
COMMENT

**DISPARATE TREATMENT OF MEXICAN
UNACCOMPANIED ALIEN CHILDREN: THE
UNITED STATES' VIOLATION OF THE
TRAFFICKING PROTOCOL, SUPPLEMENTING
THE UN CONVENTION AGAINST
TRANSNATIONAL ORGANIZED CRIME**

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I. INTRODUCTION

In June 2014, a leaked United Nations (“U.N.”) report revealed that Mexican unaccompanied alien children (“UAC”) are not protected from harm at the United States-Mexico border (“Border”) because the United States Customs and Border Protection (“CBP”) is biased against these children.¹ Mexican children are frequently used as smuggling guides along the Border because if caught, they are

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1. U.N. High Comm’r for Refugees, Confidential Report, *Findings and Recommendations Relating to the 2012-2013 Missions to Monitor the Protection Screening of Mexican Unaccompanied Children Along the U.S.-Mexico Border* 5 (June 2014), http://americanimmigrationcouncil.org/sites/default/files/UNHCR_UAC_Monitoring_Report_Final_June_2014.pdf [hereinafter Confidential Report].

typically repatriated to Mexico without any serious repercussions.² Many CBP officers see children involved in smuggling as criminals, and consequently, fail to properly determine whether they are victims of trafficking—which they sometimes are.³

The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (“Trafficking Protocol”) defines trafficking in persons as an act performed through coercion, fraud, or force for the purpose of exploitation.⁴ The definition includes a sub-section that defines children as anyone under eighteen years old, and states that coercion is not necessary for children to become victims of trafficking.⁵ The United States signed and ratified the Trafficking Protocol, and even implemented its own trafficking law in 2000, the Victims of Trafficking and Violence Act of 2000 (“Trafficking Act”).⁶ The 2008 Amendment to the Trafficking Act

2. U.N. High Comm’r for Refugees, *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection* 37-38 (2014), <http://www.unhcrwashington.org/children/reports> [hereinafter *Children on the Run*].

3. See, e.g., Dara Lind, *The Process Congress Wants to Use for Child Migrants is a Disaster*, VOX (July 15, 2014, 9:00 AM), <http://www.vox.com/2014/7/15/5898349/border-children-mexican-central-american-deport-quickly-2008-law> (explaining that CBP officers assumed the children voluntarily engaged in smuggling, and failed to ask questions about fear and protection, despite the fact that some of the children were actually victims of trafficking). See generally BETSY CAVENDISH & MARU CORTAZAR, APPLESEED, CHILDREN AT THE BORDER: THE SCREENING, PROTECTION AND REPATRIATION OF UNACCOMPANIED MEXICAN MINORS 7 (2011) (indicating that CBP officers have received no specialized training, and the existing limited training is superficial and insufficient to ensure that CBP officers are able to identify children at risk of trafficking, abuse or persecution).

4. Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3(a), Dec. 12, 2000, 80 Stat. 271, 2237 U.N.T.S. 319 [hereinafter *Trafficking Protocol*].

5. *Id.* art. 3(c)-(d).

6. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1470 (codified at 22 U.S.C. § 7101 (2000)) (defining severe forms of trafficking in persons as “sex trafficking . . . induced by force, fraud or coercion, or in which the person induced . . . has not attained 18 years of age[.]” and “the recruitment, harboring, transportation, provision, or obtaining of a person for labor . . . through the use of force, fraud, or coercion for the purposes of subjection to involuntary servitude, peonage, debt bondage, or slavery”); *Signatories to the CTOC Trafficking Protocol*, U.N. OFFICE ON DRUGS & CRIME, <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist->

("TVPRA") includes specific provisions relating to UACs to combat trafficking in the United States.⁷ The United States also introduced the Trafficking in Persons Report in 2000, which ranks governments around the world based on their efforts to combat trafficking.⁸

Although the United States is a strong advocate of anti-trafficking efforts, its CBP officers' failure to identify potential victims of Mexican trafficking along the Border undermines these efforts.⁹ While certain factors, such as lack of training, may affect CBP's ability to identify such victims, its differential treatment of Mexican UACs through the mandatory forty-eight hour screening process after apprehension has done more harm than good in protecting UACs from drug cartels and other forms of organized crime in Mexico.¹⁰

This Comment argues that the United States is failing to uphold its obligation under the Trafficking Protocol because CBP's screening process for Mexican UACs fails to adequately determine whether Mexican children apprehended at the Border are victims of trafficking. Part II of this Comment gives a brief history of the development of the trafficking phenomenon, specifically child

traffickingprotocol.html (last visited Apr. 13, 2015).

7. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235, Pub. L. No. 110-457, 122 Stat. 5044, 5074-82 (codified at 8 U.S.C. § 1232 (2008)) (enumerating the separate procedures appropriate for UACs from contiguous countries and those from non-contiguous countries).

8. U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 7*, 58 (2014) (recounting that the international community has made substantial progress in combating trafficking in the fourteen years since the United States has produced this report).

9. See generally Press Release, Amnesty Int'l, *United States and Other Regional Governments Failing to Protect Unaccompanied Migrant Children* (July 3, 2014), available at <http://www.amnestyusa.org/news/press-releases/united-states-and-other-regional-governments-failing-to-protect-unaccompanied-migrant-children> (recounting that Mexican UACs are repatriated at an expedited pace compared to children from other countries, and face risk of killings from gangs in Mexican border towns).

10. Cf. Walter Ewing, *Sealed UNHCR Report Warns of Poor Protections for Unaccompanied Mexican Children*, IMMIGRATION IMPACT (July 28, 2014), <http://immigrationimpact.com/2014/07/28/sealed-unhcr-report-warns-of-poor-protections-for-unaccompanied-mexican-children/> (arguing that the blanket policy of return towards Mexican UACs prevents any meaningful screening for child trafficking, and fails to meet the United States' obligations under international law).

trafficking, and its relevant international conventions.¹¹ It then lays out the United States obligations under international¹² and domestic trafficking laws.¹³ It finally describes CBP officers' current treatment of apprehended Mexican UACs.¹⁴

Part III of this Comment demonstrates how TVPRA's procedural measures, as they apply to Mexican UACs, are not combating child trafficking and asserts that, as a result, the United State is violating its obligations under international law to properly identify victims of trafficking. This part particularly focuses on how CBP's screening process of Mexican UACs is violating international law under articles 10(2), 6(4), 9(1), and 11(1) of the Trafficking Protocol.¹⁵ Part III very briefly analyzes how the United States is also violating the "best interests of the child" standard, which has been widely accepted in the United States and other states.¹⁶

Part IV recommends that the United States amend its CBP screening process in three ways: (1) extend the forty-eight hour deadline;¹⁷ (2) train its CBP officers on how to identify victims of

11. See discussion *infra* Part II.A (explaining that although trafficking is not a new phenomenon, it has only gained the legal interest of the international community in the last couple of decades with the passage of the Convention Against Transnational Organized Crime and its Protocols).

12. See discussion *infra* Part II.B (describing that the United States has signed and ratified the Trafficking Protocol, and must comply with its mandatory provisions, as well as general international guidelines, such as the due diligence standard, when combating trafficking).

13. See discussion *infra* Part II.C (summarizing that the TVPRA, the United States' most recent law against trafficking, binds the United States because the amendment contains provisions that directly apply to UACs, particularly Mexican UACs).

14. See discussion *infra* Part II.D (recounting that the CBP does not properly identify Mexican UACs as possible victims of trafficking because it lacks training, and that most children are repatriated to Mexico even though they could have received relief in the United States).

15. See discussion *infra* Part III.A-B (arguing that the screening process applied to Mexican UACs is in violation of certain articles of the Trafficking Protocol because of procedural failures, and a general inability to properly identify victims of trafficking, especially children).

16. See discussion *infra* Part III.C (focusing on how the United States, although it has not ratified the CRC, must still apply the "best interests of the child" approach, and is failing to do so because it is treating Mexican UACs differently than adults).

17. See discussion *infra* Part IV.A (affirming that forty-eight hours is not enough to properly screen a child for signs of victim trafficking).

trafficking; and (3) require CBP officers to speak Spanish to be able to communicate with Mexican UACs.¹⁸ It further recommends that the United States automatically transfer each Mexican UAC to the Office of Refugee Resettlement (“ORR”), as it does with all other UACs. Part V of this Comment concludes that the United States is in violation of the Trafficking Protocol because its screening process towards Mexican UACs fails to identify potential victims of trafficking.¹⁹

II. BACKGROUND

Although trafficking is not a new phenomenon, the concept only recently began to draw attention of the international community.²⁰ To combat this situation, states, including the United States, signed and ratified several treaties and conventions.²¹ For example, treaties like the Trafficking Protocol and the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor—both of which integrate the “best interests of the child” approach of the Convention of the Rights of the Child (“CRC”)—bind the United States as a signatory.²² In consequence,

18. See discussion *infra* Part IV.B (advocating for reforms to accommodate that CBP officers are not properly trained, and cannot properly communicate with children, so reforms must be made to accommodate them).

19. See discussion *infra* Part IV.C (proposing that Mexican UACs should be automatically transferred to ORR after apprehension because it would give children more time to express their fears); see also *infra* Part V (stating that CBP’s forty-eight hour screening process does not provide enough time to determine if they are the victims of trafficking).

20. See ANTI-SLAVERY INT’L, THE MIGRATION-TRAFFICKING NEXUS: COMBATING TRAFFICKING THROUGH THE PROTECTION OF MIGRANTS’ HUMAN RIGHTS 3, 4 (2003) (claiming that trafficking has increased dramatically since the 1990’s); see also MIKE DOTTRIDGE, KIDS AS COMMODITIES? CHILD TRAFFICKING AND WHAT TO DO ABOUT IT 16 (2004) (remarking that there has been an increase in references to human trafficking, trafficking in people, and child trafficking since 1990).

21. See, e.g., Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor art. 3(a), June 17, 1999, 80 Stat. 271, 2133 U.N.T.S. 161 (including the “sale and trafficking of children” as part of the worst forms of child labor).

22. See U.S. CITIZENSHIP AND IMMIGRATION SERVS. ASYLUM DIV., ASYLUM OFFICER BASIC TRAINING COURSE: GUIDELINES FOR CHILDREN’S ASYLUM CLAIMS 9 (2009) [hereinafter GUIDELINES FOR CHILDREN’S ASYLUM CLAIMS] (affirming that even though the United States is only a signatory to the CRC, it is obliged under international treaty law to refrain from acts that defeat the purpose of the

the United States must comply with the mandatory terms of the Trafficking Protocol, and apply its provisions to its domestic law when it addresses trafficking.²³ Under the international due diligence standard, a state must take adequate “care in preventing and responding to” acts that interfere with human rights.²⁴ A state will be held responsible for failing to do everything in its power to make a situation better for a victim.²⁵ Control over the transportation of drugs and the smuggling of people across the Border are ways in which the United States has the opportunity to manifest its compliance with international law.²⁶ Unfortunately, the United States implemented a procedural requirement regarding Mexican UACs that has been fruitless in combating trafficking and has failed to

CRC).

23. See ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* 1, 462 (2010) [hereinafter GALLAGHER, *HUMAN TRAFFICKING*] (indicating that there is correlation between compliance with international rules and putting these rules into effect through domestic implementation); cf. Anne T. Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 *HUM. RTS. Q.* 975, 993 (2001) [hereinafter Gallagher, *Human Rights*] (“State parties are also to provide or strengthen training for law enforcement, immigration, and other relevant personnel aimed at preventing trafficking as well as prosecuting traffickers and protecting the rights of victims.”). Each state that signs and ratifies an international treaty must comply with the obligatory terms, and implement the provisions into its domestic law. See generally GALLAGHER, *HUMAN TRAFFICKING*, *supra* note 23, at 72, 462 (2010) (affirming that there are varying levels of legal obligation depending on whether provisions are mandatory, require consideration, or are optional). A state complies with its treaty obligations when its behavior conforms to a specified rule. *Id.* at 461.

24. GALLAGHER, *HUMAN TRAFFICKING*, *supra* note 23, at 241; see U.N. HIGH COMM’R FOR HUMAN RIGHTS, *RECOMMENDED PRINCIPLES AND GUIDELINES ON HUMAN RIGHTS AND HUMAN TRAFFICKING: COMMENTARY*, at 77, U.N. Sales No. E.10.XIV.1 (2010) [hereinafter U.N. PRINCIPLES AND GUIDELINES] (emphasizing that states have obligations that go beyond the duty “not to traffic” under the due diligence standard, including the duty to protect, respect, promote, and fulfill).

25. See GALLAGHER, *HUMAN TRAFFICKING*, *supra* note 23, at 242; U.N. PRINCIPLES AND GUIDELINES, *supra* note 24, at 77.

26. Accord Sally Terry Green, *Protection for Victims of Child Sex Trafficking in the United States: Forging the Gap Between U.S. Immigration Laws and Human Trafficking Laws*, 12 *U.C. DAVIS J. JUV. L. & POL’Y* 309, 312 (2008) (observing that the United States is one of the top three destinations for human trafficking); see *United States v. Nava-Martinez*, No. B-13-441, 2013 WL 8844097, at *3-4 (S.D. Tex. Dec. 13, 2013) (referring to how the Mexican cartels control most of the human trafficking in Texas, and that the exploitation and trafficking of children is the most vile crime in which these organized criminals engage).

identify many Mexican victims of trafficking during the forty-eight hour screening process.²⁷

A. A BRIEF HISTORY OF CHILD TRAFFICKING

The buying and selling of children is not a new concept in world history.²⁸ However, developments in the last two decades illuminated the ways in which children are exploited and dramatically shifted this pattern.²⁹ In the late 1990s, the U.N. began discussing ways to fight human trafficking, and in 2000 it passed the Convention Against Transnational Organized Crime (“Convention”).³⁰ Countries like Argentina and the United States were dissatisfied with the international legal regime’s inability to address child prostitution and pornography, and voiced their concern during the Convention’s negotiations.³¹ To address this concern, the Convention differentiated between adult and child victims of trafficking.³²

27. See generally Rebecca Surtees, *Trafficked Men as Unwilling Victims*, 4 ST. ANTONY’S INT’L REV. 16, 21 (2008) (recounting that to begin the process of preventing trafficking, victim identification is step one); *id.* at 25 (finding that people who were trafficked will often feel uncomfortable about the victim category attached to their identity).

28. E.g., DOTTRIDGE, *supra* note 20, at 18 (noting that it was acceptable to sell or loan children in many countries in the 1920s, and that there was debate at the international level as to what constituted child slavery).

29. *Id.* (listing the four ways in which trafficking patterns have changed: (1) improvement in infrastructure; (2) increase in demand for children sexual exploitation; (3) access to more info through technology; and (4) increase in demand for cheap labor).

30. *Id.* at 19. See generally GALLAGHER, HUMAN TRAFFICKING, *supra* note 23, at 71 (recounting that the driving force behind implementing the Convention was the effort to treat the sovereignty issues behind trafficking, migrant smuggling, and its connection to organized crime).

31. See Gallagher, *Human Rights*, *supra* note 23, at 982 (noting that Argentina was concerned that the broader human rights regime was not sufficient to tackle the issue, and, consequently, lobbied for trafficking to be dealt with as part of the larger fight against organized crime).

32. See DOTTRIDGE, *supra* note 20, at 19 (stating that now recruitment of a person under eighteen years old amounts to trafficking if that person is subjected to exploitation).

B. U.S. OBLIGATION UNDER INTERNATIONAL LAW TOWARDS
MEXICAN UACS

Although the United States has signed and ratified several international treaties, the most relevant to trafficking are the Convention and the Trafficking Protocol. Article 25 of the Convention declares that states parties must take appropriate measures to provide assistance and protection to victims of offenses as covered by the Convention, including trafficking.³³ Article 25 of the Convention applies to the entirety of the Trafficking Protocol.³⁴

The Trafficking Protocol supplements the Convention and its purpose is (1) to prevent and combat trafficking in persons, particularly women and children; and (2) to promote cooperation among states to meet this end.³⁵ Although several articles in the Trafficking Protocol apply to Mexican UACs, the most relevant include article 6(4),³⁶ article 9(1),³⁷ article 10(2),³⁸ and article 11(1).³⁹ While most of the provisions in these articles are mandatory obligations, some, such as article 6(3), are “soft law,” and, as such, not mandatory.⁴⁰ Even though “soft law” provisions are more

33. United Nations Convention Against Transnational Organized Crime art. 25, Dec. 12, 2000, 80 Stat. 271, 2225 U.N.T.S. 209 [hereinafter Convention Against Transnational Organized Crime].

34. *Id.* art. 37(4) (“Any protocol to this Convention shall be interpreted together with this Convention, taking into account the purpose of that protocol.”).

35. Gallagher, *Human Rights*, *supra* note 23, at 983.

36. Trafficking Protocol, *supra* note 4, art. 6(4) (“Each State Party shall take into account . . . the age, gender and special needs of victims of trafficking . . . in particular the special needs of children . . .”).

37. *Id.* art. 9(1)(a)-(b) (“State Parties shall establish comprehensive policies . . . to prevent and combat trafficking . . . and to protect victims of trafficking in persons, especially women and children, from re-victimization.”).

38. *Id.* art. 10(2) (“State Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking . . . including protecting the victims . . . training should also take into account the need to consider human rights and child-and-gender-sensitive issues . . .”).

39. *Id.* art. 11(1) (summarizing that State Parties shall strengthen border controls to prevent and detect trafficking in persons).

40. *See* U.N. Office on Drugs & Crime, Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto 243, 283 (2004), http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf [hereinafter Legislative Guides] (indicating that the procedural

ambiguous in relation to compliance, most still possess legal substance, and can be applied as customary international law.⁴¹

Article 10(2) of the Trafficking Protocol requires states parties to strengthen training for law enforcement, immigration, and other relevant officials in preventing trafficking.⁴² Its procedural purpose signifies that this article is obligatory to all states parties.⁴³ It can be split into two requirements. First, states parties must provide or strengthen training for immigration and other officials to prevent trafficking. Second, the training should take into account child-sensitive issues.⁴⁴

Articles 6, 9, and 11 enumerate specific measures that states parties must take towards victims of trafficking and the prevention of trafficking in persons.⁴⁵ Although there is no article that unambiguously requires the identification of victims,⁴⁶ articles 6, 9, 10, and 11, when taken together, require states parties, such as the United States, to deliberately identify such victims.⁴⁷ The correct and

requirements and safeguards are mandatory, but the state has discretion over assistance and support for victims provisions); *see also* GALLAGHER, HUMAN TRAFFICKING, *supra* note 23, at 138 (defining “soft law” as principles in treaties that do not have hard obligations).

41. *See* GALLAGHER, HUMAN TRAFFICKING, *supra* note 23, at 139, 142 (describing that “soft law” provisions can generally ascertain required behavior, and can even form or codify customary law).

42. Legislative Guides, *supra* note 40, at 306.

43. *See id.* at 283 (indicating that procedural requirements are mandatory).

44. Trafficking Protocol, *supra* note 4, art. 10(2); *see* Legislative Guides, *supra* note 40, at 306.

45. *See* Legislative Guides, *supra* note 40, at 283, 297-98 (observing that article 6 provides for mechanisms that protect the privacy and identity of victims, article 9 requires states parties to adopt non-legislative initiatives, such as mass media campaigns to prevent the spread of trafficking, and article 11 provides for legislative measures that prevent traffickers from utilizing commercial carriers to carry out their activities).

46. *See* GALLAGHER, HUMAN TRAFFICKING, *supra* note 23, at 280-81 (emphasizing that supplementary legislative material provides guidance on the issue and lays out recommendations). *But see id.* at 281, 325 (distinguishing from the European Trafficking Convention which embeds and recognizes the importance of accurate identification of victims, especially towards children, by requiring the necessary personnel and legal framework be available for victims).

47. *Cf.* U.N. Office of the High Comm’r for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, U.N. Doc. E/2002/68/Add. 1 (2002) [hereinafter *Recommended Principles and Guidelines on Human Rights*] (emphasizing that if a country fails to correctly identify a victim of trafficking, this will result in a denial of other rights, and that states must properly

timely identification of victims, especially child victims, is an obligation because if the victim is not identified at all, this will prevent the victim from accessing any future rights he or she might have under the law.⁴⁸

If the United States breaches any of its obligations under the Trafficking Protocol, it will be held internationally responsible.⁴⁹ As long as the government or some other agent of the state commits the act or omission, it will be attributable to the United States, even if the agent is exceeding his lawful authority.⁵⁰ The United States will be held equally responsible if it fails to do everything in its power to stop trafficking.⁵¹

C. U.S. OBLIGATION UNDER DOMESTIC LAW TOWARDS MEXICAN UACS

Under domestic law, the United States is bound to its obligations under the TVPRA, one of its most recent amendments to the Trafficking Act.⁵² In enacting this amendment, Congress attempted to respond to concerns that UACs were not being screened properly to determine whether they were eligible for protection or relief in the

identify victims for this reason).

48. U.N. PRINCIPLES AND GUIDELINES, *supra* note 24, at 162.

49. See GALLAGHER, HUMAN TRAFFICKING, *supra* note 23, at 230 (observing that for a state to be held internationally responsible, the conduct must be attributable to the state, and must be a breach of one of the state's international obligations); cf. U.N. PRINCIPLES AND GUIDELINES, *supra* note 24, at 77 (following that a state's failure to fulfill or protect its human rights obligations is enough to trigger international legal responsibility); GALLAGHER, HUMAN TRAFFICKING, *supra* note 23, at 220, 222 (establishing that "an act of a [s]tate which breaches an international obligation will be internationally wrongful even if it does not contravene the [s]tate's own internal law" or domestic law).

50. See generally GALLAGHER, HUMAN TRAFFICKING, *supra* note 23, at 226 (quoting *Velasquez-Rodriguez v. Honduras*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988) ("Under international law, a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.")).

51. See *id.* at 237 (summarizing that a state can incur international responsibility when its own organs fail to prevent possible harm flowing from the consequences of others' acts).

52. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, 5074-82 (codified at 8 U.S.C. § 1232 (2008)).

United States.⁵³ Notably, the TVPRA includes a provision that relates specifically to UACs.⁵⁴ Additionally, the United States has signed bilateral agreements with Mexico regarding Mexican nationals⁵⁵ that stemmed from a debate in federal courts on treatment of UACs.⁵⁶

Under section 235 of the TVPRA, Mexican UACs are treated differently than Central American UACs when apprehended at the Border.⁵⁷ CBP officers have forty-eight hours to determine whether Mexican children have a fear of returning to Mexico, are victims of trafficking, and are not able to make an independent decision to withdraw an application for admission to the United States.⁵⁸ If the CBP officers determine that all of these elements are lacking, they repatriate the Mexican UACs back to Mexico.⁵⁹ However, if one of

53. *See id.* § 235.

54. *Id.* (requiring the United States to develop policies to ensure UACs are safely repatriated to their countries).

55. CAVENDISH & CORTAZAR, *supra* note 3, at 25-26 (referring to the 2009 consular agreement between the United States and Mexico as providing a template for expedited and safe repatriation of Mexican nationals).

56. *Accord* Wendy Young & Megan McKenna, *The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.-C.L. L. REV. 247, 250 (2010) (expressing standards established towards UACs were not routinely followed after the Flores settlement agreement); Maricela Garcia, *Unaccompanied Children in the United States: Challenges and Opportunities*, LATINO POLICY FORUM 2 (2008), <http://www.latinopolicyforum.org/resources/document/Unaccompanied-Children-Article.pdf> (referring to the *Perez-Funez v. INS*, 619 F. Supp. 656, 659 (C.D. Cal. 1985) case, and emphasizing the need to advocate for rights towards UACs because they possess constitutional and statutory rights); *see* AM. IMMIGRATION COUNCIL, CHILDREN IN DANGER: A GUIDE TO THE HUMANITARIAN CHALLENGE AT THE BORDER 1, 7 (2014) (showing how the TVPRA intends to respond to the concern that the UACs the CBP apprehend are not properly screened for protection or relief available to them).

57. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235(a)(2)(B)-(C); *see* WOMEN'S REFUGEE COMM'N, STEP-BY-STEP GUIDE ON APPREHENSION AND DETENTION OF JUVENILES IN THE UNITED STATES 1-2 (2014) [hereinafter GUIDE ON APPREHENSION AND DETENTION OF JUVENILES] (explaining that Mexican UACs, because they are from contiguous countries, can be immediately repatriated if CBP finds no protection concerns).

58. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235(a)(2)(A).

59. *See id.* § 235 (a)(2)(B); *cf.* AM. IMMIGRATION COUNCIL, *supra* note 56, at 7 (indicating that Mexican and Canadian UACs get offered "voluntary return" when none of the conditions apply to them, since CBP is not required to turn these children over to Health and Human Services, unlike UACs from other countries).

the elements is present, the children are automatically transferred to the ORR, just like Central American UACs.⁶⁰ Once transferred, Mexican UACs can schedule a hearing before an immigration judge, who will determine whether they have a valid claim to stay in the United States or can apply for other relief.⁶¹

D. CURRENT TREATMENT OF MEXICAN UACs AFTER APPREHENSION AT THE BORDER

Despite the fact that the TVPRA clearly lays out a list of procedures that tries to encompass the “best interests of the child” approach⁶² towards Mexican UACs, actual practice at the Border substantially deviates from the TVPRA’s intended purpose.⁶³ CBP officers implement three main tools to increase the efficacy of the forty-eight hour screening process: (1) Form 93; (2) a refresher course for CBP officers; and (3) a “Know What to Expect” video for Mexican UACs intended to inform them of their rights when apprehended. However, several reports and articles have shown that CBP officers frequently send Mexican UACs back to Mexico, and

60. See CAVENDISH & CORTAZAR, *supra* note 3, at 21 (explaining the process Central American UACs receive at the Border as the following: (1) determine whether the child is under eighteen years old, or is a UAC, within forty-eight hours; (2) if either answer in (1) is true, then transfer the child to the ORR within seventy-two hours; and, (3) if the UAC has family in the United States then transfer the child to the family’s home; if the child has no family in the United States then keep the child in the ORR shelter until a hearing before an immigration judge can take place); *id.* (listing possible outcomes for Central American UACs as removal or deportation, asylum, T-Visa, U-Visa, SIJS, or other forms of relief).

61. *Id.* at 26 (setting forth that removal proceedings determine whether the Mexican UACs are entitled to any form of immigration relief).

62. AM. IMMIGRATION COUNCIL, *supra* note 56, at 5 (addressing that the TVPRA requires UACs to be screened for signs of trafficking, ensures that UACs are exempt from certain limits on asylum, and establishes that UACs have representation if transferred to Health and Human Services).

63. See, e.g., *id.*, at 7 (explaining that automatic repatriation is often the consequence of the screening process); Confidential Report, *supra* note 1, at 14 (concluding that CBP practices presume an absence of protection for Mexican UACs rather than rule out needs that the TVPRA requires); Julia Preston, *Rush to Deport Young Migrants Could Trample Asylum Claims*, N.Y. TIMES (July 19, 2014), http://www.nytimes.com/2014/07/20/us/rush-to-deport-young-migrants-could-trample-asylum-claims-.html?_r=1 (reporting that since October 2013, CBP officers apprehended over 12,600 UACs along the Border and rapidly returned most of them back to Mexico); Lind, *supra* note 3 (outlining the various deficiencies of the screening process).

fail to properly screen them for signs of trafficking.⁶⁴ This is surprising given that, although the focus has recently been on Central American UACs, the large percentage of Mexican undocumented immigrants has stayed relatively stable for over a decade.⁶⁵ For example, in 2013, the United States apprehended about 41,800 UACs, referred about 24,600 to the ORR, and concluded that out of these 24,600 UACs, only 846 were Mexican UACs, even though about 18,700 of the 41,800 UACs came from Mexico.⁶⁶

One in three immigrants in the United States is Mexican, suggesting that Mexico plays a much larger role than any other country in the undocumented immigration context.⁶⁷ Several push factors help explain why these children are crossing the Border. The violence that results from organized crime in Mexico is the one of the most important factors.⁶⁸ The power of the drug cartels and organized crime in the country tears families apart, and causes some children to become dependent on these groups.⁶⁹ Many of these children are used as smuggling guides for other adults and children, or are coerced into smuggling drugs into the United States.⁷⁰ While

64. See, e.g., Ewing *supra* note 10 (observing that the screening process is devoid of any meaning because of CBP's blanket repatriation policy).

65. See Organización de los Estados Americanos *Derechos Humanos de los Migrantes y otras Personas en el Contexto de la Movilidad Humana en México* [*The Human Rights of Migrants and Other People in the Context of Human Mobility in Mexico*], at 28-29, OEA Doc. OEA/Ser.L/V/II. Doc. 48/13 (Dec. 30, 2013) [hereinafter *Human Rights in Mexico*].

66. Confidential Report, *supra* note 1, at 8.

67. See *Human Rights in Mexico*, *supra* note 65, at 29.

68. Children on the Run, *supra* note 2, at 37 (reporting that thirty-two percent of Mexican children interviewed stated that they left the country because of the inescapable violence that the drug cartels and other criminal groups brought about in Mexico); accord SARNATA REYNOLDS, REFUGEES INT'L, MEXICO'S UNSEEN VICTIMS 3 (2014), <http://refugeesinternational.org/sites/default/files/070214%20Mexico%20Unseen%20Victims%20English%20letterhead.pdf> (remarking that families, as a result of violence in the Sierra Madre mountain range, were forced to work for the drug cartel, leave, or die).

69. See CAVENDISH & CORTAZAR, *supra* note 3, at 16 (observing that UACs who are separated from their homes become an important source of income for Mexico's drug cartels); Children on the Run, *supra* note 2, at 24, 37 (explaining that the violence related to drug cartels forces Mexican UACs to leave their families or reunite with them in the United States).

70. CAVENDISH & CORTAZAR, *supra* note 3, at 16 (finding that minors engaged in the smuggling of drugs, or *menores del circuito*, are recruited by drug cartels because they make useful mules, and are likely to get repatriated to Mexico

not all Mexican UACs fall victim to this practice, reports show that organized criminal groups victimize enough children to cause concern in the international arena.⁷¹ Frequently, migrants that seek assistance to cross the Border from these trafficking groups ultimately become victims themselves.⁷² One report from the Inter-American Commission on Human Rights shows that Mexican UACs and women are the most vulnerable to such trafficking.⁷³

The United States is aware of the presence and power of the drug cartels in Mexico.⁷⁴ However, assuming at least some of the Mexican children that cross the Border do not voluntarily become smugglers, but are rather under the coercion of the cartels, the United States, through the CBP, has struggled to identify these children as possible victims of trafficking.⁷⁵ This fact, when taken together with evidence that some CBP officers are violent towards UACs, demonstrates that CBP officers have failed to fully comply with their obligations under the TVPRA.⁷⁶ Moreover, CBP officers do not know how to

if apprehended at the Border); Children on the Run, *supra* note 2, at 39 (reciting that Mexican UACs are lured with the promise of money, and then once ensnared, are not easily allowed to cease smuggling, and are threatened if they try to do so).

71. See, e.g., Children on the Run, *supra* note 2, at 38 (reporting that most of the Mexican UACs interviewed for the report were trapped into the human smuggling business, and represented the single biggest “protection-related category for” them); Confidential Report, *supra* note 1, at 20 (citing that smuggling groups recruit children on purpose because they know that CBP officers will almost always send the children back to Mexico, and never prosecute them in the United States).

72. See *Human Rights in Mexico*, *supra* note 65, at 44.

73. See *id.*

74. See generally *United States v. Nava-Martinez*, No. B-13-441, 2013 WL 8844097, at *3 (S.D. Tex. Dec. 13, 2013) (reiterating that government representatives have been consistently telling the courts that the drug cartels are the ones who control the entire Mexican smuggling process); REYNOLDS, *supra* note 68 (noting that the U.S. Drug Enforcement Administration affirms that drug cartels use children to traffic drugs along the Border, to torture people, to kill children, and to act as lookouts for the cartels).

75. See generally *CAVENDISH & CORTAZAR*, *supra* note 3, at 49 (recounting that ORR officials confirm that although the number of Mexican UACs referred to their office has increased, it is nowhere near what they originally expected when TVPRA was passed); Confidential Report, *supra* note 1, at 8 (assessing that only 3.4% of Mexican UACs are transferred to ORR, even though they account for 45% percent of all apprehensions at the Border); Preston, *supra* note 63 (discussing that UACs who are questioned at border patrol facilities after being apprehended might not feel safe to disclose the dangers they face).

76. See *CAVENDISH & CORTAZAR*, *supra* note 3, at 33 (proclaiming that some

determine if a child is a victim, and focus on quick, rather than substantive, answers when conducting interviews.⁷⁷ CBP officers also do not have proper training on how to best interview children in light of their age and gender.⁷⁸ Part III.A will critically analyze the efficacy of the CBP's screening process in further detail.

III. ANALYSIS

The United States is violating its obligations to prevent trafficking under international law because the screening process for Mexican UACs fails to properly determine whether these children might be victims of human trafficking.⁷⁹ Forty-eight hours is not enough time for children to properly express their fears of returning to Mexico, or their victimization.⁸⁰ Specifically, the United States is violating article 10(2) of the Trafficking Protocol, along with articles 6, 9, and 11, and is also violating the "best interests of the child" approach,⁸¹ which the international community has generally accepted and followed. It is in violation of these articles because CBP is not

Mexican UAC reported being hit and kicked during apprehension, and that CBP officers showed little enthusiasm towards them).

77. *Id.* at A-26 (exemplifying that most of the questions require yes and no answers, including questions such as is the child engaged in any type of labor?; did the child have freedom of movement?; and, was the child forced to perform sexual acts for money or services?).

78. *See id.* at 37 (affirming that many officers believe they will receive their training with children on the job, and that those who have nieces and nephews possess sufficient training with children); *see also* Lind, *supra* note 3 (reporting that Mexican UACs are questioned out in the open, and sometimes in front of their own traffickers).

79. *Cf.* Perez-Funez v. INS, *supra* note 56 (reiterating that even though UACs enter the country illegally, they still possess constitutional and statutory rights). *But cf.* GALLAGHER, HUMAN TRAFFICKING, *supra* note 23, at 281, 325 (contrasting with the European Trafficking Convention, and its requirement that states parties adopt the necessary legal framework and personnel available for the victim identification process).

80. *See* Confidential Report, *supra* note 1, at 32 (explaining that the CBP needs "time, patience, and gentle probing" to effectively identify victims of trafficking); *see also* Preston, *supra* note 63 (retelling the story of one UAC who only felt comfortable enough to relay his trafficking story after a week had passed since apprehension).

81. *See* discussion *infra* Part III.C (noting that the United States has adopted the wrong approach towards children because children cannot be treated as adults, and are screened so quickly that they often do not have the opportunity to express their fears).

adequately trained to deal with children, does not take into account their needs, and fails to establish measures to protect Mexican UAC victims and strengthen border controls. The United States has also violated the CRC, even though the United States does not consider its provisions to be obligatory because it has not yet ratified the treaty.

A. THE U.S. SCREENING PROCESS VIOLATES ARTICLE 10(2) OF THE TRAFFICKING PROTOCOL BECAUSE CBP IS NOT ADEQUATELY TRAINED TO PREVENT AND DETECT TRAFFICKING, AND DOES NOT TAKE INTO ACCOUNT SENSITIVE ISSUES INVOLVING MEXICAN UACS

Article 10(2) is the key article in the Trafficking Protocol with which the United States has failed to comply. A states party complies with a treaty when it puts its legal commitments into effect through domestic implementation.⁸² Although the United States has signed and ratified the Trafficking Protocol, and the obligatory measures laid out in article 10(2) are therefore binding on it, it has not followed up with proper domestic implementation for two reasons. First, the United States has not provided adequate training and second, it has not strengthened training for immigration officials to prevent trafficking of Mexican UACs.⁸³ As detailed above in Part II.D, because of a Mexican UAC's unique position under United States law after apprehension, the United States only has forty-eight hours to detect and prevent trafficking.⁸⁴ As assessed in further detail below in Part III.B, CBP's forty-eight hour screening process fails to accomplish the TVPRA's intended goals.⁸⁵ The screenings are so

82. GALLAGHER, HUMAN TRAFFICKING, *supra* note 23, at 462.

83. CAVENDISH & CORTAZAR, *supra* note 3, at 37; *see* Gallagher, *Human Rights*, *supra* note 23, at 980 (recounting that states must provide training for immigration officials).

84. *See supra* Part II.C (discussing the difference in treatment between Mexican UACs and Central American UACs in relation to the amount of time the CBP takes to screen these children).

85. *Cf.* CAVENDISH & CORTAZAR, *supra* note 3, at 36 (confirming that CBP officers have received little to no training on how to work with children, and to identify victims of trafficking pursuant to the provisions of TVPRA); Children on the Run, *supra* note 2, at 16 (emphasizing that because most Mexican UACs are returned to Mexico, the need for protection is virtually invisible to the United States government and social providers, neither of whom have the opportunity to meet these children).

quick that most children do not understand what is happening, and are not subjected to procedures suitable to their age and level of understanding.⁸⁶ Although the measures the United States has adopted to strengthen CBP officer training seem effective on their face,⁸⁷ they are not so in practice because CBP officers are still largely incapable of identifying potential victims.⁸⁸ The mere fact that these efforts exist does not mean that the United States is complying with international law.⁸⁹

The United States' efforts to comply with the TVPRA have failed for three reasons. First, reports show that Form 93 and the refresher course have been ineffective in giving CBP officers the training they need to detect victims of trafficking.⁹⁰ Form 93 devotes less than one page for determinations of the screening process.⁹¹ Less than one page is not enough, especially if the form consists of "yes" or "no" questions, rather than those that force the officers to investigate the matter further. Along with this procedural inadequacy, many CBP

86. See Lind, *supra* note 3 (adding that many times, CBP officers never get a chance to find out about the threats children face because of the speed of the interviews); see also CAVENDISH & CORTAZAR, *supra* note 3, at 36 (reiterating that undocumented UACs still possess constitutional and statutory rights). *But see* Preston, *supra* note 63 (recounting the story of a young UAC who only felt comfortable after a week had passed since apprehension to tell CBP officers that he had almost been trafficked).

87. See CAVENDISH & CORTAZAR, *supra* note 3, at 39 (describing the tools the United States has adopted to strengthen the CBP screening process, including Form 93).

88. See *supra* text accompanying notes 64-66 (demonstrating that despite these measures, Mexican UACs are still almost always sent back to Mexico due to the CBP officers' failure in identifying potential victims); *cf.* Children on the Run, *supra* note 2, at 16. *But see* CAVENDISH & CORTAZAR, *supra* note 3, at 26 (explaining that Central American UACs under eighteen years of age automatically get transferred to ORR or to family members they have in the United States while they wait for their immigration hearing).

89. *Cf.* GALLAGHER, HUMAN TRAFFICKING, *supra* note 23, at 226 (observing that a state can be internationally responsible when its organs do not prevent harm resulting from the consequences of someone else's acts); *supra* text accompanying note 25 (finding a state to be responsible for not succeeding in making a victim's situation better when the state had the ability of doing so).

90. See CAVENDISH & CORTAZAR, *supra* note 3, at A-26 (providing a copy of Form 93).

91. *Id.* at 36; see Confidential Report, *supra* note 1, at 36 (affirming that an effective interviewing tool would make the screening process easier, and would better ensure that CBP officers get the information they need from Mexican UACs as required by law).

officers also do not understand the instructions on the forms.⁹² Even some CBP senior officers have agreed that Form 93 does not equip officers with specialized training to deal with Mexican UACs.⁹³ For example, during an investigation in Laredo, Texas, many CBP officers did not believe the questions on Form 93 applied to Mexican UACs, especially to the ones suspected to be involved in smuggling,⁹⁴ and either did not ask the questions on the form or asked them poorly.

Second, studies indicate that only thirty to forty percent of CBP officers actually watched the optional refresher course in 2008 and 2009. Many officers did not even know one existed, let alone knew that they were required to watch it on an annual basis.⁹⁵ Finally, a leaked U.N. report showed that the “Know What to Expect” video has been ineffective because children often do not understand the video, and, therefore, do not fully understand their rights. CBP officers sometimes do not even show the video.⁹⁶ These three factors hinder CBP’s efforts in identifying victims of trafficking, and, in consequence, prevent CBP from identifying possible Mexican UACs. This better explains why only 3.4% of Mexican UACs are transferred to ORR even though they constitute almost half of all apprehensions at the Border.⁹⁷ The screening process towards Mexican UACs, at least in regard to Form 93 and the refresher course, is currently violating obligatory procedural requirements laid out by the Trafficking Protocol.⁹⁸ Under international law, the United

92. See Confidential Report, *supra* note 1, at 36 (noting that the form is confusing because some of the questions are directed to the UACs, and others to the officers, and that the officers answer the questions regarding trafficking themselves, rather than asking the UACs for answers).

93. CAVENDISH & CORTAZAR, *supra* note 3, at 36.

94. Confidential Report, *supra* note 1, at 36 n.37.

95. CAVENDISH & CORTAZAR, *supra* note 3, at 36.

96. See Confidential Report, *supra* note 1, at 41-42 (summarizing that Mexican UACs are also not benefitting from the video because provisions are not all applicable to them, and giving an example of one Mexican UAC who approached a CBP officer after the video and asked for a hearing, but the officer was not in the position to make that decision because trafficking screening was not performed yet); *cf.* CAVENDISH & CORTAZAR, *supra* note 3, at 42 (explaining that Mexican UACs are not provided adequate information during the screening process to make an informed decision about whether they should voluntarily return to Mexico).

97. Confidential Report, *supra* note 1, at 36 n.37.

98. See *id.* at 32.

States is held responsible for its own failure to investigate into these procedural mechanisms that do not help prevent further trafficking.⁹⁹

Finally, the United States has failed to take into account child-sensitive issues when providing training to its CBP officers in relation to the proper treatment of Mexican UACs.¹⁰⁰ Although the second part of article 10(2) is not a binding obligation on the United States, in not taking into account a child's specific needs because of his age and vulnerability, the United States is in effect violating its duties to further prevent trafficking.¹⁰¹ Section 235 of the TVPRA specifically focuses on efforts to prevent the trafficking of children.¹⁰² If the second part of article 10(2) of the Trafficking Protocol is not a hard obligation on the United States, then it is still obliged to comply under its own domestic law, or under the "soft law" provisions of international law.¹⁰³

An Appleeed report additionally asserted that the United States has violated article 10(2) because its inadequately trained CBP officers are violent with Mexican UACs. Such conduct demonstrates that the officers are not taking into account the UACs' age or vulnerability, and are treating them like adults instead of children, in contravention of international law.¹⁰⁴

99. See U.N. PRINCIPLES AND GUIDELINES, *supra* note 24 (imposing that states have obligations well beyond just "not to traffic" under the due diligence standard).

100. Compare *supra* notes 67-73 and accompanying text (explaining how Mexican UACs are easy prey for drug cartels, are lured with false promises, and lack the ability to escape or leave the system), with Confidential Report, *supra* note 1, at 14 (concluding that CBP practices presume an absence of protection for Mexican UACs), and Lind, *supra* note 3 (highlighting that CBP officers assumed children chose to go into smuggling, and failed to ask questions about fear and protection).

101. See U.N. PRINCIPLES AND GUIDELINES, *supra* note 24, at 77 (noting that a state's failure to fulfill or protect its human rights obligations is enough to prompt international legal responsibility).

102. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5074-82 (codified at 8 U.S.C. § 1232 (2008)).

103. See generally AM. IMMIGRATION COUNCIL, *supra* note 56 (describing that the purpose behind passage of the TVPRA was to respond to CBP's failures in screening children for possible relief available to them in the United States); Green, *supra* note 26, at 312 (noting that the United States is one of the top three destinations for human trafficking).

104. See Confidential Report, *supra* note 1, at 36 n.37; *supra* note 91 and

B. THE U.S. SCREENING PROCESS VIOLATES ARTICLES 6(4), 9(1), & 11(1) OF THE TRAFFICKING PROTOCOL BECAUSE CBP OFFICERS DO NOT TAKE INTO ACCOUNT THE SPECIAL NEEDS OF MEXICAN UACS, FAIL TO ESTABLISH MEASURES THAT PROTECT VICTIM MEXICAN UACS, AND FAIL TO STRENGTHEN BORDER CONTROLS

1. *The Screening Process Violates Article 6(4) Because CBP Officers Fail to Take into Account the Special Needs of Mexican UACs in Applying the Provisions of the Trafficking Protocol*

Article 6(4) of the Trafficking Protocol recommends that states parties take into account age, gender, and special needs of victims, especially children, when applying its provisions.¹⁰⁵ This article lies within the “soft law” provisions of the Trafficking Protocol.¹⁰⁶ However, this does not mean that states parties, such as the United States, are not under an obligation to take into account such factors when applying provisions of the Protocol.¹⁰⁷

The United States has to take measures sufficient to ensure that it is not held partly liable for failing to take measures to prevent harm.¹⁰⁸ The provisions in article 6(4) are similar to those in the CRC.¹⁰⁹ Consequently, the United States cannot pass any laws or take any measures that could interfere with the rights of children.¹¹⁰

accompanying text. *See generally* Trafficking Protocol, *supra* note 4, art. 3(a), (c)-(d) (explaining the differences in the requisite treatment of an adult and a child victim of trafficking).

105. Trafficking Protocol, *supra* note 4, art. 6(4).

106. *See* Legislative Guides, *supra* note 40, at 282 (maintaining that provisions that talk about assistance and support for victims are not mandatory).

107. *See* GALLAGHER, HUMAN TRAFFICKING, *supra* note 23, at 142 (describing that “soft law” provisions can generally ascertain required behavior, and can even form or codify customary law).

108. *See id.*; *supra* note 50 and accompanying text (reiterating that a state will be held responsible under international law when it fails to do everything in its power to prevent possible harm flowing from trafficking).

109. *Compare* Trafficking Protocol, *supra* note 4, art. 6(4) (“Each [s]tate [p]arty shall take into account, in applying the provisions of this article, the age, gender[,] and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate housing, education[,] and care.”), *with* Convention on the Rights of the Child, art. 3(1), Nov. 20, 1989, 1577 U.N.T.S. 3 (“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be the primary consideration.”).

110. GUIDELINES FOR CHILDREN’S ASYLUM CLAIMS, *supra* note 22, at 9.

This means that, when conducting the screening process at the Border, CBP officers, who are considered agents of the United States, cannot ignore the fact that Mexican UACs are children who need special care and attention when it comes to victim identification.¹¹¹

Nevertheless, the screening process fails to do just that.¹¹² CBP officers are more concerned with getting as many UACs processed at the Border, and care less about properly identifying these potential victims.¹¹³ Victims of trafficking usually do not like to identify themselves as victims. In permitting untrained CBP officers to deal with children in this state of vulnerability, the United States is failing to consider that forty-eight hours is not enough time for a child to feel comfortable enough to say he feels like he has been trafficked.¹¹⁴ Successful cases of victim identification take place when children are given more time to reflect on their situation, and have the opportunity to speak to professionals who can better take into account the child's age, gender, and vulnerabilities.¹¹⁵

These failures violate the United States' obligations under international law because the screening process fails to take adequate "care in preventing and responding to" acts that interfere with human rights.¹¹⁶ Reports show that at least some Mexican UACs are victims of trafficking, and because CBP officers fail to use proper measures towards these children, the screening process is doing more harm

111. See generally *supra* text accompanying note 22 (reminding that the United States is a signatory to treaties that incorporate the "best interests of the child" approach); *supra* note 49 and accompanying text (reemphasizing who would be considered an agent of a state).

112. See generally AM. IMMIGRATION COUNCIL, *supra* note 56, at 5 (stating that the purpose behind passage of the TVPRA was the concern over CBP's inadequate screening towards UACs).

113. Cf. Confidential Report, *supra* note 1, at 36 n.37 (noting that CBP officers presume an absence of protection for Mexican UACs); *supra* text accompanying note 77 (remarking that CBP officers are focused on producing quick answers, and do not know how to deal with children).

114. See generally Surtees, *supra* note 27 (stating that victims do not like to be identified as such although victim identification is the first step in defeating trafficking).

115. See Preston, *supra* note 63 (recounting the story of a young UAC who finally felt comfortable telling his story of almost being trafficked after a week had passed since apprehension).

116. GALLAGHER, HUMAN TRAFFICKING, *supra* note 23, at 241.

than good.¹¹⁷ One of the main purposes of the TVPRA was to add a provision that applied to UACs. However, the screening process is not only failing to protect this vulnerable population, but is also hindering the United States from properly applying international victim identification measures, especially towards children.¹¹⁸

2. The Screening Process Violates Article 9(1) Because it Fails to Establish Measures That Protect Mexican UACs Who are Victims of Trafficking

Article 9(1) of the Trafficking Protocol says that states parties must implement policies and measures to prevent trafficking in persons, especially children, and protect them from becoming victims again.¹¹⁹ This article also lies within the “soft law” provisions of the Trafficking Protocol.¹²⁰ However, as stated before, this does not mean that the United States is absolved from any liability for failing to adhere to the measures suggested in article 9(1).¹²¹

To comply with article 9(1), the United States implemented the TVPRA to protect and prevent the trafficking of UACs.¹²² However, it is not enough that the United States has passed legislation to address this issue. It must also check to see that the passage and implementation of the law actually follows its intended purpose.¹²³

117. See *supra* notes 68, 71 and accompanying text (reporting that there are enough Mexican UACs that are victims of these criminal groups to cause concern in the international arena of trafficking). See generally *Children on the Run*, *supra* note 2, at 37 (citing that thirty-two percent of Mexican children interviewed stated that they left home because of the violence that organized crime and drug cartels have engaged in).

118. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5074-82 (codified at 8 U.S.C. § 1232 (2008)); see also AM. IMMIGRATION COUNCIL, *supra* note 56 (reminding that the purpose behind the TVPRA was to protect unaccompanied children through proper screening).

119. Trafficking Protocol, *supra* note 4, art. 9(1).

120. See Legislative Guides, *supra* note 40, at 283 (maintaining that provisions that talk about assistance and support for victims are not mandatory).

121. See *supra* note 41 and accompanying text (showing that “soft law” provisions do not absolve a state of international obligations, and can be recognized as customary law).

122. See William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 235.

123. See U.N. PRINCIPLES AND GUIDELINES, *supra* note 24, at 77 (imposing that under due diligence, states have a responsibility beyond not trafficking). See

The United States intended that the screening process, specifically applied towards Mexican UACs, would quickly determine whether children might be victims of trafficking.¹²⁴

Unfortunately, not only do CBP officers fail to identify many potential Mexican UAC trafficking victims, the whole process is rushed, thereby preventing many potential victims from expressing their fears of possible re-victimization.¹²⁵ Drug cartels are aware that Mexican UACs are continually returned to Mexico. They take advantage of this process, and continue to use UACs as smugglers of humans and drugs along the Border.¹²⁶

Accordingly, the United States is responsible for partaking in measures that continue the flow of trafficking.¹²⁷ Under standards of international law, a state is responsible for actions its agents take or do not take in violation of human rights.¹²⁸ In following their duties under the screening process, CBP officers are unknowingly continuing the flow of trafficking.¹²⁹ The United States has ignored the various reports that illustrate that TVPRA fails, as a law, to identify victims of trafficking, and has not significantly improved efforts to do so.¹³⁰ Consequently, the United States is violating article

generally supra text accompanying note 23 (confirming that a state is complying with international treaty obligations when its behavior adheres to the specified rule).

124. AM. IMMIGRATION COUNCIL, *supra* note 56, at 11. *See generally supra* note 7 (comparing TVPRA procedures for Mexican UACs with those intended for all other UACs).

125. *See supra* text accompanying note 77 (remarking that CBP officers are focused on producing quick answers, and do not know how to deal with children).

126. Confidential Report, *supra* note 1, at 20 (laying out that smugglers purposefully recruit Mexican minors because they know the United States will almost always send the children back to Mexico after apprehension); *see supra* note 70 and accompanying text.

127. *See generally* GALLAGHER, HUMAN TRAFFICKING, *supra* note 23, at 237 (summarizing that a state will be held internationally responsible when its agents fail to prevent harm from others' acts); *supra* text accompanying note 74 (claiming that the United States is aware of the presence of the drug cartels).

128. *See supra* text accompanying note 49 (maintaining that the United States will be held responsible when its agents or the government commit an act or omission).

129. *See generally supra* note 50 and accompanying text (explaining that a state will be held responsible when it does not do everything in its power to prevent trafficking).

130. *See* CAVENDISH & CORTAZAR, *supra* note 3, at 36-37 (confirming CBP officers receive virtually no training on how to work with children or identify

9(1) of the Trafficking Protocol for failing to take effective measures that protect Mexican UACs from becoming trafficking victims.

3. The Screening Process Violates Article 11(1) Because it Fails to Strengthen Border Controls to Prevent Trafficking

Article 11(1) of the Trafficking Protocol requires states parties to strengthen border controls as is necessary to prevent and detect trafficking in persons.¹³¹ This article lies within the mandatory provisions of the Trafficking Protocol. This means that the United States has a greater burden to comply with this provision.¹³²

Although the United States is known for its strong border security measures, such policies are too strong in relation to the identification of Mexican UACs as trafficking victims, because they focus too much on rapidly removing non-citizens out of the country.¹³³ The purpose of strengthening border controls is to prevent and detect trafficking, and the United States fails to do both when it rushes through the screening process.¹³⁴ United States border controls along the Border do not have the requisite balance to prevent and detect trafficking because many unidentified Mexican children victims are returned to Mexico, and trafficked back in again.¹³⁵ The United

victims of trafficking); *cf. supra* Part III.A (outlining the various deficiencies of the screening process that prevents CBP officers from obtaining adequate training).

131. Trafficking Protocol, *supra* note 4, art. 11(1).

132. See Legislative Guides, *supra* note 40, at 283 (indicating that procedural requirements are mandatory).

133. *Cf. supra* note 75 and accompanying text (demonstrating that only 3.4% of Mexican UACs were not repatriated to Mexico, even though they account for almost half of all apprehensions at the Border).

134. *Cf. Press Release, supra* note 9 (recounting that Mexican UACs are repatriated more often than UACs from other countries, even though they face the same dangers back home); Ewing, *supra* note 10 (maintaining that the blanket policy applied to Mexican UACs precludes any meaningful screening for trafficking).

135. Compare *supra* text accompanying notes 2-3 (showing that most Mexican UACs get returned to Mexico because of improper victim identification, even though many are victims of trafficking), with GALLAGHER, HUMAN TRAFFICKING, *supra* note 23, at 281, 325 (showing that the European Trafficking Convention focuses much more on victim identification and the protection of children). See generally Trafficking Protocol, *supra* note 4, art. 11(1) (detailing the requisite border measures states parties should adopt to prevent trafficking); *Recommended Principles and Guidelines on Human Rights, supra* note 47, at 4 (commenting that states must ensure that victim identification takes place).

States government is currently debating over whether to extend the border control measures to other UACs. However, such a policy is unwise because these measures are currently ineffective for Mexican UACs.¹³⁶

At the same time, the United States does not go far enough to strengthen its border controls in other respects. CBP officers fail to recognize that potential traffickers might be in the same room as Mexican UACs after apprehension, and fail to prevent future trafficking when they send these UACs back into the hands of their persecutors.¹³⁷ By focusing too much on trying to promptly screen Mexican UACs to repatriate them back to their country, the United States fails to acknowledge the larger issues at stake, and recognize its duty to prevent traffickers from continuing to exploit these children.¹³⁸

United States border control measures towards Mexican UACs violate international law because they apply the screening process as a blanket policy to all Mexican UACs.¹³⁹ Through control over the transportation of drugs and human smuggling across the Border, the United States can comply with international law, but it fails to do so when CBP officers try to prevent the trafficking of children through the use border measures that do more harm than good.¹⁴⁰

136. Ewing, *supra* note 10 (recommending against the extension of the screening process for Mexican UACs to Central American UACs because the current blanket policy has been ineffective in identifying victims of trafficking in accordance with international standards).

137. See Confidential Report, *supra* note 1, at 8 (stating that smugglers usually wait for the children in Mexico, knowing that most of them will eventually get returned); Preston, *supra* note 63 (discussing that UACs who are questioned at border patrol facilities after being apprehended might not feel safe to disclose dangers they face); Lind, *supra* note 3 (showing that Mexican UACs are questioned out in the open, sometimes in front of their traffickers).

138. See Children on the Run, *supra* note 2, at 16 (reciting that since most Mexican UACs get sent right back to Mexico, the need for protection is invisible to the United States, who never has the chance to meet these children); *supra* text accompanying note 70 (admitting that Mexican cartels coerce at least some of the Mexican UACs that cross the Border, and make them victims of trafficking).

139. See U.N. PRINCIPLES AND GUIDELINES, *supra* note 24, at 77 (mandating that a state has more obligations than just not to traffic); *supra* text accompanying note 25 (holding a state responsible when it fails to make a situation better for a victim).

140. See *supra* text accompanying note 26 (affirming that one way in which the United States is given the opportunity to comply with international law is in

C. THE U.S. SCREENING PROCESS VIOLATES THE “BEST INTERESTS OF THE CHILD” APPROACH

The United States has stated in reports and cases that children hold a special place in society.¹⁴¹ Although the United States has not ratified the CRC, it cannot take measures that go against the object and purpose of the CRC’s provisions, particularly the “best interests of the child” approach.¹⁴² The United States is using preferential treatment because it treats Mexican UACs different from Central American UACs. Moreover, as explained in detail in Part III.B, many Mexican UACs do not get identified as victims of trafficking because the screening process is so quick and confusing that the children rarely get to properly express their fears.¹⁴³

The European Trafficking Convention puts pressure on its agents to properly identify trafficking victims, especially children.¹⁴⁴ In contrast, the United States does not emphasize the importance of identifying Mexican victims, but rather focuses on the quickest way of sending these children back to Mexico.¹⁴⁵ The United States is applying the wrong approach towards children¹⁴⁶ because children cannot be treated the same way as adults. CBP officers must take precautionary measures that adequately help identify children who

controlling the transportation of drugs and the smuggling of people across the Border). *See generally supra* text accompanying notes 49-50 (holding the United States responsible when its agents fail to commit an act or omission and fail to do everything in their power to stop trafficking).

141. *Accord* United States v. Nava-Martinez, No. B-13-441, 2013 WL 8844097, at *1, *3-4 (S.D. Tex. Dec. 13, 2013) (referring to how Mexican cartels control most of the human trafficking in Texas, and child trafficking is the most vile crime in which these organized criminals engage); Perez-Funez v. INS, *supra* note 56 (advocating for UAC rights).

142. GUIDELINES FOR CHILDREN’S ASYLUM CLAIMS, *supra* note 22, at 9.

143. *See supra* text accompanying note 86 (noting that many Mexican UACs have no idea what is going on because the standards are not set based on their age and understanding). *But see* Preston, *supra* note 63 (recounting story of how one UAC felt comfortable expressing fears after one week of apprehension).

144. *See* GALLAGHER, HUMAN TRAFFICKING, *supra* note 23, at 281, 325.

145. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5074-82 (codified at 8 U.S.C. § 1232 (2008)) (showing the purpose behind this amendment was repatriation).

146. *See* Legislative Guides, *supra* note 40, at 306; *see also supra* text accompanying note 139 (referring to importance of children in the United States).

fear for their lives.¹⁴⁷ The United States is currently failing to do so, and is, therefore, taking measures that contravene the CRC.¹⁴⁸

IV. RECOMMENDATIONS

Many scholars would agree that children should be treated differently from adults under the law.¹⁴⁹ This should be no different when identifying trafficking victims along the Border. Although the United States has taken procedural measures to guarantee the well-being of Central American UACs, it has failed to do the same for Mexican UACs.¹⁵⁰ Most recently, President Barack Obama decided to allow Central American children to apply for refugee status in their respective countries.¹⁵¹ Mexican children should not be excluded from these benefits just because they are not featured in headlines as frequently as Central American UACs. Therefore, to comply with both international and domestic trafficking law, the United States should amend its current laws to better identify Mexican UACs along the Border, and offer them the same protections that the laws grant to Central American UACs.¹⁵²

147. See *supra* text accompanying notes 114-21 (laying out different procedures currently in place in which CBP's measures do not help properly identify victims of trafficking, such as lack of training in victim identification and lack of training in how to deal with children); *cf. supra* text accompanying note 103 (illustrating that some officers used violence against Mexican UACs).

148. See Lind, *supra* note 3 (explaining that some CBP officers assume children voluntarily become smugglers, and fail to ask questions about fear and protection); *supra* text accompanying note 63 (claiming that what actually goes on at the Border is not what the TVPRA intended regarding the "best interests of the child"); *supra* text accompanying note 100 (reporting that CBP officers do not perform proper training on how to deal with children).

149. *Cf. Young & McKenna, supra* note 56, at 248 (portraying that UACs lack protection from adults and are vulnerable while fleeing their home because they cannot take care of themselves properly).

150. See *id.* at 259 (observing that in 2010 it was unclear how many Mexican UACs were properly screened, and that adequate measures needed to be put in place after the passage of the TVPRA of 2008).

151. Michael D. Shear, *Obama Approves Plan to Let Children in Central America Apply for Refugee Status*, N.Y. TIMES (Sept. 30, 2014), <http://nytimes.com/2014/10/01/us/obama-approves-plan-to-let-children-apply-for-refugee-status-in-central-america.html?referrer> (proposing that this new plan will provide a legal path for family reunification, and resulted partly from concerns that the journey across Mexico was more dangerous than the conditions the children were fleeing from in Central America).

152. See generally CAVENDISH & CORTAZAR, *supra* note 3, at 17 (noting that

A. THE SCREENING PROCESS SHOULD BE LONGER THAN FORTY-EIGHT HOURS

Most would agree that forty-eight hours is not enough time to screen a child for signs of trafficking.¹⁵³ Because the process is so quick, children are placed in unfriendly environments that do not make them feel comfortable and safe.¹⁵⁴ A lot of times, these environments prevent children from opening up about being victims of trafficking, and they should not be expected to express themselves the same way as adults.¹⁵⁵ Therefore, the United States should extend the screening at least another forty-eight hours, or even a week. With more time to think about their situation, and to rationalize their fears, children will more likely openly express their emotions.¹⁵⁶ Central American UACs receive a longer overall screening process, and consequently, more victims are identified this way.¹⁵⁷ Whatever solution the United States implements, it must take into account the child's vulnerabilities, and must extend the forty-eight hour screening process.¹⁵⁸

only a tiny fraction of Mexican UACs get transferred to the ORR, despite the passage of the TVPRA and its efforts to provide better protection for these children).

153. See *supra* text accompanying note 58.

154. See *U.S.: Surge in Detention of Child Migrants*, HUMAN RIGHTS WATCH (June 25, 2014), <http://www.hrw.org/news/2014/06/25/us-surge-detention-child-migrants> (stating that qualified professionals trained in "age-and gender-sensitive interviewing techniques" should evaluate UACs in friendly atmospheres to meet standards of international law).

155. See *Children on the Run*, *supra* note 2, at 20 (analyzing that children may be too young and immature to convey their hardships in a way that is easy to understand for an adult).

156. Cf. *Surtees*, *supra* note 27, at 25 (finding that people that have been trafficked will often feel uncomfortable about the victim category attached to their identity and situation).

157. Cf. *Lind*, *supra* note 3 (suggesting that if Mexican UACs are transferred to the ORR like Central American UACs, a child-welfare professional who will know what to look for and be better able to engage in victim identification will interview them); *Ewing*, *supra* note 10 ("[O]ur treatment of children from Mexico is not something we should emulate with the children of any other country.").

158. See *generally* *Perez-Funez v. INS*, *supra* note 56 (confirming that the law must recognize that children have a special place, and they often do not understand legal language or know what to do when apprehended).

B. CBP SHOULD BE PROPERLY TRAINED TO IDENTIFY MEXICAN
UAC VICTIMS OF TRAFFICKING

Equally as important to extending the forty-eight hour screening process is the need to properly train CBP officers to identify victims of trafficking. If the screening process extends past forty-eight hours but CBP officers are not trained to identify victims of trafficking, the extension will have little practical effect. Specifically, CBP officers should be required to speak Spanish in order to have effective communication with the children.¹⁵⁹ Officers should also be informed of the proper definition of trafficking, the signs to look for in children victims, and the proper ways to deal with these children victims.¹⁶⁰ To ensure CBP officers are doing their best to identify Mexican UAC victims of trafficking, they should coordinate with social workers, non-governmental organizations, and psychologists, and allow them to participate in the screening process.¹⁶¹

C. CBP SHOULD AUTOMATICALLY TRANSFER MEXICAN UACs TO
THE ORR

Although extending the screening process and properly training CBP officers to identify Mexican UAC victims of trafficking are effective short-term solutions, the best long-term solution would be to treat Mexican UACs the same way as Central American UACs. Specifically, the United States should automatically transfer Mexican UACs to the ORR after the initial screening process takes place.¹⁶² That way, the children have more time to evaluate their situation, and have a better chance of obtaining justice through an immigration

159. See CAVENDISH & CORTAZAR, *supra* note 3, at 38 (remarking that CBP officers learn Spanish on the job, but that this informal training is not sufficient to interview a child and determine whether he or she is a victim of trafficking).

160. See *id.* (informing that as of 2011 there were no training programs for officers to carry out obligations under the TVPRA); see also Confidential Report, *supra* note 1, at 27 (reporting that of the agents interviewed none were able to provide examples of how they would identify victims of trafficking using the TVPRA-required questions, and none had ever identified an existing or potential child trafficking victim).

161. See AM. IMMIGRATION COUNCIL, *supra* note 56, at 12 (suggesting that CBP officers should be paired with child welfare experts, or should be replaced with asylum officers because of their inadequacy to screen children).

162. See Confidential Report, *supra* note 1, at 6 (concluding that in ORR custody Mexican UACs will be in a much more child-friendly environment and would receive more equal treatment).

hearing.¹⁶³ Although the government is currently debating whether to treat Central American UACs in the same manner as Mexican UACs, such a policy is not advisable.¹⁶⁴ A temporary solution to a long-term historical issue is not the answer. Instead, Mexican UACs deserve to get treated the same as Central American UACs, and not be discriminated against because of bilateral political agreements between the United States and Mexico.¹⁶⁵

V. CONCLUSION

Although the United States endeavors to be a strong proponent of combating international trafficking, its policies are lacking in relation to the screening process of Mexican UACs at the Border. The CBP process does not provide enough time to determine whether the children are victims of trafficking—which in many cases they are. Other procedural elements of the screening process also do not help determine whether these children are victims of trafficking. Because of this, the United States is violating its obligations under international law to prevent and identify victims of trafficking under article 10(2), and other relevant provisions of the Trafficking Protocol.

163. Cf. CAVENDISH & CORTAZAR, *supra* note 3, at 23 (reiterating that forty-eight hours is too short for decision-making).

164. See Lind, *supra* note 3 (commenting that screenings would get more careless if all UACs were treated like Mexican UACs because CBP officers would have four times as many children to screen at one time); see also Cristian Omar Reyes, *The Children of the Drug Wars*, KIDS IN NEED OF DEFENSE (July 13, 2014) <http://www.supportkind.org/en/908-the-children-of-the-drug-wars> (reiterating that Central American UACs should not be switched to the forty-eight hour screening process because life and death decisions would have to be made within hours, and studies show this screening is failing to identify Mexican UAC victims of trafficking).

165. See generally AM. IMMIGRATION COUNCIL, *supra* note 56, at 7 (stating that United States and Mexico repatriation has been geared more towards logistics, rather than the child's best interest).