocol is the first instrument with an internationally recognized definition of human trafficking. Ratifying countries must criminalize human trafficking and develop anti-trafficking laws in line with the protocol’s legal provisions. They must provide protection and assistance to victims of human trafficking and ensure their rights are fully respected.¹¹⁶

The governments of Mexico, El Salvador, Guatemala, and Honduras signed and ratified UNTOC and its following protocols, committing themselves to take those actions to combat transnational organized crime. However, the governments have fallen short on these obligations.

OAS Hemispheric Plan of Action

Beyond UN efforts, Mexico and northern Central American governments made commitments at the OAS to combat transnational organized crime and other regional security threats. The OAS adopted The Plan of Action in 2006, to promote the application of UNTOC and its protocols by OAS member states. The Plan of Action also urges member states to enhance cooperation in areas of prevention, investigation, prosecution of judicial decisions related to transnational organized crime, and strengthen national, sub-regional, and regional capabilities with transnational organized crime.¹¹⁷

INTERNATIONAL ASYLUM AND MIGRATION MANAGEMENT OBLIGATIONS

Governments in Mexico, El Salvador, Guatemala, and Honduras have assumed obligations under several international conventions, declarations, and frameworks to improve asylum systems and enhance migration management capacities in their countries.

It is important to draw a distinction between refugees, asylees, and migrants in this discussion.

- Refugee – “A person outside his or her country of nationality who is unable or unwilling to return to his or her country of nationality because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹¹⁸
- Asylee – “A person who meets the definition of refugee and is already present in the United States or is seeking admission at a port of entry.”¹¹⁹
- Migrant – “A person who may leave his or her country for many reasons that are not related to persecution such as for the purposes of employment, family reunification or study.”¹²⁰

The distinction between refugee, asylee, and migrant should be critical in how the United States, Mexico, El Salvador, Guatemala, and Honduras, respectively, approach migration management challenges. Refugees and asylees fleeing persecution should go through the legal process in countries to apply for asylum, whereas migrants must opt for other legal pathways including immigrant and non-immigrant visas.

In an effort to improve refugee and asylum systems, Mexico, El Salvador, Guatemala, and Honduras signed the 1951 Convention Relating to the Status of Refugees (1951 Convention) and its 1967 Protocol. These define and outline the rights of refugees, as well as the legal obligations of states to protect them.¹²¹

Mexico and northern Central American countries also adopted the 1984 Cartagena Declaration. Under this declaration, signatories agreed to provide asylum and complementary protection to those seeking it under broader eligibility criteria, including fleeing generalized violence or internal conflicts, among other reasons.¹²² Moreover, its definition of refugee, which is broader than that of the 1951 Convention, means many of the individuals applying for protection in signatory countries qualify as refugees.

Since 2004, the OAS General Assembly has dedicated a particular resolution to the “Protection of Asylum Seekers, Refugees, Returnees, and Stateless Persons in the Americas,” based on the 1951 Convention.¹²³ OAS member states committed to extending protection to asylum seekers, refugees, and returnees, recognized efforts to provide protection and assistance, and committed to finding lasting solutions for refugees in the region.¹²⁴ Unfortunately, Mexico, El Salvador, Honduras, and Guatemala have struggled to implement these resolutions and provide protection to these groups.

Beyond efforts to improve refugee processing and asylum capacity, Mexico and Central American countries have also made commitments to strengthen regional migration management. In 2017, the governments of Mexico, Guatemala, Honduras, Belize, Costa Rica, and Panama signed the San Pedro Sula Declaration to strengthen protection and promote solutions for affected people, and to address the underlying causes of forced displacement by promoting a stable environment that ensures security, economic development, and prosperity.¹²⁵ El Salvador later signed the declaration in 2019.

Through the declaration, countries agreed to participate in the Comprehensive Regional Protection and Solutions Framework (MIRPS) to strengthen regional migration cooperation and shared responsibility associated with countries of origin, transit, and destination. All countries committed to adopt and implement national action plans, aligned to country-specific commitments and priorities.¹²⁶ However, the MIRPS framework has several challenges, and has not been fully operational.

While governments have struggled to adhere to these international obligations due to a variety of factors, primary reasons center on the lack of political will and widespread government corruption in those countries. Further, the Biden Administration has lost significant leverage in building political will to address these issues by promoting dangerous domestic immigration policies, and more generally generating the perception that the United States will unilaterally solve the problems in the region.

To reduce illegal immigration, the Biden Administration must adopt tighter domestic immigration policies, while the governments in Mexico, El Salvador, Guatemala, and Honduras must do more to effectively enforce their international obligations to address the key factors enabling massive flows of illegal migrants arriving at the U.S. border.



CHAPTER 5

INADEQUATE REGIONAL ENFORCEMENT OF INTERNATIONAL OBLIGATIONS

CÍA
TAL

POLICÍA
ESTATAL

The inability of governments in Mexico, El Salvador, Guatemala, and Honduras to fully adhere to their international obligations to counter transnational organized crime and strengthen migration management and border security mechanisms exacerbates the illegal migration crisis. If governments took greater action to enforce their obligations, migration throughout Mexico and northern Central America would be more orderly, safe, and controlled. Further, if countries were equipped to do their part to foster orderly and legal migration through their national territories, the United States would not face such a disastrous security and humanitarian crisis at the southern border.

However, successive governments in Mexico, El Salvador, Guatemala, and Honduras have struggled to adhere to these international obligations for a variety of reasons, but primarily due to lack of political will and corruption. Governments have not adequately established, funded, or maintained effective mechanisms to enforce commitments regarding transnational organized crime, migration management, and border security.

TRANSNATIONAL ORGANIZED CRIME

Mexico, El Salvador, Guatemala, and Honduras have not taken sufficient action to uphold their international obligations to address transnational organized crime through the UN Convention against Transnational Organized Crime and the Organization of American States' Hemispheric Plan of Action against Transnational Organized Crime. When these countries fall short on their obligations to address transnational organized crime, transnational criminal organizations (TCOs) benefit. Their criminal activities rely on status quo weak migration management and lax enforcement of border security to thrive and facilitate illegal migration to the United States.

These shortcomings are particularly manifested in regional governments' responses to human trafficking, where TCOs focus a significant portion of their criminal activities throughout Mexico and northern Central America. The State Department monitors and evaluates countries' efforts to acknowledge and combat human trafficking through an annual assessment, known as the Trafficking in Persons (TIP) Report. In examining years of the report, it is clear that governments in Mexico, El Salvador, Guatemala, and Honduras have struggled to effectively combat human trafficking within their national territories.

The TIP Report uses a tiered process to assess countries' efforts to combat human trafficking. In the 2021 TIP Report, Mexico, El Salvador, Guatemala, and Honduras are all listed on Tier 2. Tier 2 designees are countries and territories whose

governments do not comply with the minimum standards of the 2000 Trafficking Victims Protection Act, as amended, but are making significant efforts to bring themselves into compliance with those standards.¹²⁷ The following sections examine the areas where governments have not taken sufficient action to combat human trafficking in their countries.

In Mexico, the government has fallen short on its commitments to effectively combat human trafficking through the country by failing to meet minimum standards in key areas. The 2021 TIP Report highlights, “The Mexican government did not prosecute or convict any public officials for complicity in trafficking crimes and took limited action to investigate and prosecute forced labor crimes.”¹²⁸ Failing to prosecute or convict individuals involved in human trafficking in Mexico demonstrates the lack of focus and resources the government places on combatting this crime. Impunity for traffickers in Mexico signals to TCOs that they can continue engaging in this horrific criminal activity without detection or retribution.

Similarly, El Salvador faced challenges in meeting the minimum standards to combat trafficking in several areas. The 2021 TIP Report highlights, “The government did not initiate any investigations, prosecutions, or convictions of officials for involvement in human trafficking or report progress on investigations from previous years.”¹²⁹ El Salvador’s failure to initiate any legal activity against human traffickers despite the significant challenge it poses in the country demonstrates the lack of political will to address the issue. Further, “The government did not implement procedures to identify potential trafficking victims among children apprehended for illicit gang-related activity, and it decreased its anti-trafficking training for officials.”¹³⁰ In effect, the government’s inaction limits its overall ability to combat human trafficking in El Salvador.

Guatemala also faced challenges in combatting trafficking in several areas. The 2021 TIP Report notes, “The government initiated fewer investigations and prosecutions, achieved fewer convictions, and maintained insufficient specialized victim services given the scope of the problem.”¹³¹ While the government has dedicated some attention to the trafficking issue, it decreased efforts to prosecute human traffickers. In addition, the TIP Report highlighted that “authorities did not increase efforts to combat forced labor, and corruption and complicity remained significant concerns.”¹³² Corruption and lack of political will in Guatemala has created a permissible environment for human trafficking in the country.

Finally, the Honduran government did not meet the minimum standards to address human trafficking through the country. The 2021 TIP Report notes, “The government lowered penalties for trafficking crimes, through new amendments to

the penal code, which resulted in penalties that were not commensurate with those prescribed for other grave crimes, such as rape.”¹³³ In amending the penal code in this way, Honduras deliberately reduced the emphasis it placed on combatting human trafficking. Additionally, “the government identified fewer victims overall and investigated, prosecuted, and convicted fewer suspects.”¹³⁴ This inaction highlights the reduced focus the Honduran government places on human trafficking.

The Biden Administration’s weak enforcement of security at our border and poor immigration laws in the United States compound the shortcomings of U.S. foreign assistance programs to improve regional capacity to combat human trafficking.

ASYLUM AND BORDER MANAGEMENT

Mexico and northern Central American countries have struggled to enforce their international obligations on matters related to migration management and border security. This weakness has led to porous borders, an absence of credible law enforcement, and uncoordinated border management policies, which allow transnational crime and illegal migration to flourish throughout the region. In this context, the Biden Administration’s rhetoric and lack of effective immigration policies undermine U.S. national security and any efforts neighboring countries may take to effectively enforce their international obligations.

Regional efforts to create systems to manage migration thus far have yielded limited results due to a lack of political will, insufficient resources by the governments of Mexico and the countries of northern Central America, and ineffective diplomacy from the Biden Administration. These countries have not developed effective national and regional action plans to strengthen processes and capacities of migration enforcement agencies to carry out these commitments. Where implementing legislation does exist, the agencies remain underfunded and ineffective. The countries lack individual internal processes, as well as coordinated inter-country processes for managing migration.

Mexico faces significant challenges in providing effective border security and migration management systems. In particular, Mexico has not provided its migration management agencies sufficient resources to manage the influx of migrants from northern Central America and beyond. Fewer resources mean agencies cannot adequately staff offices, train officers, or establish sufficient physical presence throughout the country. When agencies don’t have technical or physical capacity to manage migration, they are not adequately prepared to deal with the massive flows of migrants through their territory. Further, they cannot respond to or stop the TCOs enabling illegal migration.

The Mexican Commission for Refugee Assistance (COMAR), in particular has faced significant challenges in providing asylum seekers and refugees legal status, which creates bottlenecks and causes people to abandon the process altogether. Low budget allocations have crippled COMAR's ability to hire and train staff, and contributed to a significant backlog of cases.¹³⁵ When COMAR cannot provide services, many asylum applicants caught in backlogs choose to evade the process altogether rather than contend with the uncertainty and delays, which effectively pushes the asylum challenge north to the U.S. southern border.

Mexico's National Institute of Migration (INM) – the primary government agency charged with regulating the entry, stay, and exit of foreigners – faces significant management and operational challenges that inhibit its effectiveness to provide security and manage migration. INMs physical presence remains relatively limited, and budgetary constraints prevent it from increasing capacity. Agency-wide corruption and lack of accountability exacerbate these problems and delegitimize its agency role.

The governments of El Salvador, Guatemala, and Honduras have struggled to establish and carry out migration management and border security capacities, despite their international obligations. In these countries, migration management agencies and policies are not fully established and are subject to change as circumstances shift; migration agencies are barely institutionalized; and asylum systems remain extremely weak.¹³⁶

Guatemala: While the Guatemalan government has recently demonstrated political will to improve migration management capacity, it has historically struggled to staff, fund, and coordinate agencies' efforts. The Guatemalan Migration Institute – the responsible agency for controlling migrant entry, permanence, and exit of migrants through territory – has limited staff across the country to legally account for and process migration. Similarly, the National Commission for Refugees suffers from low budgets and limited staff, which hurt its ability to process refugee and asylum claims.

Honduras: Honduras faces similar challenges in creating the adequate government capacity to manage migration and provide border security. The Honduran government has not adequately funded INM, the primary institution charged with migration management. This limitation has severely restricted the ability of the agency to improve asylum procedures, which leaves asylum applicants facing slow response times. Low budgets also limit INM's physical capacity along the border, which reduces the ability to protect borders and manage migration.

El Salvador: The government of El Salvador has also struggled to enforce its international obligations to effectively manage migration through its national territory, in both protecting borders and providing legal status to refugees and asylum seekers. El Salvador has not allocated sufficient resources to the General Directorate charged with migration management, which has created enforcement and processing challenges as well as overlap, confusion, and lack of accountability for officials and government agencies. The General Directorate has limited presence along the borders, which impacts its ability to effectively respond to increases in illegal migration. Further, El Salvador has struggled to provide legal protection to foreigners through inefficiencies in refugee and asylum process.

Through these challenges, it is clear that the governments in Mexico, El Salvador, Guatemala, and Honduras have fallen short on international obligations to address transnational organized crime and illegal migration issues. As the number of migrants traveling through the region continues to increase, it is imperative that countries increase their migration management capacities, including border control and legal protection mechanisms.

The Biden Administration's rhetoric, policies, and lax enforcement of U.S. immigration controls weaken the incentives among governments in Mexico and northern Central America to address challenges posed by migration in their own respective countries. Promoting sustainable political will in the region to enforce these obligations will go a long way in tackling the mass illegal migration waves undermining U.S. security and destabilizing large parts of Latin America and the Caribbean.

CONCLUSION

The illegal migration crisis at the southern border presents a grave threat to the United States. The existing security and humanitarian catastrophe is the result of the Biden Administration's intent to repeat the mistakes of the Obama Administration's disastrous border and immigration policies. These policies exacerbate long-standing transnational organized crime, migration management, and border security challenges in Mexico and northern Central America, while undercutting U.S. efforts to build sustained political will among regional governments to address these issues.

The Biden Administration must change course to uphold the rule of law at our borders and in the interior of our country. The stakes are too high. April 2022 saw the highest monthly total of illegal migrants at the U.S. southern border.¹³⁷ Without stricter border security and enforcement of U.S. immigration laws, the number of illegal migrants arriving at the U.S. southern border will only increase, and transnational criminal organizations (TCOs) will grow in strength and capacity to directly threaten the safety of American communities well beyond our borders.

The Biden Administration must begin by immediately strengthening border security in the United States. Not only will stronger immigration controls protect our own national borders, but they will signal U.S. political will to meaningfully address illegal migration to governments in the region, and signal to TCOs and would-be illegal migrants that they cannot illegally enter the United States with impunity.

At the same time, the United States should revamp efforts to collaborate with international organizations and the governments of Mexico and northern Central America in establishing credible migration management institutions and processes in the region. Efforts should enhance judicial and security cooperation, and build long-term political will to identify and allocate local resources sufficient to address the challenges at hand.

The illegal migration crisis at the U.S. southern border has reached an inflection point. The Biden Administration must act now to reduce the security and humanitarian threats transnational organized crime and illegal migration present. The recommendations presented in the following chapter detail the specific actions the Biden Administration must take to achieve safety and security at the U.S. southern border.

RECOMMENDATIONS

1. Immediately strengthen enforcement of U.S. immigration laws at the border:

- **President Biden must use all available tools to secure U.S. borders.**

No amount of U.S. assistance or diplomatic persuasion will overcome the tantalizing prospects of open borders or weak enforcement of immigration laws in the United States. The administration should immediately extend Title 42 authorities until the end of the COVID-19 health emergency, retract the October 2021 U.S. Department of Homeland Security memo vowing to terminate the Migrant Protection Protocols (MPP), and stop further litigation of the program in U.S. courts.

2. Improve regional security and migration management capacities:

- **The Biden Administration should establish bilateral agreements with the governments in Mexico, El Salvador, Guatemala, and Honduras to improve migration management capacity.** The Biden Administration should model bilateral agreements off of the MPP and Asylum Cooperative Agreements to build political will among regional governments to do their part to manage migration through their national territories. This would reduce the burden on U.S. law enforcement at the southern border, while promoting safe, orderly, and legal migration throughout the region.
- **Congress should more directly target U.S. assistance to encourage measurable improvements in regional border security and asylum processing capacity.** Congress should formally authorize and direct U.S. assistance in Mexico and northern Central America to build their domestic political will and capacity to tackle illegal migration, and meet their international obligations to refugees and asylum seekers. These actions should include the development and implementation of plans to strengthen the capacity, funding, and staffing of migration management and law enforcement agencies, and tangible efforts to reduce backlogs in refugee and asylum processing claims.

3. Combat transnational organized crime fueling illegal migration:

- **The Biden Administration should leverage existing bilateral extradition treaties and the Palermo Protocols to prosecute transnational criminal actors facilitating illegal migration to the United States.** The United States should maximize existing Palermo protocols and bilateral extradition treaties with Mexico, El Salvador, Guatemala, and Honduras to prosecute human smugglers and traffickers. These efforts will send a stark message across the vast criminal networks that they can no longer target vulnerable individuals and engage in these horrific activities without clear punishment and justice brought by the United States.

ABBREVIATIONS AND ACRONYMS

ACAs – Asylum Cooperative Agreements

Bicentennial Framework – U.S.-Mexico Bicentennial Framework for Security, Public Health, and Safe Communities

CBP – U.S. Customs and Border Protection

COMAR – Mexican Commission for Refugee Assistance

DACA – Deferred Action for Childhood Arrivals

DHS – U.S. Department of Homeland Security

DR-CAFTA – Dominican Republic-Central America Free Trade Agreement

ICE – U.S. Immigration and Customs Enforcement

Merida – 2008 Merida Initiative

MIRPS – Comprehensive Regional Protection and Solutions Framework

MPP – Migration Protection Protocols

MS-13 – Mara Salvatrucha

INM – National Institute of Migration

OAS – Organization of American States

SIAs – Special Interest Aliens

SUR 13 – Sureños

TCOs – transnational criminal organizations

The Plan of Action – The Hemispheric Plan of Action against Transnational Organized Crime

The Strategy – President Obama's U.S. Strategy for Engagement in Central America

TIP – Trafficking in Persons Report

UNTOC – The UN Convention against Transnational Organized Crime

1951 Convention – 1951 Convention Relating to the Status of Refugees

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- 135 See Andrew Selee, “Laying,” April 2021.
- 136 See Andrew Selee, “Laying,” April 2021.
- 137 See U.S. Customs and Border Protection, “Southwest” May 2022.



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