



MEXICAN CONSULAR AND DIPLOMATIC FUNCTIONS  
VIS-À-VIS PRIVATE INTERNATIONAL LAW  
AND NATIONALITY CONFLICTS: TOWARDS  
A NEW NORMATIVE FRAMEWORK  
FOR THE TWENTY-FIRST CENTURY

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*ABSTRACT: The study of Mexican law and practice makes it apparent that the regulation of several consular and diplomatic functions within the framework of the protection of nationals and dual or multiple nationals abroad, inheritance upon death (successions mortis causa), family law and international judicial assistance, needs to be updated in accordance with the development of private international law, information technologies and cyberspace. Ongoing preparatory work in drafting National Rules on Civil and Family Law Procedure presents an opportunity and framework to that effect, opening space for inter alia: the legal recognition of electronic apostilles (e-APPs); for regulating consular intervention on behalf of minors and persons lacking full capacity; for reasserting the mandatory six-week deadline for the child's return in international child abduction procedures; as well as for enacting domestic provisions on the transmission and execution of requests of international judicial assistance by electronic means; as well as for digital research into foreign law. Mexico's leadership would likewise be enhanced through the promotion of multilateral protocols on the subject and the negotiation of international judicial technological interconnection agreements; through the updating of official guidelines on consular protection for dual or multiple nationals; through the statutory definition of Mexican authorities entrusted with executing foreign requests regarding Mexican law; and in particular through the launching of a Presidential Program on International Human Mobility and high level programs connected to The law of the international movement of persons.*

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**KEYWORDS:** *Apostille, consular functions, diplomatic functions, international judicial assistance, nationality conflicts, private international law, draft National Rules on Civil and Family Law Procedure.*

**RESUMEN:** *Del análisis de la normatividad y la práctica mexicanas, se desprende que la regulación de diversas funciones consulares y diplomáticas vinculadas con la protección de nacionales tanto como de dobles o múltiples nacionales, las sucesiones y el derecho de familia, así como con la cooperación procesal internacional, amerita impostergables adecuaciones que las pongan en sincronía con el desarrollo del derecho internacional privado, de las tecnologías de la información y del ciberespacio. La deliberación del proyecto de Código Nacional de Procedimientos Civiles y Familiares presenta la oportunidad y el espacio naturales para ello, mediante por ejemplo el reconocimiento expreso de las apostillas electrónicas; la regulación de la intervención consular a favor de menores e incapaces y la reafirmación del plazo convencional de seis semanas para casos de sustracción internacional de menores; tanto como la transmisión y el desahogo de rogatorias internacionales, así como la constatación del derecho extranjero, por medios electrónicos. La promoción de protocolos internacionales para la obtención de pruebas y la práctica de notificaciones por medios digitales, la celebración de convenios judiciales de interconexión tecnológica internacional, la actualización de guías consulares en materia de protección de dobles o múltiples nacionales y la definición legal de autoridades mexicanas competentes para atender solicitudes extranjeras de información sobre derecho mexicano, pero sobre todo el establecimiento de un Programa presidencial de movilidad humana internacional junto con programas de alto nivel sobre el Derecho de los flujos internacionales de personas, abonarían también al liderazgo de México en este ámbito.*

**PALABRAS CLAVE:** *Apostilla; conflictos de nacionalidad; cooperación procesal internacional; derecho internacional privado; funciones consulares; funciones diplomáticas; proyecto de Código Nacional de Procedimientos Civiles y Familiares.*

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## I. INTRODUCTION AND BACKGROUND

*Legal research is to be technically sound, politically impartial, as well as useful from the social standpoint. Ordinary citizens should expect legal scholars to be able to ascertain and to propose the best juridical options to settle social conflicts within the framework of peaceful conviviality. Our mission is to find out both the best practices and the most avant-garde approaches in order to set out proposals—which competent authorities might eventually make their own—towards the national Rule of law’s advancement.*

Pedro SALAZAR UGARTE<sup>1</sup>

At first glance, to address the connection between consular and diplomatic functions and private international law might seem like a trivial exercise. In spite of certain overlaps between public and private international law in this field, consular functions are traditionally associated with “private” international law, within the framework of jurisdiction and applicable law to the points of contact among the nationals of the receiving State and the sending

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<sup>1</sup> See [interview by] Gerardo Laveaga, *Pedro Salazar Ugarte. Investigación jurídica desde la UNAM, EL MUNDO DEL ABOGADO*, (March 29, 2018), available at <http://elmundodelabogado.com/revista/entrevistas/item/pedro-salazar-ugarte>.

State, or viceversa. By comparison, diplomatic functions are more often associated with “public” international law, due to the representation, negotiation, cooperation and dispute prevention and settlement that occur between and among States. A rudimentary online research leads us immediately to the Hague Academy Collected Courses,<sup>2</sup> as well as to writings in English,<sup>3</sup> French<sup>4</sup> and Spanish<sup>5</sup> on the subject. Nevertheless, in so far as Mexican law and practice are concerned, this topic is anything but trivial. The same is true regarding related issues concerning international conflicts in nationality law, which are traditionally approached within the purview of public international law while remaining closely related to private international law, especially (albeit not exclusively) in the case of transnational corporations.

In Mexico, the strategic value of private international law for a “socially oriented humanistic” foreign policy has been evident since the 1990s; as a response to the international abduction of Mexican children, in the 1990s Mexico became party to the Hague Conventions on Apostille, on the Civil Aspects of International Child Abduction and on Intercountry Adoption, as well as to the U.N. Convention on Maintenance Obligations, catalyzed through the sponsorship of the Foreign Affairs Ministry (FAM).<sup>6</sup> Today, the actual or potential effects of policies that criminalize undocumented migration, the uncertainty surrounding the Deferred Action for Childhood Arrivals program (DACA) and an ongoing anti-immigrant, xenophobic atmosphere<sup>7</sup> impacting the property, legal standing, education and family integrity of countless Mexican citizens in the U.S., make the strategic value of private international law even more apparent.

Indeed, it would be misleading to equate private international law to a panacea for such challenges, yet it may nevertheless contribute —with the crucial assistance of the Mexican Foreign Service (MFS)— to mitigating the so-

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<sup>2</sup> See Adolfo Maresca, *Les relations consulaires et les fonctions du consul en matière de droit privé*, 134 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 105 (1971).

<sup>3</sup> See Jana Maftai, *The Contribution of the European Convention on Consular Functions to International Law*, EUROPEAN INTEGRATION – REALITIES AND PERSPECTIVES. PROCEEDINGS (2005), available at [https://www.researchgate.net/publication/311576884\\_The\\_Contribution\\_of\\_the\\_European\\_Convention\\_on\\_Consular\\_Functions\\_to\\_the\\_Development\\_of\\_International\\_Law](https://www.researchgate.net/publication/311576884_The_Contribution_of_the_European_Convention_on_Consular_Functions_to_the_Development_of_International_Law).

<sup>4</sup> See Götz-Sebastian Hök, *Le fonctions consulaires en droit civil*, EUROJURIS, available at <http://www.dr-hoek.de/FR/beitrag.asp?t=les-fonctions-des-fonctionnaires-consulaires>.

<sup>5</sup> See MARIANO AGUILAR BENÍTEZ DE LUGO, *INTERVENCIÓN CONSULAR EN EL DERECHO INTERNACIONAL PRIVADO* (Universidad de Sevilla, 2005).

<sup>6</sup> See Eduardo Peña, *Combate al secuestro de niños mexicanos en EU y el programa de capacitación de miembros del SEM en derecho estadounidense*, 109 REVISTA MEXICANA DE POLÍTICA EXTERIOR 232 (2017); and María Cristina Oropeza, *El derecho internacional privado y la política exterior: Apuntes desde los alimentos internacionales*, *id.*, at 75.

<sup>7</sup> See, e.g., Víctor Corzo, *Entre sueños y pesadillas: el programa DACA*, EL MUNDO DEL ABOGADO (Oct. 4th, 2017), available at <http://elmundodelabogado.com/revista/derecho-en-el-mundo/item/entre-suenos-y-pesadillas-el-programa-daca>.

cial and human costs of a deportation, the disintegration of families or the dissolution of marriages across borders, for example. As outlined by the Hague Conference on Private International Law, the purpose of this legal field is to build bridges between legal systems in order to reinforce legal certainty in personal, family or commercial situations involving more than one country. Seldom have such bridges been so vital.

One cannot overemphasize the anachronistic nature of certain Mexican norms and practices pertaining to: dual nationality conflicts; apostilles; the consular protection of minors and other nationals requiring special measures of assistance; and international judicial assistance. Astonishingly, none of these—with the exception of intercountry adoption rules—have been updated in the draft National Code on Civil and Family Law Procedure (NCCL) that was entered into the legislative docket<sup>8</sup> after a landmark Constitutional amendment, which, in the words of a leading scholar, was one of the most critical reforms enacted in Mexico in 2017.<sup>9</sup>

The purpose of this paper is to call attention to the need to harmonize the national legal framework pertaining to certain functions foreseen in the Vienna Consular and Diplomatic Conventions, as well as in the Mexican Foreign Service Act (MFSA),<sup>10</sup> in accordance with the development of private international law, information technologies and cyberspace, as well as with higher standards of juridical certainty and effective access to justice. Consular and diplomatic functions shall be successively addressed, each within its specific legal framework, and, whenever possible, in the same order in which they are enunciated in the Vienna Conventions. Proposals towards normative and institutional improvements are included in the concluding remarks.

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<sup>8</sup> See Senadora Yolanda de la Torre Valdéz et al. (Partido Revolucionario Institucional, LXIII Legislatura), INICIATIVA CON PROYECTO DE DECRETO POR EL QUE SE EXPIDE EL CÓDIGO NACIONAL DE PROCEDIMIENTOS CIVILES Y FAMILIARES Y QUE REFORMA LA LEY GENERAL DE LOS DERECHOS DE LAS NIÑAS, NIÑOS Y ADOLESCENTES, ASÍ COMO, LA LEY ORGÁNICA DEL PODER JUDICIAL DE LA FEDERACIÓN, EN MATERIA DE ADOPCIÓN, available at BARRA MEXICANA, COLEGIO DE ABOGADOS A.C., BMA OBSERVATORIO JURÍDICO, 02/11/2017, CÓDIGO NACIONAL DE PROCEDIMIENTOS CIVILES (PROYECTO), available at <https://www.bmaobservatorio.org.mx/codigo-nacional-de-procedimientos-civiles-proyecto/> [hereinafter draft NCCP or NCCP]; compare the draft NCCP, arts. 568-602 with Código Federal de Procedimientos Civiles [C.F.P.C.] [Federal Civil Procedure Code, hereinafter FCCP], as amended, Diario Oficial de la Federación [D.O.], 24 de febrero de 1943 (Mex.), arts. 543-577.

<sup>9</sup> See Raúl Contreras, *Código único en materia civil y familiar*, EXCÉLSIOR, (Jan. 13, 2018), available at <http://www.excelsior.com.mx/opinion/raul-contreras-bustamante/2018/01/13/1213364>; see also Decreto por el que se reforman y adicionan los artículos 16, 17 y 73 de la Constitución Política de los Estados Unidos Mexicanos, en materia de Justicia Cotidiana (Solución de Fondo del Conflicto y Competencia Legislativa sobre Procedimientos Civiles y Familiares), D.O. 15 de septiembre de 2017 (Mex.).

<sup>10</sup> Ley del Servicio Exterior Mexicano [L.S.E.M.], as amended, D.O. Jan. 4th, 1994 (Mex.).

## II. CONSULAR FUNCTIONS, PRIVATE INTERNATIONAL LAW AND NATIONALITY CONFLICTS: “HELPING AND ASSISTING NATIONALS”

### 1. *Legislative History*

The Vienna Convention on Consular Relations<sup>11</sup> (VCCR) —with its two additional protocols—<sup>12</sup> was adopted by the United Nations Conference on Consular Relations on April 24, 1963; the Conference was convened under General Assembly Resolution 1685 (XVI) of 18 December 1961, in order to fulfill the codification and progressive development undertaken by the International Law Commission (ILC) since 1955.<sup>13</sup> Mexico was included among 92 participating States, and it took charge of one of 18 Vice-Chairs.<sup>14</sup> The 1928 Havana Convention on Diplomatic Agents, concluded during the Sixth International Conference of American States, was distributed among the official documents.<sup>15</sup> The *travaux préparatoires* of the VCCR left no doubt that the list of consular functions in Article 5 should not be approached as exhaustive, to the extent that the sending State remains free to entrust to the consular post other functions “which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State”.<sup>16</sup> Furthermore, an addition to the draft during the Conference regarding “transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence”<sup>17</sup> is particularly significant, as it made the connection between the VCCR and other treaties drafted by the Hague Conference since 1954 even more apparent, all within a timeframe nearly parallel to that of the ILC. It bears noting that Article 1 of the 1954 Hague Convention on Civil Procedure predated the Vienna Convention in enshrining the role of consular agents in the international service regarding processes between Contracting States.

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<sup>11</sup> Vienna Convention on Consular Relations, adopted Apr. 24, 1963, entered into force Mar. 19, 1967, 21 U.S.T. 77; 596 U.N.T.S. 261.

<sup>12</sup> Optional Protocol to the Vienna Convention on Consular Relations Concerning Acquisition of Nationality, adopted Apr. 24, 1963, entered into force Mar. 19, 1967, 596 U.N.T.S. 469; Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, adopted Apr. 24, 1963, entered into force Mar. 19, 1967, 21 U.S.T. 325; 596 U.N.T.S. 487.

<sup>13</sup> See Santiago Torres, *La Convention de Vienne sur les Relations Consulaires (La Conférence de Nations Unies sur les Relations Consulaires)*, 9 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 78-118 (1963).

<sup>14</sup> *Id.* at 79.

<sup>15</sup> *Ibid.* at 80.

<sup>16</sup> *Ibid.* at 84-85; see VCCR art. 5(m).

<sup>17</sup> Santiago Torres, *supra* note 14, at 84-85.

The essential consular function enshrined in Article 5(a) of the VCCR consists of “protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law”. Article 5(e) similarly includes among consular functions “helping and assisting nationals, both individuals and bodies corporate, of the sending State”. Article 36, moreover, codifies so-called “Communication and contact with nationals of the sending State” concerning the arrest, imprisonment or custody pending trial, or detention in any other manner of any of those nationals, which is vigorously reasserted by both the Inter-American Human Rights Court and the International Court of Justice upon, *inter alia*, Mexico’s well-known legal *démarches*.<sup>18</sup>

The MFSA provides, in turn: (a) That it is a corporate, institutional duty of the MFS as a whole, not only of consular posts: “To protect, under the rules and principles of international law, the dignity and rights of Mexican nationals abroad, as well as to exercise all befitting actions towards the vindication of their rightful claims” (art. 2 § II); (b) That it is the duty of all heads of consular posts: “To protect, within their corresponding consular districts, the interests of Mexico and the rights of Mexican nationals under international law as well as to keep the FAM updated about the situation of those nationals, especially in cases requiring special measures of protection” (art. 44 § I).

The question of whether the consular post is expected to “protect”, “help” or “assist” a Mexican national in any given case appears to be one of degree. Suffice it to highlight here certain questions pertaining the nationality of individuals and bodies corporate for either consular or diplomatic protection purposes.

## 2. “Helping and Assisting Nationals”: Individuals

### A. Nationality Conflicts

In Mexican law and practice consular protection is oriented towards individuals. Neither the term “*personas naturales*” (individuals) nor the term “*personas jurídicas*” (bodies corporate) used in the VCCR Spanish text are to be found in the MFSA. Nonetheless, under the rules and principles of international law indirectly incorporated by the MFSA it is essential for an individual’s consular or diplomatic protection abroad —*vis-à-vis* either the receiving State or a third State— to ascertain whether the Mexican national has acquired other nationality or nationalities, either by freely chosen naturalization, or

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<sup>18</sup> See The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, 1999 Inter-Am. C.H.R., (Ser. A) No. 16 (Oct. 1st., 1999) [requested by Mexico]; *Avena and Other Mexican Nationals (Mex. v. U.S.)* 2004 I.C.J. Rep. 12 (Mar. 31).

as result of either or both of the so-called *jus soli* and *jus sanguini* principles. Paradoxically, the Constitution of Mexico, the MFSA and its Regulations, the Mexican Nationality Act and its Regulations, and the official MFS online guidelines on consular protection do not explain how the MFS is expected to address the protection of dual or multiple Mexican nationals.<sup>19</sup>

With these gaps in mind, is worth returning to the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.<sup>20</sup> Even if the underlying rationale of the 1930 Hague Convention is the suppression of both statelessness and dual nationality, pursuant to the international framework then in force,<sup>21</sup> and although the Convention's text technically addresses diplomatic protection only, it is nevertheless a most suitable precedent regarding the principles of international law governing, *mutatis mutandis*, both the consular and diplomatic protection of dual nationals. Article 4 states: "A State may not afford diplomatic protection to one of its national against a State whose nationality such person also possesses"; and according to Article 5:

Within a third State, a person having more than one nationality shall be treated as if he had only one. Without prejudice to the application of its law in matters of personal status and of any conventions in force, a third State shall, of the nationalities which any such person possesses, recognise exclusively in its territory either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected.

The ILC, in its 2006 Draft articles on Diplomatic Protection,<sup>22</sup> addresses the matter in a similar manner, albeit with particular overtones:

*Article 6*

*Multiple nationality and claim against a third State*

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<sup>19</sup> See, e.g., Secretaría de Relaciones Exteriores (S.R.E.), Dirección General de Protección a Mexicanos en el Exterior, *Guía de procedimientos de protección consular*, S.R.E., 1st ed., 2013, available at [https://www.gob.mx/cms/uploads/attachment/file/109345/Gu\\_a\\_de\\_Procedimientos\\_de\\_Protecci\\_n\\_Consular.pdf](https://www.gob.mx/cms/uploads/attachment/file/109345/Gu_a_de_Procedimientos_de_Protecci_n_Consular.pdf); CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS [hereinafter MEX. CONST.], D.O. Feb. 5, 1917, as amended D.O. March 20, 1997, art. 32; Ley de Nacionalidad, D.O. Jan. 23, 1998 (Mex.), arts. 12 *et seq.*

<sup>20</sup> Convention on Certain Questions Relating to the Conflict of Nationality Laws, adopted 12 April 1930; entered into force July 1st, 1937, 179 L.N.T.S. 89, No. 4137.

<sup>21</sup> See Mariano Aguilar, *Doble nacionalidad*, 10-11 BOLETÍN DE LA FACULTAD DE DERECHO, (UNED, Madrid, 1996), available at <http://e-spacio.uned.es/fez/eserv.php?pid=bibliuned: BFD-1996-10-11-D08AEE0E&dsID=PDF>.

<sup>22</sup> I.L.C., Draft articles on Diplomatic Protection, 2006, Official Records of the General Assembly, Sixty-first Session, Supplement No. 10 (A/61/10), available at [http://legal.un.org/ilc/texts/instruments/english/draft\\_articles/9\\_8\\_2006.pdf](http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf).

1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.

2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.

*Article 7*

*Multiple nationality and claim against a State of nationality*

A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.

“For the purposes of the diplomatic protection of a natural person, a State of nationality means”, pursuant to Article 4, “a State whose nationality that person has acquired, in accordance with the law of that State, by birth, descent, naturalization, succession of States or in any other manner, not inconsistent with international law”.

Within this framework a Mexican national simultaneously bearing another nationality would hardly retain standing to resort to Mexican consular protection *vis-à-vis* the State of his or her other nationality, or viceversa. By contrast, Mexico could and should, if appropriate, afford him or her protection *vis-à-vis* a third State, whether individually or jointly with the State of his or her other nationality, to the extent of his or her habitual residence in Mexican territory. Furthermore, should the interested individual’s Mexican nationality be fully established, upon his or her stating not to bear the receiving State’s nationality, the consular post would be under the duty to protect the individual, unless and until the emergence of supervening proof to the contrary or in case of express objection to such action by the interested —adult, fully capable— individual (*see* VCCR, art. 36.2 *in fine*).

Further overtones arise out of comparative law and practice. The U.S. Department of State cautions dual U.S. nationals that “their dual nationality *may hamper efforts of the U.S. Government to provide consular protection to them when they are abroad, especially when they are in the country of their second nationality*”.<sup>23</sup> Mexico’s Supreme Court of Justice, in an *avant-garde*, pro-human rights 2014 resolution drafted by Judge Ortiz-Mena —oblivious, it seems, of both its potential foreign policy repercussions and international conflicts of nationality law— states:<sup>24</sup>

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<sup>23</sup> U.S. STATE DEPT. – BUREAU OF CONSULAR AFFAIRS, DUAL NATIONALITY, *available at* <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/Advice-about-Possible-Loss-of-US-Nationality-Dual-Nationality/Dual-Nationality.html> (emphasis added).

<sup>24</sup> NOTIFICACIÓN, CONTACTO Y ASISTENCIA CONSULAR DE LAS PERSONAS MEXICANAS DETENIDAS QUE TENGAN DOBLE O MÚLTIPLE NACIONALIDAD. LA AUTORIDAD NO PUEDE TOMAR EN CUENTA ELEMENTOS DE ALEGADA PERTENENCIA NACIONAL PARA NEGAR AQUEL DERECHO HUMANO, Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Gaceta del

Whenever an individual bearing dual or multiple nationalities —Mexico’s among them— is detained, authorities are prevented from assessing the individual’s sense of alleged national allegiance —including language, residence, family bonds— in order to deny such right [of consular communication, access and assistance]—, which has evolved into a human right to be recognized under any circumstance. Hence, in the case of an individual bearing dual or multiple nationalities —Mexico’s among them— [...] no police, prosecuting or judicial authority is to assume that an individual’s bearing of Mexican nationality suffices to fulfill the cultural ethos’s requirements [...] the only circumstance to be taken into account by the bench —for the sole purpose of assessing the effects of the violation of this right in a given case— is whether, on due process and effective access to justice grounds, the interested individual enjoyed access to adequate means of defense. In case of evidence of failure to recognize the individual’s right, that does not withstand, beyond the question of the dual or multiple national’s adequate defense, for the court’s guaranteeing his/her immediate access to it, at any stage of the proceedings.

Mexican law enforcement and judicial authorities would thus now in theory be bound,<sup>25</sup> under the Supreme Court’s approach, to mandatorily accord consular communication and access to dual Mexican nationals arrested in Mexican territory. Should it then follow that Mexican consular authorities are equally bound to assist dual Mexican nationals abroad, provided that foreign authorities within their districts similarly accord the arrested individuals consular communication and access? Moreover, should consular authorities demand that such communication be mandatorily accorded in cases of detention of dual Mexican nationals bearing the receiving State’s nationality? From a foreign affairs standpoint the answer should probably take into account international comity and reciprocity: If Mexican law enforcement and judicial authorities accord consular communication and access in cases of dual Mexican nationals bearing the nationality of the receiving State, then the receiving State should reciprocally accord equal consular rights in cases of dual nationals of the receiving State bearing Mexican nationality as well.<sup>26</sup>

Approaching the issue from the human rights law perspective, however, leads to a different result. International case law makes it plain that the due process-related right of consular communication, access and assistance is to display its full benefits regardless of international comity and reciprocity.<sup>27</sup>

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Semanario Judicial de la Federación, Décima Época, Libro 12, Noviembre de 2014, Amparo directo en revisión 496/2014, 8 de octubre de 2014, Tesis 2007986. 1a. CDIV/2014, Página 723 (Mex.).

<sup>25</sup> Because of the limited scope of the writ of amparo to the individual cases before the Mexican courts of law, preliminarily the Supreme Court’s resolution could be ignored by law enforcement and judicial authorities not directly involved as parties in the case at hand without any sort of legal consequence for these authorities.

<sup>26</sup> See Inter-Am. C.H.R., Advisory Opinion OC-16/99, *supra* note 19, at 15 (U.S. pleadings).

<sup>27</sup> *Id.*, 88-97 (Inter-American Court’s reasoning).

And it does make sense to provide a higher standard of protection to dual nationals of the sending State without effective language, cultural, residence or family bonds to the receiving State of their simultaneous nationality. But the potentially controversial effects to which a blind dismissal of cases involving dual nationals by reason of non-compliance with consular communication is illustrated by the release—in part, claim certain sources, due to the failure of law enforcement authorities to comply with consular communication during her arrest in Mexico—of “Comandanta Nestora”, a dual U.S.-Mexican national who is now a senator despite alleged human rights abuses against the civilian population by the so-called “*policía comunitaria*” she led when alleged abuses were committed in Olinalá, in the Mexican State of Guerrero.<sup>28</sup>

Soundly applied, Mexico’s highest Court’s approach would rather seem to involve a three-fold standard. First, whenever a dual Mexican national is arrested in Mexico, his/her human right of consular communication and access is to be fully respected by Mexican authorities; second, failure to do so is to be addressed by according immediate consular communication and access, at any stage of the procedure; and third, whether the arresting authority’s failure to provide consular communication and access had the effect of depriving the dual national from adequate means of defense consistent with due process and effective access to justice is to be determined on a case-by-case basis taking into account the court’s assessment of national allegiance including language, culture, residence and family bonds. Such a reading of the Supreme Court of Mexico’s 2014 resolution does provide as well meaningful guidelines for assessing the degree—if any—of protection of dual Mexican nationals abroad that might be expected from Mexican consular posts, in order to assure their adequate defense and effective access to due process and justice, under a due diligence standard.

### B. Other Developments

Beyond the technicalities pertaining to the consular protection of dual nationals, it is instructive to review three related developments in international law. In the case of denial of justice or flagrant violation of internationally recognized human rights of the dual Mexican national in and by the receiving

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<sup>28</sup> See, e.g. Rogelio Agustín Esteban, *Quién es Nestora Salgado*, MILENIO, (May 25, 2018), available at <http://www.milenio.com/policia/quien-es-nestora-salgado>; Carlos Marín, *La presenadora Nestora*, *id.*, (May 24, 2018), available at <http://www.milenio.com/opinion/carlos-marin/el-asalto-la-razon/la-presenadora-nestora>; Héctor de Mauleón, *La otra Nestora*, EL UNIVERSAL, (May 23, 2018), available at <http://www.eluniversal.com.mx/columna/hector-de-mauleon/nacion/la-otra-nestora>; Gloria Leticia Díaz, *Se violó debido proceso de Nestora pero comunitarios también cometieron abusos: CNDH*, PROCESO, (May 23, 2018), available at <https://www.proceso.com.mx/535516/se-violo-debido-proceso-de-nestora-pero-comunitarios-tambien-cometieron-abusos-cndh>.

Stat —his or her other nationality being the receiving State’s— by reason of the individual’s national origin, it seems clear that it is the duty of the head of the Mexican consular post in whose district the denial or violation takes place, to report it to the corresponding diplomatic mission as well as to the FAM, in order for them to assess the pertinent *démarches* under international law. Emerging as far back as the 1848 Treaty of Guadalupe Hidalgo —with provisions intended to assure the interim protection of Mexican citizens to acquire U.S. citizenship in enjoyment of their civil, political and religious rights, as well as of their property and equal standing before the law—,<sup>29</sup> the principle of juridical equality and non-discrimination is today recognized in inter-American law as one with *jus cogens, erga omnes* rank —the highest existing standard of international protection—.<sup>30</sup>

Another noteworthy development is to be found in Article 46 of the European Union’s Charter on Fundamental Rights,<sup>31</sup> according to which: “Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.” Supplementing the launching of the “joint embassies” project by Colombia, Chile, Mexico and Peru under the Pacific Alliance institutional framework is a consular assistance cooperation agreement, in force since 2014, that resembles EU Charter’s Article 46.<sup>32</sup>

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<sup>29</sup> See Treaty of Peace, Friendship, Limits, and Settlement, U.S.-Mexico, May 30, 1848, art. IX; available at NATIONAL ARCHIVES, available at <https://www.docstoc.org/documents/document/guadalupe-hidalgo-original>.

<sup>30</sup> See Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, 2003 Inter-Am. C.H.R., (Ser. A) No. 18 (Sep. 17, 2003), 173 [requested by Mexico]. See also American Convention on Human Rights, Nov. 21, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143, S. Treaty Doc. No. 95-21, 9 I.L.M. 99 (1969), pmb. & art. 24. On *jus cogens* see generally ANTONIO GÓMEZ - ROBLEDO, *EL ius cogens INTERNACIONAL. ESTUDIO HISTÓRICO – CRÍTICO* (Instituto de Investigaciones Jurídicas, UNAM, Serie Doctrina Jurídica, Núm. 147, México, 2003) (1982); and Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, arts. 53 & 64.

<sup>31</sup> Charter of Fundamental Rights of the European Union, Nize, December 7th, 2000 (2012/C 326/02).

<sup>32</sup> See, e.g., GOBIERNO DE COLOMBIA – CANCELLERÍA, *EMBAJADAS COMPARTIDAS ENTRE CHILE, COLOMBIA, MÉXICO Y PERÚ, UNO DE LOS LOGROS DE LA ALIANZA DEL PACÍFICO*, (Feb. 8th, 2014), available at <http://www.cancilleria.gov.co/newsroom/news/embajadas-compartidas-entre-chile-colombia-mexico-y-peru-uno-los-logros-la-alianza-del>; Acuerdo Interinstitucional entre los Ministerios de Relaciones Exteriores de los Estados Parte de la Alianza del Pacífico para el Establecimiento de Medidas de Cooperación en Materia de Asistencia Consular, (Feb. 10, 2014), available at [http://apw.cancilleria.gov.co/tratados/AdjuntosTratados/d3f7c\\_AP\\_M-ACINTERINSTITUCIONAL PARAESTABLECIMIENTODEMEDIDASDECOOPERACIONENMATERIACONSULAR2014-TEXTO.pdf](http://apw.cancilleria.gov.co/tratados/AdjuntosTratados/d3f7c_AP_M-ACINTERINSTITUCIONAL PARAESTABLECIMIENTODEMEDIDASDECOOPERACIONENMATERIACONSULAR2014-TEXTO.pdf); República de Colombia – Cancillería, *CANCELLERES DE LA ALIANZA DEL PACÍFICO*

Finally, in spite of its limited scope (only three ratifications: Georgia in 2011, Norway since 1976, Portugal as of 1985; not yet the five required for entry into force), Article 2.2 of the 1967 Protocol to the European Convention on Consular Functions concerning the Protection of Refugees, sets out the consular protection of refugees by their State of habitual residence,<sup>33</sup> and ought not to be overlooked.

### 3. “Helping and Assisting Nationals”: Corporate Bodies

As Professor Elina Mereminskaya aptly demonstrates, within the international legal framework currently in force the consular and diplomatic protection of bodies corporate has receded into an essentially residual institution. Mereminskaya argues this comes as a result of the development of dispute-settlement mechanisms such as the World Bank’s International Centre for Settlement of Investment Disputes (ICSID)—whose foundational Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) was recently approved by the Mexican Senate—,<sup>34</sup> but also of the proliferation of Free Trade and Reciprocal Promotion and Protection of Investments Agreements (FTAs/RPIAs).<sup>35</sup> Unlike the legal framework in force at the time of the International Court of Justice judgments in the *Barcelona Traction*<sup>36</sup> and *Elettronica Sicula*<sup>37</sup> quintessential cases on diplomatic protection and the nationality of bodies corporate, today it is up to the arbitration case law of ICSD and similar mechanisms, as well as to the clauses of each FTA and RPIA to ascertain corporate nationality under applicable criteria, e.g., constitutional/organizational venue, substantial economic activity, effective control.<sup>38</sup>

Thus, within the current international legal framework the consular or diplomatic protection of Mexican transnational corporations has today only a subsidiary role to play in connection to the increasing Mexican investments

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SUSCRIBIERON ACUERDO DE COOPERACIÓN CONSULAR, (Feb. 10, 2018), available at <http://www.cancilleria.gob.co/newsroom/news/cancilleres-la-alianza-del-pacifico-suscribieron-acuerdo-cooperacion-consular>.

<sup>33</sup> See Protocol to the European Convention on Consular Functions concerning the Protection of Refugees, adopted Dec. 11, 1967, E.T.S. No. 61 A.

<sup>34</sup> See Santiago Corcuera, *El Convenio de arbitraje CIADI*, EL UNIVERSAL, (May 5th, 2018), available at <http://www.eluniversal.com.mx/articulo/santiago-corcuera/nacion/convenio-de-arbitraje-ciadi>.

<sup>35</sup> See Elina Mereminskaya, *La nacionalidad de las personas jurídicas en el derecho internacional*, 18 REVISTA DE DERECHO No. 1 (2005), available at [http://www.scielo.cl/scielo.php?script=sci\\_arttext&pid=S0718-09502005000100006](http://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0718-09502005000100006).

<sup>36</sup> *Barcelona Traction, Light and Power Company, Limited* (New Application: 1962) (Belg. v. Spain), Judgment, 1970 I.C.J. Rep. 3 (Feb. 5).

<sup>37</sup> *Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. Rep. 15 (July 20).

<sup>38</sup> Elina Mereminskaya, *supra* note 36.

on a global scale (e.g., Bimbo, Cemex, Sigma).<sup>39</sup> It is worth noting that, according to the ILC's Draft articles on Diplomatic Protection: (a) As a general rule, “[a] State of nationality of shareholders in a corporation shall not be entitled to exercise diplomatic protection in respect of such shareholders in the case of an injury to the corporation [...]” (draft Article 11); (b) “To the extent that an internationally wrongful act of a State causes direct injury to the rights of shareholders as such, as distinct from those of the corporation itself, the State of nationality of any such shareholders is entitled to exercise diplomatic protection in respect of its nationals” (draft Article 12).

### III. CONSULAR SERVICES

#### 1. *General Framework*

As regards travel, notarial, civil registration and related administrative services and documents, Article 5 of the VCCR sets out the consular functions, which consist of:

- (d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State; [...]
- (f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State [...]

In their civil registrar role, Mexican consular agents “are to afford the widest possible protection of the rights of Mexican nationals abroad under the principle of non-discrimination” (MFSA, art. 44 § III), while their authentication powers in the acts and contracts entered into abroad to be executed in Mexico is equivalent to those of Mexico City’s notaries public (*see id.*, art. 44 § IV). Mexican consular posts are authorized for issuing passports; visas; Mexican citizens registers (i.e., “*matrícula consular*”); certified civil registration records; certified affidavits (i.e., “*certificados a petición de parte*”), particularly as evidence supporting consular protection; corporate constitution certificates and powers of attorney, as well as to intervene in the authentication of wills, among other activities.

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<sup>39</sup> See Jorge Cicero, *Jurisprudencia estadounidense sobre el Alien Tort Statute de 1789: El caso de la jurisdicción civil extraterritorial por violaciones corporativas al derecho internacional* (unpublished manuscript, on file with the Academia Mexicana de Derecho Internacional Privado y Comparado, A.C., XL Seminario de Derecho Internacional Privado “Homenaje a los precursores del Derecho Internacional Privado en México”, Universidad Autónoma de San Luis Potosí, Facultad de Derecho “Abogado Ponciano Arriaga Leija”, Nov. 17, 2017).

The resemblance between private international law and consular law is highlighted again by these powers and services —the setting and background of both legal fields being cross-border transactions and the international minimum standard of treatment as regards foreign nationals—. <sup>40</sup> Whereas private international law is oriented towards conflict of laws resolution under either *lex loci*, *lex patriae*, *lex contractus*, *locus regit actum* or *lex rei sitae* principles, <sup>41</sup> the purpose of consular law is to ascertain, considering the nationality/sending State's personal jurisdiction and the residence/receiving State's territorial jurisdiction, whether it is up to the former, *ratione sanguinis*, or for the latter, *ratione soli*, to govern a given situation. <sup>42</sup> Whilst private international law is never to trespass upon *ordre public*, consular law is always employed under the condition of compatibility with the receiving State's laws and regulations, as VCCR Article 5 emphatically reiterates in each subparagraph. <sup>43</sup> The fact that consular authority to officiate civil marriages is constrained to those among nationals of the sending State illustrates these points. <sup>44</sup>

## 2. *Apostilles*

The 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, <sup>45</sup> in force for Mexico as of August 14, 1995, constitutes a turning point in the field of consular services and private international law. Eliminating the requirement of consular or diplomatic legalisation for the recognition of foreign documents among the Contracting States, its immediate result is to suppress the cumbersome chain of certifications previously in force: <sup>46</sup>

### Article 2

Each Contracting State shall exempt from legalisation documents to which the present Convention applies and which have to be produced in its territory.

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<sup>40</sup> Adolfo Maresca, *supra* note 3, at 130 *et seq.*

<sup>41</sup> *Id.* at 130.

<sup>42</sup> *Ibid.* at 131-133.

<sup>43</sup> *Ibid.* at 133.

<sup>44</sup> See, e.g., Consular Convention, Mex.-People's Rep. of China, Dec. 7, 1986, D.O. Mar. 8th, 1988, art. 10.1.

<sup>45</sup> Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, concluded Oct. 5, 1961, entered into force Jan. 24, 1965, 527 U.N.T.S. 189.

<sup>46</sup> For instance, for Mexican international letters rogatory issued by state courts the chain of certifications might unfold as follows: (a) certification of the seal and signature of the court by the corresponding State's Supreme Court, (b) certification of the Supreme Court's seal and signature by the State's Secretary of State or Government; (c) the Secretary of State's by the federal Interior Ministry; (d) the Interior Ministry's by the FAM; and viceversa for the return of the letter rogatory including the legalization by the consul of Mexico in the corresponding foreign district.

For the purposes of the present Convention, legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.

Article 3

The only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the State from which the document emanates. [...]

“Each Contracting State shall”, therefore, “take the necessary steps to prevent the performance of legalisations by its diplomatic or consular agents in cases where the present Convention provides for exemption” under Article 9.

The Hague Apostille Convention is clear and unambiguous, but not so the Mexican codes of civil procedure, whose harmonization with the Hague Convention remains to be carried out. Article 546 of the FCCP, referred to in this connection by Mexican state law,<sup>47</sup> still provides, without any stipulation about apostilles: “In order for foreign public documents to be given full faith and credit in Mexico, they shall be legalised by the competent Mexican consular authorities under applicable laws. Documents transmitted through official channels to display their legal effects, shall be exempted from legalisation.”

Despite the related contents in the official sites of the Ministry of the Interior and its sister state secretariats, as well as in those of Mexican consulates, online research on the subject leads to the paper *Back «home» without apostille: Mexican-American students in Mexico*, according to which “bureaucratic burdens constitute the first step of the chain of trials to afford this population with an adequate education”.<sup>48</sup> Official translations fees by often overloaded certified experts represent a further burden to that effect.

As of December 20, 2017, the Hague Apostille Convention boasted 115 Contracting Parties, yet as of November, 2016 only around 200 Competent Authorities of 29 Parties —the Mexican state of Baja California Sur included— had either partially or fully implemented the Electronic Apostille Program (e-App).<sup>49</sup> The participants of the 10th International e-App Forum “reiterated that the e-APP enables the Apostille Convention to continue to

<sup>47</sup> See, e.g., Código de Procedimientos Civiles para el Estado de Baja California (Code of Civil Procedure for the State of Baja California), art. 324.

<sup>48</sup> See Mónica Jacobo-Suárez, *De regreso a «casas» y sin apostilla: estudiantes mexicanoamericanos en México*, 48 SINÉCTICA no.48 (Tlaquepaque Jan./Jun. 2017; Oct. 22, 2018), available at [http://www.scielo.org.mx/scielo.php?script=sci\\_arttext&pid=S1665-109X2017000100003](http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1665-109X2017000100003).

<sup>49</sup> See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, 10TH INTERNATIONAL FORUM ON THE ELECTRONIC APOSTILLE PROGRAM (E-APP), CONCLUSIONS & RECOMMENDATIONS (Nov. 1st, 2016), available at <https://assets.hcch.net/docs/81ed60f1-27f6-49c9-a9a9-fa015f09d396.pdf>.

grow from strength to strength [...] as a tool to further the secure and effective operation of the Convention more broadly”.<sup>50</sup> The benefits of a wider e-App implementation for both Mexicans abroad, or studying abroad, as well as for expatriates in Mexico, are obvious.

#### IV. INHERITANCE UPON DEATH, MINORS, PERSONS LACKING FULL CAPACITY, PROVISIONAL MEASURES DUE TO ABSENCE

##### 1. *General Framework*

Regarding inheritance upon death, minors and other persons lacking full capacity, and persons requiring special measures of protection due to absence, Article 5 of VCCR assigns the following functions to the consular post:

(g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending States in cases of succession *mortis causa* in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;

(h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;

(i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests [...]

All of these functions are to be exercised, then, subject to the laws of the receiving State. Since in federal systems successions and the civil legal capacity of persons remain within the domain of the constituent units of the federal State, in those systems the consular post shall be subject to the laws of, for example, the State of California, the Province of Mendoza, or the Province of Ontario, in the realization of the aforementioned functions. As for the European Union member states, although such subject-matters likewise belong to their exclusive domestic jurisdiction, within the so-called European Space of Justice remarkable harmonization efforts have been undertaken as far as

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<sup>50</sup> *Id.*

international judicial jurisdiction, applicable law and cross-border enforcement of judgements in succession matters are concerned.<sup>51</sup>

## 2. *Inheritance upon Death*

Article VIII of the 1942 U.S.-Mexico Consular Convention is particularly clear in outlining the scope of consular intervention in inheritance upon death.<sup>52</sup>

1. In case of the death of a national of either High Contracting Party in the territory of the other [...] Party, without having in the locality of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform nearest consular officer of the State of which the deceased was a national of the fact of his death, in order that necessary information may be forwarded to the persons interested.

2. In case of the death of a national of either [...] Party in the territory of the other [...] Party, without will or testament whereby he has appointed testaments executors, the consular officer of the State of which the deceased was a national and within whose district the deceased made his home at the time of the death, shall and pending the appointment of an administration and until letters of administration have been granted, be deemed qualified to take charge of the property left by the decedent for the preservation and protection of such property. Such consular officer shall have the right to be appointed as administrator within the discretion of a court or other agency controlling the administration of estates, provided the laws of the place where the estate is administered so permit.

3. Whenever a consular officer accept the office of administrator of the estate of a deceased countryman, he subjects himself in that capacity to the jurisdiction of the court or other agency making the appointment for all necessary purposes to the same extent as if he were a national of the State by which he has been received.

These provisions immediately pose at least two problems, notwithstanding Mexican civil procedure's recognition that "[i]n the successions of foreign nationals, consular agents shall enjoy the intervention provided for by the law".<sup>53</sup> Consular intervention, as foreseen in the U.S.-Mexico 1942 Convention, is strongly deterred because of the express waiver of jurisdictional im-

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<sup>51</sup> See Luis Francisco Carrillo, *El Reglamento Europeo 650/212 ante el cambio de paradigma del derecho de sucesiones*, 151 BOLETÍN MEXICANO DE DERECHO COMPARADO 64 (2018).

<sup>52</sup> See VCCR, art. 37. See also Consular Convention, Bulg.-Mex., Oct. 1<sup>st</sup>, 1984, D.O. July 3, 1986, art. 31,

<sup>53</sup> See, e.g., Code of Civil Procedure for the State of Baja California, art. 763; Código de Procedimientos Civiles para el Estado Libre y Soberano de México [hereinafter Code of Civil Procedure for the State of Mexico], art. 4.24.

munity set out in paragraph 3, in sharp contrast both to the VCCR and other bilateral Consular Conventions.<sup>54</sup> On the other hand, the extent to which supervening privacy laws might bar consular access to protected data such as the deceased's bank account numbers and balances is not to be taken lightly. Although Mexican privacy law does provide for its "interpretation according to treaties concluded by Mexico" and for the exemption of previous consent requirements in cases consistent with those set out in the U.S.-Mexico Convention,<sup>55</sup> similar provisions in no way are to be taken for granted in comparative law.<sup>56</sup>

Two additional hypotheses on inheritance upon death are laid out in Article IX, paragraphs 1 and 2 of the U.S.-Mexico Consular Convention authorizing consular officers:

1. [...] to appear personally or by authorized representative in all matters concerning the administration and distribution of the estate of a deceased person under the jurisdiction of the local authorities, for all such heirs or legatees in the estate, either minors or adults, as may be nonresidents of the country and nationals of the State by which the consular officer was appointed, unless such heirs or legatees have appeared [...]

2. [...] on behalf of his nonresident countrymen collect [...] for their distributive shares derived from estates in process of probate or accruing under the provisions of so-called Workmen's Compensation laws or other like statutes, for transmission through channels prescribed by his Government to the proper distributees, provided that the court or other agency making distribution through him may require him to furnish reasonable evidence of the remission of the funds to the distributees.

Whether the 1942 Convention has fallen into *desuetude* (disuse) or not, in the current state of affairs its ongoing force as treaty law and the mutually reinforcing relation it has with the VCCR ought not to be neglected.<sup>57</sup> Note

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<sup>54</sup> Compare with Consular Convention, Mex.-U.K., Dec. 24, 1954, D.O. July 19, 1955, art. 13.1 (no responsibility for consular agents, *vis-à-vis* the receiving State's courts of justice, arising out of proceedings included among his/her consular functions under international law).

<sup>55</sup> See, e.g., Ley General de Protección de Datos Personales en Posesión de Sujetos Obligados (LGPDP- General Act on the Protection of Personal Data within the Domain of Incumbent Parties), D.O. Jan. 26, 2017 (Mex.), arts. 8 & 22.

<sup>56</sup> See, e.g., OFFICE OF THE PRIVACY COMMISSIONER OF CANADA, SUMMARY OF PRIVACY LAWS IN CANADA/ RELATED CONTENT/ THE FEDERAL GOVERNMENT AND YOUR PERSONAL INFORMATION, available at <https://www.priv.gc.ca/en/privacy-topics/your-privacy-rights/the-federal-government-and-your-personal-information/>.

<sup>57</sup> Article 73 of VCCR "RELATIONSHIP BETWEEN THE PRESENT CONVENTION AND OTHER INTERNATIONAL AGREEMENTS" reads as follows: "1. The provisions of the present Convention shall not affect other international agreements in force as between States parties to them. 2. Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof".

as well the Convention's meticulous framing, paradoxically intended to prevent claims such as those arising out of the Bracero Program's back pay class action.<sup>58</sup>

### 3. *Minors and Other Nationals Requiring Special Measures of Assistance*

The consular function of safeguarding the interests of minors and other persons lacking full capacity is emblematic of the MFSA's mandate to closely monitor the situation of Mexican nationals requiring special measures of protection. This function under article 5(h) of the VCCR is to be differentiated both from the *guardian ad litem* in the common law system, and from the role of the Family Law Directorate, of the FAM's Directorate General for the Protection of Mexican Nationals Abroad, as Central Authority under the 1980 Hague Convention on the Civil Aspects of International Child Abduction. Given the internationally abducted child return's summary process —whose purpose is not to settle the merits of the custody, but to secure all necessary interim measures to foreclose the cross-border transfer of the minor and to secure his or her best interests—<sup>59</sup> the role of Central Authority, it might be argued, closely resembles the additional consular function of representing persons whom due to absence require timely provisional measures for the preservation of their rights pursuant to VCCR Article 5(i).

Still, the designation as Central Authority of a Directorate within the purview of consular protection of Mexican nationals —instead of a Legal Affairs Office— remains, somehow, misleading. It is true that “[m]any international parental child abductions involve parents and children who are dual citizens”.<sup>60</sup> However, as Article 4 makes plain, the 1980 Hague Convention applies “to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights”, whether or not either the minor, or one or both of his or her parents or guardians are Mexican nationals. Hence, the issue merits attention to the extent that the designation of such Directorate might lead to the mistaken perception that the Central

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<sup>58</sup> See, e.g., *Juez ordena a Segob pagar a braceros. Una docena de campesinos mexicanos exigen la devolución del 10 por ciento que les fue retenido durante su participación en el Programa Bracero de 1941 a 1964*, MILENIO, (Mar. 7, 2016), available at [http://www.milenio.com/policia/juez\\_Segob\\_braceros-juez\\_campesinos-campesinos\\_Programa\\_Bracero\\_0\\_696530489.html](http://www.milenio.com/policia/juez_Segob_braceros-juez_campesinos-campesinos_Programa_Bracero_0_696530489.html); Pam Belluck, *Settlement Will Allow Thousands of Mexican Laborers in U.S. to Collect Back Pay*, N.Y. TIMES, (Oct. 15, 2008), available at <https://www.nytimes.com/2008/10/16/us/16settle.html>.

<sup>59</sup> See Code of Civil Procedure for the State of Mexico, art. 2.365; see also Academia Mexicana de Derecho Internacional Privado y Comparado, A.C., Proyecto de Ley de Derecho Internacional Privado, 34 REVISTA MEXICANA DE DERECHO INTERNACIONAL PRIVADO 63, 81 (2015) [hereinafter AMEDIP's draft Private International Law Act], art. 31.

<sup>60</sup> See GOVERNMENT OF CANADA, TRAVELLING AS A DUAL CITIZEN - DUAL CITIZENSHIP AND PARENTAL CHILD ABDUCTIONS, available at <https://travel.gc.ca/travelling/documents/dual-citizenship>.

Authority should afford consular protection to Mexican nationals in cases under the Convention or, worse, that foreign nationals are accorded protection against Mexican parties, despite the fact that, unlike consular treaties, the Hague Convention remains technically neutral in terms of nationality, its foundation being instead that of the best interests of the child.<sup>61</sup> Because of the foreign affairs repercussions of certain cases within this framework,<sup>62</sup> the question is far from a matter of semantics.

As for the International Hague Network of Judges, its Mexican members caution about the urgent need to enact federal legislation safeguarding the six-week timeframe for the child's return set out in the Convention.<sup>63</sup>

## V. INTERNATIONAL JUDICIAL ASSISTANCE

Another consular function under subparagraph (j) of VCCR Article 5 is associated *par excellence* with private international law, which consists of “transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State”. Unlike the previously examined consular functions, for the exercise of this one explicit reference and deference to “international agreements in force” is provided for by the VCCR, while “the laws and regulations of the receiving State” tellingly shift to a supplementary role. The framing of subparagraph (j) is consequently enlightening about the 1963 Vienna Consular Conference's intent to harmonize the VCCR not only with international agreements in force at the time, but also with the then forthcoming 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.<sup>64</sup>

By contrast, MFSA's Article 44 § V starkly states that “[i]t corresponds to the heads of consular posts [...] to execute the commissions entrusted to

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<sup>61</sup> Ana Fernández, *Aproximación al interés superior del menor en el derecho internacional privado español*, 151 BOLETÍN MEXICANO DE DERECHO COMPARADO 108 (2018).

<sup>62</sup> See, e.g., *Maude Versini gana batalla a Arturo Montiel ante la CIDH*, ECONOMÍAHOY.MX, (March 9, 2015), available at <http://www.economiahoy.mx/politica-eAm-mx/noticias/6538735/03/15/Maude-Versini-gana-batalla-a-Arturo-Montiel-ante-la-CIDH.html>.

<sup>63</sup> See TRIBUNAL SUPERIOR DE JUSTICIA DE LA CIUDAD DE MÉXICO, ADVIERTE MAGISTRADO SOBRE LA CARENCIA DE LEGISLACIÓN INTERNA QUE ESTABLEZCA LOS PLAZOS PARA LA RESTITUCIÓN INTERNACIONAL DE MENORES, Press Release No. 52/2016, (Sep. 3, 2016), available at [http://poderjudicialcdmx.gob.mx/wp-content/uploads/2016/pdfs/comunicado/Comunicado\\_52.pdf](http://poderjudicialcdmx.gob.mx/wp-content/uploads/2016/pdfs/comunicado/Comunicado_52.pdf); see also Hague Abduction Convention, art. 11.

<sup>64</sup> Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, concluded Nov. 15, 1965, entered into force Feb. 10, 1967, 20 U.S.T. 361; 658 U.N.T.S. 163.

them by the courts of law of Mexico”. There is no doubt that Article 44 § V is but one example of Mexican law and practice including Articles 551 of the FCCP and 28 § XI of the Federal Public Administration Organic Act (FPAA).<sup>65</sup> Despite FCCP’s Article 548 remanding to “international law” in regard to the consular function in question, Articles 551 of the FCPC and 28 § XI of the FPAA do not refer to international agreements, nor are they harmonically framed with one another, with the result that it is not clearly stated whether Mexico’s courts of law are bound or not to transmit international letters rogatory to Mexican consular posts through the FAM.<sup>66</sup>

Moreover, in comparison to the U.S., which ratified the Hague Service Convention as early as 1967,<sup>67</sup> Mexico’s accession to it was fulfilled until 1999.<sup>68</sup> Even though the 1975 Inter-American Convention on Letters Rogatory<sup>69</sup> was previously in force for Mexico,<sup>70</sup> the aforementioned legal record clearly points out to the need of updating Mexican law and practice in light of evolving private international law. What follows is an examination of Mexican law on service of process abroad, on taking of evidence abroad and on information on foreign law, and makes that need even more unmistakable.

### 1. *Service of Process*

In the absence of objections by the receiving State, all Parties to the Hague Service Convention are, under Article 8, “free to effect service of judicial documents upon persons abroad, without application of any compulsion, directly through its diplomatic or consular agents”; there is no room for objections where “the document is to be served upon a national of the State in which the documents originate”. Accordingly, resort to this method of service

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<sup>65</sup> Ley Orgánica de la Administración Pública Federal, D.O. Dec. 29, 1976 (Mex.).

<sup>66</sup> Compare FCCP, art. 551 (“international letters rogatory may be transmitted to the requested court by the interested parties, by judicial channels, by means of consular or diplomatic agents or by the competent authority of the requested or of the requesting State, as the case may be”) with FPAA, art. 28 § XI (“It corresponds to the [FAM] to intervene in international letters rogatory or commissions in order to transmit them to their destination, upon previous examination of their fulfilling all formal requirements for their execution and of their admissibility or inadmissibility, notice of which shall be given to the competent judicial authorities”).

<sup>67</sup> See Stephen F. Downs, *The Effect of the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*, II Cornell Int’l L.J. 128 (1969).

<sup>68</sup> See Jorge Cicero, *México y la Convención de La Haya sobre Notificaciones*, 29 *Jurídica ANUARIO DEL DEPARTAMENTO DE DERECHO DE LA UNIVERSIDAD IBEROAMERICANA* 353 (1999).

<sup>69</sup> Inter-American Convention on Letters Rogatory, concluded Jan. 30, 1975, entered into force Jan. 16, 1976, O.A.S.T.S. No. 43; see S. Treaty Doc. No. 27, 98th Cong., 2d Sess. (1984).

<sup>70</sup> See Jorge Cicero, *Cooperación judicial México-Estados Unidos: Decisiones recientes en torno al reconocimiento internacional de sentencias y la Convención Interamericana sobre Exhortos y Cartas Rogatorias*, 6 *REVISTA MEXICANA DE DERECHO INTERNACIONAL PRIVADO* 89 (1999).

is preferable in the case it is to be effected upon nationals of the sending State, as the sending State's nationals should be more prone to freely concur to the consular premises to be served in them, or to willingly receive the documents in their domiciles from the consular agents. Otherwise, the consular post would be compelled to resort to competent local officials —such as sheriffs, constables, *huissiers de justice*— in order to carry out the service; or the letter rogatory might be returned without service.

As far as documents to be served in other Contracting Parties of the Hague Service Convention are concerned, their transmission through Central Authorities —e.g., Mexico's Legal Affairs Directorate General and the U.S. Department of Justice (Civil Division)— would seem a less uncertain choice, even though Article 9 also authorizes the use of consular channels to forward documents, “for the purpose of service, to those authorities of another Contracting State which are designated by the latter for this purpose”.

Since U.S. consular agents are prohibited by U.S. law to serve documents abroad, and bearing in mind the optional nature of the choice of service through Central Authorities under U.S. declarations to the Hague Convention, it is important to note “that, subject to domestic law of the Requested State, requests for service transmitted under the main channel of transmission (the Central Authority) may be executed by electronic means under Article 5”.<sup>71</sup> In effect, the Special Commission on the practical operation of the Hague Service, Evidence and Access to Justice Conventions “encourages the transmission and receipt of requests by electronic means in order to facilitate expeditious execution”, with the understanding that “Contracting States should consider security matters when evaluating methods of electronic transmission”.<sup>72</sup> To proceed as such whenever possible is in the best interest of justice.

## 2. *Taking of Evidence*

The previous comments hold, *mutatis mutandis*, for the functions assigned to consular and diplomatic agents by the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters,<sup>73</sup> in force for Mexico as of 1989 and within the framework of which Mexico and the U.S. have designated the same Central Authorities that are competent for the Hague

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<sup>71</sup> See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, CONCLUSIONS AND RECOMMENDATIONS OF THE SPECIAL COMMISSION ON THE PRACTICAL OPERATION OF THE HAGUE SERVICE, EVIDENCE AND ACCESS TO JUSTICE CONVENTIONS (20-23 MAY 2014) 37, available at <https://assets.hcch.net/docs/eb709b9a-5692-4cc8-a660-e406bc6075c2.pdf>.

<sup>72</sup> *Id.*, 39.

<sup>73</sup> Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, concluded Mar. 18, 1970, entered into force Oct. 7th, 1972, U.S.T. 2555; 847 U.N.T.S. 231.

Service Convention. Suffice it to add here that, pursuant to Article 18 of the Hague Evidence Convention:

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorised to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

The U.S.'s designated authority for compulsory taking of evidence under Article 18, is none other than the U.S. "district court of the district in which a person resides or is found".<sup>74</sup> The U.S. declaration under Article 18 accordingly corresponds to 28 U.S. Code § 1782 - Assistance to foreign and international tribunals and to litigants before such tribunals.<sup>75</sup>

The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

No similar provision has been enacted in Mexico, nor has Mexico designated any authority under Article 18. Within the framework of the Hague Evidence Convention Mexico does nevertheless rely upon FCCP Articles 543

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<sup>74</sup> UNITED STATES OF AMERICA - COMPETENT AUTHORITY (ART. 18), available at <https://www.hoch.net/en/states/authorities/details3/?aid=870>.

<sup>75</sup> 28 U.S. Code § 1782 - Assistance to foreign and international tribunals and to litigants before such tribunals, available at CORNELL LAW SCHOOL, LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/uscode/text/28/1782>.

to 556 concerning foreign requests of judicial assistance, narrowly framed in order to prevent abusive pretrial discovery “fishing expeditions” in international litigation.<sup>76</sup> Video conferences, where technically possible in cases where the nature of the requested proofs so allows, are admissible under Mexican law for the gathering of evidence within the framework of the Hague Convention.<sup>77</sup> Consular and diplomatic taking of evidence are, further, the subject of FCCP Article 560: “For the taking of evidence in litigation abroad, the embassies, consulates and members of the [MFS] shall follow the international treaties and conventions concluded by Mexico, as well as the Organic Law on Foreign Service and other applicable provisions.”

The FCCP’s referring to the 1982 Organic Law on Foreign Service,<sup>78</sup> in force at the time of Article 560 amendment in 1988,<sup>79</sup> instead of to the MFSA of 1994,<sup>80</sup> is yet another instance of Mexico’s three-decade long international judicial assistance regulatory lag—a time framework that overlaps with the worldwide expansion of information technologies and cyberspace.

### 3. *Information on Foreign Law*

Similar regulatory laps are readily unveiled with respect to information on foreign law. In contrast to certain state laws such as Article 271 of Chihuahua’s Civil Procedure Code, which states “proof of foreign law shall be required only when the court deems it necessary and to the extent that its existence or applicability is disputed by the parties”, with the proviso that “if the court is familiar with the foreign law in question, or chooses to investigate it *ex officio*, the parties shall be relieved of the burden of proof”, the FCPC Article 86 bis reads as follows:

The court shall apply foreign law in the same manner as the courts of the State whose law is applicable, without prejudice to the parties’ disputing the existence and contents of foreign law.

Information on the text, force, meaning and scope of foreign law may be requested by the court to the [MFS], the court may as well order and admit such gathering of evidence diligences as it deems fit, or as the parties may submit.

The problem is that because Mexican consular posts, at least in the U.S., no longer issue the so-called “certificate of foreign laws”, Article 86 bis is

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<sup>76</sup> See FCCP, arts. 559 y 561-563.

<sup>77</sup> See, e.g., Code of Civil Procedure for the State of Mexico, art. 1.266.1.

<sup>78</sup> Ley Orgánica del Servicio Exterior Mexicano, D.O. Jan. 8, 1982 (Mex.), abrogated by the MFSA of 1994, *supra* note 11.

<sup>79</sup> See Decreto por el que se reforman, adicionan y derogan diversos artículos del Código Federal de Procedimientos Civiles, D.O. Jan. 12, 1988 (Mex.).

<sup>80</sup> See MFSA, *supra* note 11, transitory art. 2.

prone to meaningless requests and procedural delays to the prejudice of the parties. It is thus crucial to promote awareness of this fact among members of the bench and bar, in order to assess, where rigorously necessary, other potential options, such as:

— Resorting to the Hague Evidence Convention.

— Resorting, where applicable, to the 1979 Inter-American Convention on Proof of and Information on Foreign Law<sup>81</sup> (assessing as well the fact that Mexico's designated Central Authority is the "FAM"<sup>82</sup> *tout court* with the resulting situation of uncertainty as to which office might specifically be responsible for the transmission of the request).

— For proof of and information on U.S. law, resorting to *affidavits* by lawyers admitted to the Bar of the State or jurisdiction whose law is to be proved, with the corresponding apostille and official translation into Spanish by an expert certified to act before the requesting court.

The FCCP pushes the parties to such predicaments in the midst of the global cyberspace era, a time where official websites, digital law libraries, and databases on a worldwide scale make foreign law easily available to the interested courts and parties, which seems baffling. As stressed out by Spanish scholars:

As regards States' or EU's official websites related to foreign law, the courts of Spain are easily able to verify the authenticity of such texts, which therefore carry a heightened evidential value notwithstanding the court's discretion to establish that value on a case-by-case basis within the framework of the "sound reasoning" standard.<sup>83</sup>

Last, but not least, as the scope of FCPC Article 86 bis is restricted to the gathering of proof of and information on foreign law for litigation in Mexican courts, the proof of and information on Mexican law requested by foreign courts for litigation abroad remain in a situation of complete uncertainty.

#### 4. *Maintenance Obligations*

The previously mentioned MFA Family Law Directorate is also designated as Central Authority for the 1989 Inter-American Convention on Sup-

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<sup>81</sup> Inter-American Convention on Proof of and Information on Foreign Law, concluded Aug. 5, 1979, entered into force June 14, 1980, O.A.S.T.S. No. 53.

<sup>82</sup> See Information provided by Mexico in accordance with Articles 2, 4, 9 & 11, available at <http://www.oas.org/juridico/english/sigs/b-43.html>.

<sup>83</sup> ALFONSO CALVO & JAVIER CARRASCOSA, I DERECHO INTERNACIONAL PRIVADO 551 (16th ed. Granada, 2016), quoted in Andrés Rodríguez & Alfonso Ybarra, *Las nuevas reglas sobre información y prueba del derecho extranjero en el sistema español de derecho internacional privado*, 150 BOLETÍN MEXICANO DE DERECHO COMPARADO 1358-59 (2017).

port Obligations,<sup>84</sup> whose purpose is “to establish the law applicable to support obligations and to jurisdiction and international procedural cooperation when the support creditor is domiciled or habitually resides in one State Party and the debtor is domiciled or habitually resides or has property or income in another State Party” (Article 1, paragraph 1). “The judicial or administrative authorities of the States Parties shall”, in the terms of Article 15, “order and carry out, pursuant to a well-founded request of a party or through the respective diplomatic agent or consular officer, provisional or urgent measures that are territorial in nature and whose purpose is to secure the outcome of a pending or anticipated support claim”. The Convention on Support Obligations is only in force in 13 Latin American countries.<sup>85</sup>

Neither consular or diplomatic transmission, nor consular or diplomatic intervention in support requests are stipulated in the 1956 UN Convention on the Recovery Abroad of Maintenance<sup>86</sup> (currently in force in 64 States, Mexico included as of 1992 with the same designated Authority).<sup>87</sup> The same is true of the 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.<sup>88</sup> Unlike partner countries with Mexican Diasporas such as France, Spain and the U.S., Mexico is not yet a Party. Again, the role of the Mexican Central Authority is to be distinguished from the functions of consular posts and diplomatic missions on behalf of Mexican nationals in the receiving State.

Let us now review diplomatic functions *vis-à-vis* private international law and nationality conflicts.

## VI. DIPLOMATIC FUNCTIONS, PRIVATE INTERNATIONAL LAW AND NATIONALITY CONFLICTS

In the terms of Article 3, paragraph 1 of the Vienna Convention on Diplomatic Relations (VCDR) concluded on April 18, 1961 “[t]he functions of a diplomatic mission consist, *inter alia*, in” (compare with MFSA arts. 2 and 43):

- (a) Representing the sending State in the receiving State;

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<sup>84</sup> Inter-American Convention on Support Obligations, concluded July 15, 1989, entered into force Mar. 6, 1996, O.A.S.T.S. No. 71.

<sup>85</sup> See status at Convención Interamericana sobre Obligaciones Alimentarias, available at <http://www.oas.org/juridico/spanish/firmas/b-54.html>.

<sup>86</sup> Convention on the Recovery Abroad of Maintenance, adopted May 17, 1955, entered into force May 25, 1957, 268 U.N.T.S. 3.

<sup>87</sup> See status at U.N. TREATY COLLECTION, available at [https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XX-1&chapter=20&Temp=mtdsg3&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XX-1&chapter=20&Temp=mtdsg3&clang=_en).

<sup>88</sup> Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, concluded Nov. 23, 2007, entered into force Jan. 1st, 2013, Treaty Doc. No. 110-21, 110th Cong., 2d Sess. (2008).

- (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
- (c) Negotiating with the Government of the receiving State;
- (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
- (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

Nothing in the VCDR is to be construed as preventing the performance of consular functions by a diplomatic mission (Article 3, paragraph 2).<sup>89</sup> Quite the contrary, as previously shown, international agreements and Mexican law both extend different international judicial assistance functions to diplomatic agents, including functions usually carried out by consular agents. With this in mind, only a handful of additional comments remain to be addressed.

In connection to the protection of nationals abroad the 1942 U.S.-Mexico Consular Convention is, yet again, particularly clear as to the threshold for a given case to cross the borderline between consular and diplomatic intervention. Article VI, paragraph 1 addresses the matter as follows:

Consular officers of either [...] Party may, within their respective consular districts, address the authorities, National, State, Provincial or Municipal, for the purpose of protecting the nationals of the State by which they were appointed in the enjoyment of rights accruing by treaty or otherwise. Complaint may be made for the infractions of those rights. Failure upon the part of the proper authorities to grant redress or to accord protection may justify interposition through the diplomatic channel [...] to the Government of the country.

For the ILC, diplomatic protection is nothing other than an available means for a State to invoke “the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility”.<sup>90</sup> Being that the previous exhaustion of local remedies is a condition to that effect—to the extent, *inter alia*, that there are reasonably available remedies to provide effective redress without undue delay, and that the injured person is not manifestly precluded from pursuing them—<sup>91</sup> the consular stage of protection is a crucial step in such an exhaustion.

This said, beyond the exhaustion of consular protection as a threshold for diplomatic intervention in a given case, as a result of the 2011 amendments adding “the respect, protection and promotion of human rights” to Mexico’s foreign policy constitutional principles,<sup>92</sup> chief among the priorities

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<sup>89</sup> See also VCCR, arts. 3 & 70.

<sup>90</sup> See Draft articles on Diplomatic Protection, *supra* note 23, art. 1.

<sup>91</sup> *Id.*, art. 15.

<sup>92</sup> See MEX. CONST., art. 89 § X, as amended D.O. June 10, 2011.

of all Mexican diplomatic missions is the duty to defend and to advance the legal rights of Mexican nationals in the exercise of their functions as a whole. Some examples of actual or potential diplomatic actions to this effect follow herewith.

*Assessing legal strategies for the protection of nationals abroad.* Judge Bernardo Sepúlveda vigorously advocates Mexico's resorting to both U.S. courts and international bodies in order to reassert the rights of undocumented Mexican nationals against the loss of their freedom or property, the fragmentation of their families or illegal deportation procedures in violation of either U.S. law or international law.<sup>93</sup> As has been explained, private international law is vital for mitigating some cross-border effects of family fragmentation, as well as for advancing the best interests of minors and for protecting the rights of nationals who otherwise would have little, if any, effective access to justice by reason of absence. MFS member Eduardo Peña recalls how his inquiries into the "interstate commerce" clause of the U.S. Constitution led to the consular return of a Mexican child who was abducted from San Luis Potosí, Mexico, to Houston, Texas.<sup>94</sup> Sepúlveda likewise advocates Mexico's reasserting the 2008 William Wilberforce Act (§ 235 "Enhancing the Efforts to Combat the Trafficking of Children") to the benefit of non-accompanied migrant minors, so as for them to be put under the care of the Secretary of Health and Human Services.<sup>95</sup> Once more, private international law is crucial for defending the rights and best interests of these children, and should be taken into due account in any diplomatic consultations on the consular protection of dual or multiple nationality minors.

*Negotiating innovative agreements with the receiving State's local authorities.* Outstanding among Mexico-U.S. inter-state diplomacy precedents for the best interests of minors is Mexico's unilateral reciprocity declaration allowing the accession of Mexican States to the Uniform Interstate Family Support Act (UIFSA), dating back to the Revised Uniform Reciprocal Enforcement of Support Act (URESARURESA).<sup>96</sup> If Mexico's Federal Judiciary has already concluded agreements of technological interconnection with its sister judiciaries of several Mexican States, including the electronic transmission of letters rogatory,<sup>97</sup> is it out of place to expect similar agreements between the judi-

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<sup>93</sup> See Bernardo Sepúlveda, *Directrices de política exterior para la era Trump. La protección de inmigrantes y el sistema judicial estadounidense, Reforma*, REVISTA DOMINICAL, March 19, 2017, at 16-17.

<sup>94</sup> See Eduardo Peña, *supra* note 7, at 235-236.

<sup>95</sup> See Bernardo Sepúlveda, *supra* note 94, at 16-17.

<sup>96</sup> With the exception of Colorado, Florida, Georgia, Iowa, Maryland, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Virginia, Wisconsin. See SECRETARÍA DE RELACIONES EXTERIORES, PENSIONES ALIMENTICIAS INTERNACIONALES, available at <https://www.gob.mx/sre/acciones-y-programas/pensiones-alimenticias-internacionales>

<sup>97</sup> See PODER JUDICIAL DEL ESTADO DE SINALOA, FIRMA DE CONVENIO DE INTERCONEXIÓN TECNOLÓGICA ENTRE EL PODER JUDICIAL DEL ESTADO DE SINALOA Y EL PODER JUDICIAL DE LA FEDERACIÓN, (June 30, 2016), available at <http://www.stj-sin.gob.mx/poderjudicial/noticias/337>.

ciaries of the Mexican States, on the hand, and their sister judiciary counterparts in one or more of Mexico's neighbor countries under the coverage of applicable international conventions? Regarding border States, for instance, Article 27 of the 1994 Inter-American Convention on International Traffic in Minors<sup>98</sup> states: "The competent authorities in border areas of the States Parties may, at any time, directly agree on more expeditious procedures to locate and return minors than those provided for in the present Convention and without prejudice thereto".<sup>99</sup>

*Promoting meetings for the sharing of best practices and the advancement of international cooperation.* The Inter-American Meeting of International Hague Network Judges and Central Authorities on International Child Abduction (Mexico, 23-25 February 2011)<sup>100</sup> is just one example. The above comments should suffice for the purposes of the present discussion.

## VII. CONCLUDING REMARKS AND SUGGESTIONS

As the above review makes clear, Mexican law and practice should be the subject of thorough updates as soon as possible, in order to harmonize certain consular and diplomatic functions with current developments in private international law and nationality conflicts standards, as well as with the expanse of information technologies and cyberspace. To paraphrase the Scripture (Romans 12:2), it is no longer the time to conform with the prevailing patterns, but for transforming legal practices by the renewing of the law for the challenges of the twenty first century. By way of conclusion here follow some proposed measures towards that goal:

- 1) *Protection of Mexican nationals.* Mexico's official guidelines on consular protection should make reference to the nationality conflicts standards spelled out by the 1930 Hague Convention, the 2006 ILC's draft Articles on Diplomatic Protection and Mexico's Supreme Court resolution (2014) relating to individuals bearing dual or multiple nationality. Such updates ought to be accompanied by: (a) public briefings and awareness measures oriented towards actual or potential dual Mexican nationals regarding the hurdles for their consular or diplomatic protection abroad under international law, particularly *vis-à-vis* a State whose nationality they simultaneously bear; (b) both on-site and online train-

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<sup>98</sup> Inter-American Convention on International Traffic in Minors, concluded Mar. 18, 1994, entered into force Aug. 15, 1997, O.A.S.T.S. No. 79.

<sup>99</sup> *Accord.* AMEDIP's draft Private International Law Act, *supra* note 60, art. 210.

<sup>100</sup> See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW [Hague Abduction Convention], LIST OF JUDICIAL AND OTHER CONFERENCES 1998-2017, available at <https://www.hcch.net/en/publications-and-studies/details4/?pid=5214#latam>.

ing on the subject for MFS and FAM members, as well as for Mexican federal and state judicial authorities.

Mexico's official guidelines on consular protection should be similarly updated on the subject of bodies corporate, in accordance with current corporate nationality standards set out by FTAs, RPPIAs, IC-SID case law, as well as ILC draft Articles, including criteria regarding corporate constitution, effective control, substantial economic activity and direct prejudice to shareholders criteria. Public briefings and corporate awareness measures should be likewise considered by Mexico's FAM and Economy Ministry.

As for individuals abroad suffering blatant violations of their fundamental right to equal access to law and justice and non-discrimination by reason of their Mexican origin, regardless of their actually bearing Mexican nationality at the time of the violations, Mexico's resorting to appropriate international human rights bodies should be strongly encouraged.

- 2) *Apostille*. Due harmonization of the NCCP with the Hague Apostille Convention ought to be assured. Full implementation by Mexican federal and state authorities of e-APPs is critical, the benefits would be maximized with the negotiation of agreements between judicial and education authorities and translation schools providing for *pro bono* services for the official translation of apostilled documents.
- 3) *Inheritance upon death, family law*. Consular conventions and supervening privacy laws should be aligned, either by the issuance of appropriate criteria by agencies such as Mexico's National Institute for Transparency, Access to Information and Personal Data Protection or by negotiating international protocols on the subject. Mexico's NCCP should, as proposed by AMEDIP's draft Article 21, provide for:<sup>101</sup> "In cases involving minors or individuals lacking full capacity bearing a foreign nationality, notice shall be given by the court both to the corresponding foreign consul and to the [FAM], whose proposals as to whom should be designated as tutor or guardian, where required, may be admitted by the court".

The Hague Child Abduction Convention has a mandatory six-week deadline for the child's return, this should be safeguarded by the NCCP. The MFA should also assess elevating to Directorate General its Family Law Directorate, currently under the General Directorate for the Protection of Mexican Nationals Abroad, in order to disassociate the former's role as Central Authority within the framework of child abduction and support obligations conventions, from the MFS's function of protecting Mexican nationals abroad.

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<sup>101</sup> See AMEDIP's draft Private International Law Act, *supra* note 60.

- 4) *Service of process and taking of evidence abroad.* Mexico should evaluate the benefits of negotiating additional protocols to the Hague Service and Evidence Conventions on the transmission and execution of requests of assistance by electronic means. Similarly, Mexican federal and state judiciaries—especially those in border States—should consider analogous *démarches* in order to conclude international technological interconnection agreements towards the same goals. Appropriate provisions on the subject should be included as well in the NCCP, ideally with the advice of the Hague Conference, so as to align it with international best practices. Mexico's accession to the 2001 Budapest Cybercrime Convention<sup>102</sup> would significantly enhance the international online security framework for these as well as other purposes.
- 5) *Information on foreign law.* Information on the text, force, meaning and scope of foreign law through corresponding official websites ought to be given due recognition by the NCCP. Proof of and information on foreign law by other means might be provided for in the absence of digital evidence. When so required upon the previous exhaustion of online research, Mexican federal and state councils of the judicature, as well as bar associations, could provide reciprocal *pro bono* services agreements on the subject with key counterparts abroad, as well as supplementary agreements with certified expert translators associations and translation schools for official translations into Spanish, either on a *pro bono* basis or on a preferential fees scheme.

Likewise, the NCCP should define to which federal or state Mexican authorities (i.e., Ministry or secretariats of Government, councils of the judicature) are foreign requests of proof of or information on Mexican law to be transmitted to for their execution. The MFA should consider, in turn, giving notice to the Parties of the Inter-American Foreign Law Convention as to which specific office (i.e., Legal Advisor's Office, Directorate General for Juridical Affairs) requests of assistance should be transmitted to in order for its forwarding them to the competent federal or state authorities.

In addition, the launch of a *Presidential Program on International Human Mobility* could advance the defense of the dignity, rights and interests of Mexican nationals abroad, as well as the well being of repatriated Mexican nationals and their families, migrants, refugees, expats, visiting business persons, students, academics, and foreign tourists within Mexican borders. Law schools, bar associations and legal research institutions could organize—with or without private or multilateral sponsorship—training and advanced research programs on *The law of the international movement of persons*, including both pri-

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<sup>102</sup> Convention on Cybercrime, opened for signature Nov. 23, 2001, entered into force July 1st, 2004, E.T.S. No. 185.

vate and public international law, comparative law, conflicts of laws, immigration and nationality law, family law, human rights and the status of refugees, as well as related trade and investment agreements.

Mexico's leadership as a global player deserves no less than a national normative and institutional framework advancing international legal certainty and effective access to justice across borders.

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