



A Judicial Watch White Paper:

Designation of Drug Cartels as  
“Foreign Terrorist Organizations”  
And a Reassessment of the Classification of the  
Mexican Government Under the Trafficking Victims  
Protection Act



*Practical Solutions for a National Emergency*



March 12, 2019



# Judicial Watch White Paper: Designation of Cartels as “FTOs” & Reassessing Mexico Under TVPA

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*Though a critical ally and trading partner, Mexico presents unique challenges and risks to the national security of the United States. Two of the issue areas in which this is most evident are the threats posed by Mexican transnational criminal organizations (TCOs) and the tremendous scale of human trafficking in the country. This paper discusses two policy changes that the government of the United States may consider to address these risks: the designation of Mexican TCOs as foreign terrorist organizations, and a reassessment of the classification of the government of Mexico under the Trafficking Victims Protection Act.*

## **Part One: Designation of Mexican Transnational Criminal Organizations as Foreign Terrorist Organizations**

### **Statutory Authority**

Section 219 of the Immigration and Nationality Act (8 USC 1189) authorizes the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to designate an organization as a Foreign Terrorist Organization (FTO) if the Secretary finds that:

“(A) the organization is a foreign organization;

(B) the organization engages in terrorist activity (as defined in section 212(a)(3)(B) 1a) or terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 (22 U.S.C. 2656f(d)(2)), or retains the capability and intent to engage in terrorist activity or terrorism); and

(C) the terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.”

The definition of “terrorist activity” in the Immigration and Nationality Act is as follows:

“Any activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following:

(I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).

(II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.

(III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.

(IV) An assassination.

(V) The use of any-

(aa) biological agent, chemical agent, or nuclear weapon or device, or

(bb) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.

(VI) A threat, attempt, or conspiracy to do any of the foregoing.”

The Foreign Relations Reauthorization Act defines terrorism simply as, “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents.” (22 U.S.C. 2656f(d)(2)).

### **Process**

The process for designating an organization as an FTO is as follows:

1. The Department of State’s Office of the Coordinator for Counterterrorism (S/CT) identifies an organization for potential designation.
2. S/CT prepares an “administrative record” for the Secretary detailing how the organization’s activities meet the statutory requirements for designation.
3. The Secretary, in consultation with the Secretary of the Treasury and the Attorney General, determines that designation is appropriate.
4. Seven days prior to the designation, the Secretary is required to notify the Speaker and Minority Leader of the House, the President Pro Tempore, Majority Leader, and Minority Leader of the Senate, and the members of the Senate Judiciary, Intelligence, and Foreign Relations Committees and the House Judiciary, Intelligence, and International Relations Committees.
5. Following the seven-day period, the designation is published in the Federal Register.
6. The designated organization may seek judicial review of the designation by the D.C. Court of Appeals within 30 days of the publication.

Designation as an FTO can be revoked by an act of Congress.

There have been a number of legal actions filed by organizations designated as FTO, including the Tamil Tigers and the Kurdish Kurdistan Workers Party (PKK). These challenges have not been successful.<sup>1</sup>

The current Coordinator for Counterterrorism is Ambassador Nathan Sales, who was appointed by President Trump and confirmed by the Senate in August 2017.<sup>2</sup>

There are currently 67 designated FTOs. Most, but not all, are Islamic terrorist groups. Exceptions include the Greek anarchist organization Revolutionary Struggle (EA), ETA, Peru’s Sendero Luminoso, the FARC, and two IRA spin-off groups.

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<sup>1</sup> CRS Report for Congress: The FTO List and Congress. Congressional Research Service. October 21, 2003 (<https://fas.org/irp/crs/RL32120.pdf>), p. 10

<sup>2</sup> U.S. Department of State website (<https://www.state.gov/r/pa/ei/biog/273451.htm>)

### **Practical Impact**

There are three major impacts of designation as a Foreign Terrorist Organization. First, and perhaps most significantly, 18 U.S.C. § 2339B prohibits providing material support to an FTO or conspiring to do so:

“Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 20 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989).”

Notably, the law also contains provisions for extraterritorial jurisdiction for offenses under the act and violators who are U.S. citizens located abroad.

“Material support” is defined in the statute as “any property, tangible or intangible, or service.” The term excludes medicine and religious materials, but includes currency, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation.<sup>3</sup>

Secondly, 8 U.S.C. § 1189 (a)(2)(C) provides that the Secretary of the Treasury “may require United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets until further directive from either the Secretary of the Treasury, Act of Congress, or order of court.” This provision means that the designated organization’s assets may be frozen and access to the U.S. banking system may be denied.

Finally, the designation of an organization as an FTO has immigration implications. Members and representatives of designated organizations are inadmissible and subject to deportation.

### **Applicability to Mexican TCOs**

The idea of designating Mexican transnational criminal organizations (TCOs) as foreign terrorist organizations has been considered for several years. In 2012, Rep. Michael McCaul introduced legislation that would have directed the Secretary of State to so designate the seven largest TCOs operating at the time: The Arellano Felix Organization, Los Zetas Cartel, the Juarez Cartel, the Beltran Leyva Organization, La Familia Michoacana, the Sinaloa Cartel, and the Gulf Cartel/New Federation. The bill did not advance out of the committees to which it had been referred.<sup>4</sup>

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<sup>3</sup> Doyle, Charles. “Terrorist Material Support.” Congressional Research Service, December 8, 2016 (<https://fas.org/sgp/crs/natsec/R41334.pdf>), p. 2

<sup>4</sup> “All Actions H.R.4303 — 112th Congress (2011-2012).” (<https://www.congress.gov/bill/112th-congress/house-bill/4303/all-actions?overview=closed#tabs>)

The defeat of the bill was due, at least in part, to concerns that it would have adversely impacted U.S.-Mexico relations.<sup>5</sup>

As noted above, there are three criteria that must be met to support FTO designation: that the organization be foreign, that it engages in terrorism, and that its activities threaten the national security of the United States. Though all of the currently-designated organizations have an ideological component, the law is clear that one is not required to justify designation. The FARC, which has been designated as an FTO since 1997, has been estimated to have generated as much as \$3.5 billion annually from drug production and trafficking activities<sup>6</sup> and is arguably more accurately classified as a criminal organization than a revolutionary movement.

With regard to Mexican TCOs, satisfaction of the first criterion is self-evident. To determine the applicability of the second, it is necessary to assess whether the activities of the organizations fall within the scope of statute. In conducting such an assessment, it should be noted that the definition of terrorism codified in the Immigration and Nationality Act only requires that one of the delineated offenses be committed, and that the threat, attempt, or conspiracy to commit any of them is sufficient.

<b>Activity Constituting Terrorist Activity Pursuant to 8 U.S.C. 1182(a)(3)(B)</b>	<b>Applicability to Mexican TCO Activities</b>
The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).	Hijacking by TCO members is a frequent crime in Mexico. Targeted conveyances include buses, commercial trucks (including gasoline tankers <sup>7</sup> ), and trains. Ferromex, one of the three largest rail transport operators in the country, reports as many as 16 train robberies a day. <sup>8</sup>  Though hijacking crimes by cartel members and associates are most commonly motivated by profit, that is not always the case. Vehicles, frequently buses, are often hijacked to be used as part of blockades. <sup>9</sup> The practice has forced some bus operators to cease operations during periods of cartel violence. <sup>10</sup>

<sup>5</sup> Aguilar, Julian. “Bill Seeks to Designate Drug Cartels as Terrorists.” New York Times, April 21, 2011 (<https://www.nytimes.com/2011/04/22/us/22tccartels.html>)

<sup>6</sup> Otis, John. “The FARC and Colombia’s Illegal Drug Trade.” Wilson Center, November 2014 ([https://www.wilsoncenter.org/sites/default/files/Otis\\_FARCDrugTrade2014.pdf](https://www.wilsoncenter.org/sites/default/files/Otis_FARCDrugTrade2014.pdf)), p. 9

<sup>7</sup> Semple, Kirk. “In Mexico, an Epidemic of Fuel Thefts Becomes a Crisis.” New York Times, April 26, 2017 (<https://www.nytimes.com/2017/04/26/world/americas/mexico-fuel-theft-crisis.html>)

<sup>8</sup> Morley, Hugh. “Ferromex Sounds Alarm on Rocketing Cargo Thefts.” JOC.com, October 30, 2017 ([https://www.joc.com/rail-intermodal/international-rail/central-america/mexican-railway-sounds-alarm-rocketing-cargo-thefts\\_20171030.html](https://www.joc.com/rail-intermodal/international-rail/central-america/mexican-railway-sounds-alarm-rocketing-cargo-thefts_20171030.html))

<sup>9</sup> Eells, Josh. “The Brutal Rise of El Mencho.” Rolling Stone, July 11, 2017 (<https://www.rollingstone.com/culture/culture-features/the-brutal-rise-of-el-mencho-196980/>)

<sup>10</sup> “Gang Reacts Violently to Michoacán Arrest.” Mexico News Daily, March 5, 2018 (<https://mexiconewsdaily.com/news/gang-reacts-violently-to-michoacan-arrest/>)

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	<p>In June 2015, suspected cartel gunmen hijacked a truck to steal 11,500 Border Crossing Cards en route to U.S. Consulates in northern Mexico.<sup>11</sup></p>
<p>The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.</p>	<p>There were nearly 1,200 reported kidnappings in Mexico last year<sup>12</sup>; however, the true number of these crimes is undoubtedly higher, as most kidnappings go unreported.<sup>13</sup></p> <p>While most of these crimes are financially motivated, a significant number are executed to dissuade or prevent political, judicial, military, and law enforcement officials from effectively combating TCO members. Examples include the following:</p> <p>February 2018: Two Mexican federal agents investigating organized crime activities were kidnapped and subsequently murdered by members of the Cartel de Jalisco Nueva Generacion (CJNG). During their captivity, they were forced to read a statement criticizing the work of their agency.<sup>14</sup></p> <p>In August 2018, congresswoman-elect Norma Rodriguez was kidnapped in Hidalgo. A month earlier, local mayor Genero Urbano was kidnapped along the same highway.</p> <p>According to risk analysis firm Etellekt, there were more than 400 reported acts of aggression against politicians and candidates during the 2018 election cycle, including “assassination attempts, threats, intimidation and kidnappings.”<sup>15</sup></p>
<p>A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of title 18, United States Code) or upon the liberty of such a person.</p>	<p>Internationally protected individuals are defined in the referenced statute as a Chief of State or the political equivalent, head of government, or Foreign Minister, or any other representative, officer, employee, or agent of the United States Government, a foreign government, or international organization who at the time and place concerned is entitled pursuant to international law to special protection against attack upon his person, freedom, or dignity, and any member of his family then forming part of his household. That is, essentially, any individual afforded diplomatic status in a foreign country.</p> <p>Though Mexican TCOs have not been known to systematically target internationally protected individuals in Mexico, they have certainly demonstrated a willingness and capacity to do so. In February 1985, Sinaloa Cartel members abducted, tortured, and murdered DEA Special Agent Enrique Camarena. In October 2008, suspected</p>

<sup>11</sup> Estevez, Dolia. “U.S. Reports 11,500 U.S. Visas Stolen from Truck Hijacked in Northern Mexico.” Forbes, June 25, 2015 (<https://www.forbes.com/sites/doliaestevez/2015/06/25/u-s-reports-11500-u-s-visas-stolen-from-truck-hijacked-in-northern-mexico/#2fd6541f65eb>)

<sup>12</sup> Smith, Rory. “Hundreds of People in Mexico are Kidnapped Every Year.” Vox, May 11, 2018 (<https://www.vox.com/2018/5/11/17276638/mexico-kidnappings-crime-cartels-drug-trade>)

<sup>13</sup> “Mexico 2018 Crime and Safety Report.” OSAC, March 9, 2018 (<https://www.osac.gov/Pages/ContentReportDetails.aspx?cid=23660>)

<sup>14</sup> “Mexico Special Agents Found Dead After Cartel Kidnapping.” BBC News, February 19, 2018 (<https://www.bbc.com/news/world-latin-america-43112150>)

<sup>15</sup> Villegas, Paulina. “Criminal Groups Seek to Decide Outcome in Many Mexican Races.” New York Times, July 1, 2018 (<https://www.nytimes.com/2018/07/01/world/americas/mexico-election-assassinations.html>)

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	<p>members of the Los Zetas organization threw an undetonated grenade and fired small arms fire at the U.S. Consulate in Monterrey. In February 2011, Los Zetas members assassinated ICE Special Agent Jaime Zapata.</p> <p>Because the INA definition of terrorist activity includes the “threat, attempt, or conspiracy” to commit any of the specified acts delineated therein, the activities of Mexican TCOs likely meet this standard.</p>
An assassination.	<p>Mexican TCOs have committed hundreds of political assassinations in recent years. Between September 2017 and July 2018, 132 political candidates were assassinated in Mexico.<sup>16</sup> While it’s unprovable whether all of the killings were committed by TCO members and associates, some are known to have been. On June 8, 2018, congressional candidate Fernando Puron was murdered while posing for a photograph following a debate in which he pledged to crack down on Los Zetas. On October 18, 2016, the Mexican judge handling the case of Joaquin “Chapo” Guzman was assassinated while jogging near his home.<sup>17</sup></p> <p>The consensus among security analysts is that most of the assassinations are the result of TCOs attempting to exert political influence. According to one expert, “Criminal gangs want to be sure that in the next government, they can maintain their power networks, which is why they are increasing attacks.”<sup>18</sup></p>
The use of any biological agent, chemical agent, or nuclear weapon or device.	<p>No Mexican TCO has utilized a chemical, biological, or nuclear weapon; however, there is growing concern that such a weapon might be utilized in the future. Since 2013, there have been at least seven instances of radioactive material being stolen in the country.<sup>19</sup> The possible use of such weapons by a Mexican TCO is of particular concern due to documented contacts between members of the Sinaloa Cartel and members of Hezbollah and al Qaeda (though there is no evidence of an active operational alliance).<sup>20</sup></p>
The use of any explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.	<p>The use of explosive devices and high-caliber firearms by Mexican TCOs is well-documented. Their arsenal increasingly includes fragmentation and rocket-propelled grenades and other military weapons. In one seizure in January 2018, Mexican officials seized 1,960 from suspected cartel associates in Mexico City.<sup>21</sup> There have been approximately 150,000 organized-crime related murders in the country since 2006.<sup>22</sup></p> <p>The question of whether certain activities of Mexican TCOs are conducted for purposes other than mere personal monetary gain is</p>

<sup>16</sup> Diaz, Andrea and Jessica Campisi. “Mexico Goes to the Polls This Weekend.” CNN.com, July 2, 2018 (<https://www.cnn.com/2018/06/27/americas/mexico-political-deaths-election-season-trnd/index.html>)

<sup>17</sup> <https://abc7ny.com/news/judge-in-el-chapo-case-assassinated-while-jogging/1564586/>

<sup>18</sup> <https://www.reuters.com/article/us-mexico-election-violence/we-are-watching-you-political-killings-shake-mexico-election-idUSKBN1HP0HV>

<sup>19</sup> <https://www.foxnews.com/world/truck-carrying-radioactive-material-stolen-in-mexico-9-states-on-high-alert>

<sup>20</sup> <http://www.milenio.com/opinion/gerardo-viloria/ejercicio-del-poder/nexos-narco-y-terrorismo>

<sup>21</sup> <https://www.lmtonline.com/news/article/Federal-officers-discover-40-boxes-with-1-960-12520475.php>

<sup>22</sup> <https://fas.org/sgp/crs/row/R41576.pdf>, p. 2

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	<p>the subject of ongoing debate.<sup>23</sup> Though illicit profit from the drug trade and other criminal activities are certainly a defining characteristic of the organizations, they are also engaged in armed conflict with the Mexican government for territorial control and actively seek to influence or weaken instruments of the state. At least two major TCOs, La Familia Michoacana and the Knights Templar Cartel, published and distributed quasi-religious statements of political and social ideology.<sup>24</sup></p> <p>It is also notable that other groups currently designated as FTOs are involved in drug trafficking for profit. These include the FARC, Boko Haram, Hezbollah, and al-Qaeda in the Islamic Maghreb.<sup>25</sup></p>
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The third criterion for designation as an FTO under 8 USC 1189 is that the, “terrorist activity or terrorism of the organization threatens the security of United States nationals or the national security of the United States.” The threat posed to the United States by Mexican TCOs clearly satisfies this requirement. The Acting Administrator of the U.S. Drug Enforcement Administration recently determined, “Mexican drug trafficking organizations are the biggest criminal threat the United States faces today.”<sup>26</sup>

Incidents of Mexican TCO-related violence in the United States are innumerable and include murders, kidnappings, and sex trafficking. Occasionally, the activities of these organizations on U.S. soil more closely resemble terrorism than conventional criminality. In January 2009, suspected cartel operatives threw an undetonated grenade into a bar in Pharr, Texas. In August 2009, 17 members of a street gang working for the Tijuana Cartel were arrested for murdering nine people and dissolving two of the victims’ bodies in vats of acid. In July 2018, cartel members beheaded a 13-year old girl in Alabama after stabbing her grandmother to death.<sup>27</sup>

Writing in the American Bar Association’s National Security Law Report, Sylvia Longmire identified three ways in which Mexican TCOs constitute a threat to U.S. national security:<sup>28</sup>

- Public Safety: “There are several examples that Mexican cartels pose a threat to the safety of our citizens. Hundreds of US citizens and illegal immigrants are kidnapped by the cartels on US soil by individuals working for Mexican cartels, and often taken to Mexico to be tortured and held for ransom.”
- Territorial Integrity: “Parts of national parks and wildlife refuges along the southwest border have either been closed to the American public because of the danger posed by traffickers. Millions of acres of our national parks and forests—particularly in California—are being defended by Mexican nationals with guns who are protecting fields of marijuana, and federal agents are woefully incapable of stopping them.”

<sup>23</sup> <http://www.dtic.mil/dtic/tr/fulltext/u2/1038984.pdf>

<sup>24</sup> [http://www.academia.edu/6065057/Mexican\\_Drug\\_Cartels\\_Are\\_They\\_Terrorists](http://www.academia.edu/6065057/Mexican_Drug_Cartels_Are_They_Terrorists)

<sup>25</sup> [https://www.unodc.org/wdr2017/field/Booklet\\_5\\_NEXUS.pdf](https://www.unodc.org/wdr2017/field/Booklet_5_NEXUS.pdf), p. 11

<sup>26</sup> <https://thehill.com/hilltv/rising/409244-dea-chief-says-mexican-cartels-opioid-push-biggest-criminal-threat-to-america>

<sup>27</sup> <https://wreg.com/2018/07/17/police-alabama-teen-beheaded-by-cartel-after-witnessing-grandmothers-murder/>

<sup>28</sup>

[https://www.americanbar.org/content/dam/aba/publications/national\\_security\\_law\\_report/volume32\\_number3.pdf](https://www.americanbar.org/content/dam/aba/publications/national_security_law_report/volume32_number3.pdf)

- Economic: “Mexican cartels are having a negative impact on our economy and financial system. Their involvement in media piracy is costing US businesses hundreds of millions of dollars every year. They are actively using US banks to launder drug money . . . La Familia Michoacana, one of the larger cartels, is even involved in real estate fraud north of the border.”

Finally, of course, is the threat posed by illegal drugs themselves. In 2017, more than 72,000 Americans died of drug overdoses—a total that has more than doubled in the past ten years.<sup>29</sup> Drugs now claim more lives than firearms, suicide, homicide, and even motor vehicle accidents.<sup>30</sup> Mexican TCOs are the primary drivers of this trend. According to the Drug Enforcement Administration’s National Drug Threat Assessment, “The population using heroin, the number of heroin seizures by law enforcement, and the number of heroin-related overdose deaths have increased as heroin availability has increased. Opium poppy cultivation and heroin production in Mexico, believed to be the primary source of heroin for the U.S. market, have continued to surge, providing traffickers a steady stream of high-purity, low-cost heroin to market throughout the United States.”<sup>31</sup>

## Conclusion

Pursuant to 8 USC 1189, organizations must meet three criteria to be properly classified as Foreign Terrorist Organizations: Be foreign in nature, engage in terrorism or terrorist activity or possess the capability and intent to do so, and pose a threat to U.S. nationals or U.S. national security. Mexican TCOs clearly meet all three criteria. They are inherently foreign, routinely commit criminal acts that fall well within the statutory definition of terrorism, and arguably represent a more immediate and ongoing threat to U.S. national security than any of the currently-designated FTOs. Properly designating the major Mexican TCOs as FTOs would enhance to federal government’s ability to combat that threat by enabling the prosecution of those who provide material support to them, facilitating the denial of entry and deportation of TCO members and affiliates, and eliminating the organizations’ access to the U.S. financial system.

## **Part II: Trafficking Victims Protection Act**

The Trafficking Victims Protection Act of 2000, as amended, is a wide-ranging law that addresses the plague of international human trafficking. Key provisions include enhanced criminal sanctions for human traffickers, immigration protections for victims (specifically, the establishment of the T-Visa class), the establishment of the Department of State’s Office to Monitor and Combat Trafficking in Persons, the appropriation of grant funding, and judicial redress for trafficking victims. It also directs the Secretary of State to publish an annual report regarding the global state of the human trafficking problem that includes an assessment of the efforts of foreign nations to effectively address the problem.

This assessment includes the classification of foreign countries’ efforts into three tiers. In 2003, the law was amended to include a de facto fourth category consisting of tier two countries that merit enhanced scrutiny.<sup>32</sup> The criteria for determining the tier placement of foreign nations are as follows:

- **Tier 1:** The governments of countries that fully meet the TVPA’s minimum standards for the elimination of trafficking.

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<sup>29</sup> <https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates>

<sup>30</sup> [https://www.dea.gov/sites/default/files/2018-07/DIR-040-17\\_2017-NDTA.pdf](https://www.dea.gov/sites/default/files/2018-07/DIR-040-17_2017-NDTA.pdf), p. v

<sup>31</sup> [https://www.dea.gov/sites/default/files/2018-07/DIR-040-17\\_2017-NDTA.pdf](https://www.dea.gov/sites/default/files/2018-07/DIR-040-17_2017-NDTA.pdf)

<sup>32</sup> <https://fas.org/sgp/crs/row/R44953.pdf>, p. 1

- **Tier 2:** The governments of countries that do not fully meet the TVPA’s minimum standards, but are making significant efforts to bring themselves into compliance with those standards.
- **Tier 2 Watch List:** The government of countries that do not fully meet the TVPA’s minimum standards, but are making significant efforts to bring themselves into compliance with those standards, and for which:
  - the absolute number of victims of severe forms of trafficking is very significant or is significantly increasing;
  - there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year, including increased investigations, prosecution, and convictions of trafficking crimes, increased assistance to victims, and decreasing evidence of complicity in severe forms of trafficking by government officials; or,
  - the determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on commitments by the country to take additional steps over the next year.
- **Tier 3:** The governments of countries that do not fully meet the TVPA’s minimum standards and are not making significant efforts to do so.

Additional statutory criteria for determining placement on the Tier Two Watch List are:

- The extent to which the country is a country of origin, transit, or destination for severe forms of trafficking,
- The extent to which the country’s government does not meet the TVPA’s minimum standards and, in particular, the extent to which officials or government employees have been complicit in severe forms of trafficking, and
- Reasonable measures that the government would need to undertake to be in compliance with the minimum standards in light of the government’s resources and capabilities to address and eliminate severe forms of trafficking in persons.

The “minimum standards” as defined by the TVPA are as follows:

- (1) The government of the country should prohibit severe forms of trafficking in persons and punish acts of such trafficking.
- (2) For the knowing commission of any act of sex trafficking involving force, fraud, coercion, or in which the victim of sex trafficking is a child incapable of giving meaningful consent, or of trafficking which includes rape or kidnapping or which causes a death, the government of the country should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault.
- (3) For the knowing commission of any act of a severe form of trafficking in persons, the government of the country should prescribe punishment that is sufficiently stringent to deter and that adequately reflects the heinous nature of the offense.

(4) The government of the country should make serious and sustained efforts to eliminate severe forms of trafficking in persons.

There are 12 criteria for meeting the “serious and sustained efforts” standard, summarized by the Congressional Research Service as follows:<sup>33</sup>

1. Enforcement and prosecution—whether governments vigorously investigate and prosecute acts of severe forms of trafficking in persons, including convicting and sentencing those responsible for such acts.
2. Victim protection—whether governments protect victims of severe forms of trafficking in persons, encourage their assistance in the investigation and prosecution of such trafficking, and ensure that victims are not inappropriately incarcerated, fined, or otherwise penalized for unlawful acts resulting directly from having been trafficked.
3. Trafficking prevention—whether governments have adopted measures to prevent severe forms of trafficking in persons.
4. International cooperation—whether governments cooperate with other governments in the investigation and prosecution of severe forms of trafficking in persons and whether governments have entered into bilateral, multilateral, or regional law enforcement cooperation and coordination arrangements with others.
5. Extradition—whether governments extradite those charged with acts of severe forms of trafficking in persons on terms and to an extent similar to those charged with other serious crimes.
6. Trafficking patterns and human rights protections—whether governments monitor migration patterns for evidence of severe forms of trafficking in persons and whether law enforcement responses to such evidence are both consistent with the vigorous investigation and prosecution of acts of such trafficking and with the protection of a victim’s human rights.
7. Enforcement and prosecution of public officials—whether governments vigorously investigate, prosecute, convict, and sentence public officials who participate in or facilitate severe forms of trafficking in persons, as well as whether governments take all appropriate measures against officials who condone such trafficking.
8. Foreign victims—whether noncitizen victims of severe forms of trafficking in persons are insignificant as a percentage of all victims in a country.

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<sup>33</sup> <https://fas.org/sgp/crs/row/R44953.pdf>, p. 12

9. Partnerships—whether governments have entered into effective and transparent partnerships, cooperative arrangements, or agreements that have resulted in concrete and measurable outcomes with the United States or other external partners.

10. Self-monitoring—whether governments systematically monitor their efforts to satisfy certain above-listed criteria and publicly share periodic assessments of such efforts.

11. Progress—whether governments achieve appreciable progress in eliminating severe forms of trafficking in persons, compared to the previous year’s assessment.

12. Demand reduction—whether governments have made serious and sustained efforts to reduce demand for commercial sex acts and international sex tourism.

The most significant impact of designation as a tier three country under the TVPA is the potential loss of U.S. foreign aid under 22 U.S. Code § 7107(a):

“It is the policy of the United States not to provide nonhumanitarian, nontrade-related foreign assistance to any government that—

(1) does not comply with minimum standards for the elimination of trafficking; and

(2) is not making significant efforts to bring itself into compliance with such standards.”

Funding subject to potential restriction includes nonhumanitarian, non-trade-related foreign assistance authorized pursuant to the Foreign Assistance Act of 1961, sales and financing authorized by the Arms Export Control Act (AECA), and educational and cultural exchange funding, as well as loans and other funding provided by multilateral development banks and the International Monetary Fund.<sup>34</sup>

As a practical matter, aid restrictions pursuant to the TVPA are selectively and rarely enforced. The statute requires the President, within 45 to 90 days of the issuance of the State Department’s annual Trafficking in Persons (TIP) Report, to determine whether to fully apply the restrictions or to provide a full or partial waiver in the national interest of the United States. Presidential determinations in recent years are as follows:

<b>Fiscal Year</b>	<b>Aid Restricted</b>	<b>Full National Interest Waiver Granted</b>	<b>Partial National Interest Waiver Granted</b>
2014	Cuba, Iran, North Korea	Algeria, C.A.R., China, Guinea-Bissau, Kuwait, Libya, Mauritania, Papua New Guinea, Russia, Saudi Arabia, Uzbekistan, Yemen	D.R.C., Sudan, Equatorial Guinea, Eritrea, Syria, Zimbabwe
2015	Iran, North Korea, Russia	Algeria, C.A.R., Gambia, Guinea-Bissau, Kuwait, Libya, Malaysia, Mauritania, Papua New Guinea,	Cuba, D.R.C., Equatorial Guinea, Eritrea, Syria, Venezuela, Zimbabwe

<sup>34</sup> <https://fas.org/sgp/crs/row/R44953.pdf>, p. 14

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		Saudi Arabia, Thailand, Uzbekistan, Yemen	
2016	Iran, North Korea	Algeria, Belarus, Belize, Burundi, C.A.R., Comoros, Gambia, Guinea-Bissau, Kuwait, Libya, Marshall Islands, Mauritania, Thailand	Equatorial Guinea, Eritrea, Russia, South Sudan, Syria, Venezuela, Yemen, Zimbabwe
2017	Iran, North Korea	Algeria, Belarus, Belize, Burma, Burundi, C.A.R., Comoros, Djibouti, Gambia, Guinea-Bissau, Haiti, Marshall Islands, Mauritania, Papua New Guinea, Suriname, Turkmenistan, Uzbekistan	Equatorial Guinea, Eritrea, Russia, South Sudan, Sudan, Syria, Venezuela, Zimbabwe

The subjectivity and political sensitivity of tier rankings has led to internal disputes within the Department of State regarding the proper classification of several nations. An investigation by Reuters found that in 2015, officials within the Office to Monitor and Combat Trafficking in Persons (J/TIP) were “repeatedly overruled by senior American diplomats and pressured into inflating assessments of 14 strategically important countries.”<sup>35</sup> Specifically, China, Cuba, Malaysia, and Uzbekistan were all recommended for a tier three designation, but senior department officials ultimately assigned all to the tier two “watch list.”

In the same year, J/TIP officials recommended that Mexico be designated a tier two “watch list” country; however, that recommendation was overruled and it was ultimately elevated to tier two. It is reasonable to assume that these overrides of the J/TIP’s recommendations result from strategic political considerations.

Mexico has been classified as a tier two country for at least the past decade. As evidenced by the initial determination by J/TIP officials in 2015, that classification is dubious. While touting improvements in Mexico’s efforts in certain areas, the 2018 TIP report found that:

The government [of Mexico] did not meet the minimum standards in several key areas. The government obtained fewer convictions than in the previous year; identified fewer victims than in the previous year; provided limited specialized services for trafficking victims, which were unavailable in most parts of the country; and maintained an inadequate number of shelters compared to the scale of the problem. The government inspected and prosecuted few complaints of forced labor in agriculture, in part due to a lack of resources. Corruption and complicity remained significant concerns, inhibiting law enforcement action.<sup>36</sup>

This assessment alone makes a prima facie case that the tier-two classification is inappropriate and that the country should, at a minimum, be downgraded to the Tier Two Watch List.

<sup>35</sup> <https://www.reuters.com/article/us-usa-humantrafficking-disputes-special/special-report-state-department-watered-down-human-trafficking-report-idUSKCN0Q821Y20150803>

<sup>36</sup> <https://www.state.gov/j/tip/rls/tiprpt/countries/2018/282708.htm>

Tier Two Watch List Criteria	Applicability to the Situation in Mexico
<p>The absolute number of victims of severe forms of trafficking is very significant or is significantly increasing.</p>	<p>According to Renato Sales-Heredia, Director of Mexico’s National Security Commission, Mexico ranks fifth in the world in human trafficking.<sup>37</sup></p> <p>A 2017 analysis by the National Citizen Observatory on Femicide found that human trafficking in Mexico was “skyrocketing.”<sup>38</sup></p> <p>DHS estimates that Mexican criminal organizations generate \$500 million from human smuggling annually.<sup>39</sup></p>
<p>There is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year, including increased investigations, prosecution, and convictions of trafficking crimes, increased assistance to victims, and decreasing evidence of complicity in severe forms of trafficking by government officials.</p>	<p>As noted in the 2018 TIP report, the number of convictions for human trafficking and the number of victims identified in Mexico have both fallen.</p> <p>The report also found that, “corruption and complicity remained significant concerns, inhibiting law enforcement action.”</p> <p>16,000-20,000 Mexican and Central American children are estimated to be sex victims in Mexico.<sup>40</sup></p>
<p>The determination that a country is making significant efforts to bring itself into compliance with minimum standards was based on commitments by the country to take additional steps over the next year.</p>	<p>Mexico is repeatedly described by the Department of State as endeavoring to improve its anti-human trafficking efforts; however, the results have been mixed.</p> <p>In every annual Trafficking in Persons report since 2004, the language to describe the situation in Mexico has been identical: “The Government of Mexico does not fully comply with the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so.”</p>

<sup>37</sup> <http://www.eluniversal.com.mx/english/mexico-ranks-fifth-human-trafficking>

<sup>38</sup> <https://www.telesurtv.net/english/news/Human-Trafficking-Soaring-in-Mexico-Rights-Groups-Warn--20171227-0025.html>

<sup>39</sup> <https://www.washingtontimes.com/news/2018/may/15/kirstjen-nielsen-cartels-make-500-million-year-smu/>

<sup>40</sup> <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1036&context=njihr>, p. 314

Fifteen years of “significant efforts” to meet the statutory minimum standards for effectively combating human trafficking is difficult to reconcile with the current crisis in Mexico and raises the question of whether Mexico could be more accurately classified as a tier three country. By many of the criteria that define “serious and sustained efforts” to address the problem, Mexico has been demonstrably unsuccessful. Those include:

- **Whether governments vigorously investigate and prosecute acts of severe forms of trafficking in persons, including convicting and sentencing those responsible for such acts:** As noted above, the number of convictions for human trafficking in Mexico decreased during the 2018 TIP reporting period. In 2016, the government won convictions against 228 human traffickers. Last year, the total fell to 95.<sup>41</sup> The TIP report also found that, “The government had laws to facilitate the investigation, prosecution, or conviction of child sex tourists, but did not report any such cases. Some NGOs alleged corrupt local officials allowed child sex tourism to occur in isolated incidents, but the government did not take action in these cases.”
- **Whether governments have adopted measures to prevent severe forms of trafficking in persons:** Mexico is the “highest-ranked country in the Americas in terms of female trafficking for sexual exploitation.”<sup>42</sup> An estimated “21,000 minors are captured by trafficking networks for sexual exploitation” each year in the country, and 26 percent of human trafficking victims are minors.<sup>43</sup>
- **Whether governments protect victims of severe forms of trafficking in persons, encourage their assistance in the investigation and prosecution of such trafficking, and ensure that victims are not inappropriately incarcerated, filed, or otherwise penalized for unlawful acts resulting directly from having been trafficked:** Though there are statutory protections for victims of severe forms of human trafficking in Mexico, their application is inconsistent. According to the 2018 TIP report:

“NGOs reported that in practice some officials unlawfully detained victims. Some officials transferred victims to [immigration authorities] for detention and deportation due to their immigration status and lack of formal identification as trafficking victims. Individuals in prostitution in Mexico City alleged officials detained and forced them to sign declarations accusing detained individuals of trafficking, which raised serious concerns about law enforcement tactics to secure evidence. NGOs also reported officials often re-traumatized trafficking victims due to lack of sensitivity. The national anti-trafficking law provided for

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<sup>41</sup> <https://www.state.gov/j/tip/rls/tiprpt/countries/2018/282708.htm>

<sup>42</sup> <http://blogs.lse.ac.uk/latamcaribbean/2018/09/26/sex-trafficking-and-sexual-exploitation-are-collateral-damage-of-mexicos-neoliberal-fantasy/#author-info>

<sup>43</sup> <https://www.eleconomista.com.mx/politica/Mexico-sin-cifras-precisas-sobre-trata-20170730-0073.html>

restitution to be paid from a victims’ fund, but the government did not report whether the courts awarded any trafficking victims restitution.”<sup>44</sup>

In addition, the number of trafficking victims identified by Mexican authorities is falling dramatically, from 1,814 in 2015 to just 667 in 2017.

### **Conclusion**

The Department of State’s assessment of foreign nations’ efforts to combat human trafficking and the statutory authority to impose meaningful restrictions on foreign assistance to the world’s worst violators are critical components of the U.S. government’s anti-trafficking efforts. Unfortunately, political interference in the three-tier classification system codified in the Trafficking Victims Protection Act of 2000, as amended, undermines this goal. The country of Mexico has been classified as a tier two country since 2005. To merit this classification under the law, tier two countries must be, “making significant efforts to bring themselves into compliance” with the minimum standards for human trafficking prevention and reduction efforts as defined in the TVPA.

The scale of the human trafficking crisis in Mexico, including the prevalence of sex trafficking and the sexual abuse of minors, and the government’s ineffective response to the problem are inconsistent with a tier two classification. The number of trafficking victims identified by Mexican authorities and the number of convictions of traffickers are both declining sharply, and trafficking rings directed by transnational criminal organizations operate with near immunity.

In 2015, officials with the Department of State’s Office to Monitor and Combat Trafficking in Persons reportedly recommended that Mexico’s classification be downgraded to a level more commensurate with the country’s anti-trafficking efforts; however, their recommendation was rejected by senior officials. NGOs report that the situation in the country has only deteriorated in the intervening three years.

Since at least 2004, the Department of State’s annual Trafficking in Persons report has asserted that while, “The Government of Mexico does not fully comply with the minimum standards for the elimination of trafficking; however, it is making significant efforts to do so.” The lack of meaningful progress in the fight against human trafficking in Mexico in those fifteen years calls this assessment into doubt—indeed, it calls into doubt whether it is a factual assessment at all, or a politically-motivated and unsubstantiated claim designed to protect one of our largest trading partners.

As detailed above, the Government of Mexico’s anti-human trafficking efforts do not meet the statutory requirement for tier two classification, and whether they meet the standard for tier two watch list status is debatable. The Department of State’s inflation of Mexico’s classification weakens the effectiveness of the TVPA and, if continued, will likely raise questions in the international community regarding the depth of the U.S. Government’s commitment to combating human trafficking.

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<sup>44</sup> <https://www.state.gov/j/tip/rls/tiprpt/countries/2018/282708.htm>