Mexican Law Review

New Series

VOLUME VI

Number 2

January - June 2014

UNIVERSIDAD NACIONAL
AUTÓNOMA DE MÉXICO

INSTITUTO DE INVESTIGACIONES
JURÍDICAS

Mexican Law Review

New Series

January-June 2014 Volume VI, Number 2

Interior design and edition: Wendy Rocha
Cover elaboration: Arturo Flores

Mexican Law Review se encuentra registrada en los siguientes índices y bases de datos:

— Latindex
— Clase
— Periodica
— scielo (Scientific Electronic Library Online)
— Biblat (Indicadores Bibliométricos)
— Dialnet

Mexican Law Review

New Series

January-June 2014 Volume VI, Number 2

ARTICLES

NOTES

ARTICLES

Mexican Law Review
New Series
VOLUME VI
Number 2

DRUG USE AND THE RIGHT TO HEALTH: AN ANALYSIS OF INTERNATIONAL LAW AND THE MEXICAN CASE

Miguel Antonio Núñez Valadez*

Abstract. *This article is an analysis of international and Mexican law regarding the prohibition of drug use and the right to health. It argues that the decriminalization of personal drug use in domestic legislation is not prohibited by the 1961 Single Convention on Narcotic Drugs and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Therefore, a health-oriented system to resolve the problem of drug use is not optional for the binding States, but an obligation according to the normative content of the right to health under international law. Therefore, given that Mexico has ratified the International Covenant on Economic, Social, and Cultural Rights (ICESCR) and the right to health has constitutional status, the criminalization of drug use or drug possession for personal use is a violation of the Mexican Federal Constitution and the ICESCR.*

Key Words: *Drug use, criminalization of drug abuse, drug dependence, human rights, international law, right to health.*

Resumen. *El presente artículo es un análisis sobre la prohibición del consumo de drogas y el derecho a la salud tanto en el derecho internacional como en el nacional. El argumento principal es que la ausencia de criminalización del consumo personal de drogas en la legislación nacional no está prohibido por la Convención Única de 1961 sobre Estupefacientes y la Convención contra el Tráfico Ilícito de Estupefacientes y Sustancias Psicotrópicas de 1988 y, por ende, un sistema orientado a la prevención y rehabilitación para resolver el problema del consumo y adicción a las drogas no es opcional, sino obligatorio a la luz del contenido internacional del derecho a la salud. En ese sentido, y dado que México es parte de las referidas convenciones y se otorga estatus constitucional a los derechos humanos, como el derecho a la salud reconocido en el Pacto Internacional de Derechos Económicos, Sociales y Culturales, se considera que la sanción penal del consumo o de la estricta posesión de drogas para el consumo es una violación directa a la Constitución Federal y al mencionado tratado internacional.*

* Law Clerk, Justice Alfredo Gutiérrez Ortiz Mena, Mexican Supreme Court; LL.M., 2012, American University, Washington College of Law; B.A., 2010, Instituto Tecnológico Autónomo de México.

Palabras clave: *Consumo de drogas, criminalización del consumo, adicción, dependencia, derechos humanos, derecho internacional, derecho a la salud*.

Table of contents

I. Introduction

In the past five decades, drug control has become a major concern in Mexico and the rest of the world.[1] In 1961, the members of the United Nations adopted the Single Convention on Narcotic Drugs (1961 Single Convention) with the intention to prevent non-medical use of narcotic and psychotropic drugs.[2] The idea behind the convention was to establish international rules to inhibit the supply of drugs and, thus, reduce the risks of drug use and protect the health of the population.[3]

Before and after the 1961 Single Convention, almost all countries have decided to criminalize both the supply and the demand of drugs. With some recent exceptions, such as the Netherlands and Spain, most nations punish any kind of production, possession, purchase and cultivation of drugs.[4] Nation-States believe the criminalization approach is enough to deter drug production and drug use. The main targets are the behaviors themselves and

[1] International Narcotics Control Board [INCB], *Report of the International Narcotics Control Board 2008*, Chapter I, U.N. Doc. E/INCB/2008/1, U.N. Sales No. E.09.XI.1, available at http://www.incb.org/pdf/annual-report/2008/en/AR2008_Chapter_I.pdf.

[2] Single Convention on Narcotic Drugs, 1961, March 25, 1961, U.N.T.S available at http://www.incb.org/pdf/e/conv/convention_1961_en.pdf. This convention was amended by the 1972 Protocol amending the Single Convention on Narcotic Drugs.

[3] *Id.*

[4] Liana Sun Wyler, Congressional Research Service, International Drug Control Policy (2011), available at http://fpc.state.gov/documents/organization/107223.pdf.

not the causes and/or effects of the drug problem. In contrast, many studies have argued that this criminalization approach has been inefficient and is not the best way to solve the problems of drug trafficking and drug use, especially with behavior related to the possession and purchase of drugs solely for personal use.[5]

With regard only to drug use, these studies note that the worldwide demand of narcotics and others substances has increased rather than decreased over the last two decades.[6] According to the United Nations Office on Drugs and Crime (UNODC), an international agency established in 1997 to monitor issues regarding drug abuse, crime prevention, and criminal justice,[7] between 155 to 250 million people in the world consumed illicit substances at least once in 2008.[8] Within this group, 10% to 15% of the consumers are "problem drug users"[9] (16 to 38 million), and only 12% to 30% of them received treatment in the past year.[10] Similarly, in 2002, 5% of the Mexican population between the ages of 12 and 65 admitted to having used drugs at least once in their life, and the percentage increased to 5.7 in 2008.[11] Of this group, 13% of the consumers move to consuetudinary use and 1.9% to substance dependence.[12] Only 16.9% of the drug users entered into treatment and/or rehabilitation.[13]

In this sense, academics[14] and the UNODC[15] have stated that individuals who purchase and use drugs for their own consumption (addicts or not) suf-

---

[5] *See* U. N. Office on Drugs and Crime [UNODC], *Discussion paper: From coercion to cohesion. Treating Drug Dependence through Health Care, Not Punishment* (2010), available at http://www.unodc.org/docs/treatment/ Coercion_Ebook.pdf.

[6] *Id.* at 2.

[7] About UNODC, unodc.org (April 5, 3:54 PM), http://www.unodc.org/unodc/en/about-unodc/index.html?ref=menutop.

[8] U. N. Office on Drugs and Crime [UNODC], *World Drug Report 2010,* U.N. Sales No. E.10.XI.13 (2010), available at http://www.unodc.org/documents/wdr/WDR_2010/World_Drug_Report_2010_lo-res.pdf.

[9] *Id.* at 12.

[10] *Id.*

[11] Consejo Nacional contra las Adicciones [National Council against Addictions], *Encuesta Nacional de Adicciones 2008 [National Inquiry of Addictions 2008]*, *41*, available at http://www.conadic.salud.gob.mx/pdfs/ena08/ENA08_NACIONAL.pdf. The National Inquiry of Addictions 2011 does not include the same data; however, it concluded that the population between 12 and 65 years old which admitted to have consumed any drug in the last year (2010-2011) is 1.8%, when in 2008 was 1.6%. *See* Consejo Nacional contra las Adicciones [National Council against Addictions], *National Inquiry of Addictions 2011, at* 41, available at http://www.conadic.salud.gob.mx/pdfs/ENA_2011_ DROGAS_ILICITAS_.pdf.

[12] *Id.* at 49.

[13] *Id.*

[14] *See* Redonna K. Chandler et al., *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, 301(2) JAMA 183, 184 (2009).

[15] UNODC, *Discussion Paper: From Coercion to Cohesion, supra* note 5, at 2.

fer extreme negative externalities resulting from the criminalization system.[16] Consumers are socially discriminated against and, in most cases, they do not receive any kind of physical or mental treatment or rehabilitation.[17] For these reasons, some academics and the UNODC suggest that: *a)* a health-oriented system to reduce the supply and demand of drugs is more efficient than a sanction-oriented approach;[18] and *b)* this health-oriented system is allowed under international law.[19] In other words, they conclude that prevention, education and physical and mental treatment are the most effective ways to reduce illegal drug use and, more importantly, that the decriminalization of personal drug use is not prohibited by the 1961 Single Convention and the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention), known as the drug conventions.[20]

The objective of this article is to support the health-oriented approach from a different perspective. This article argues that a health-oriented approach to the problem of drug consumption is not only optional, but an obligation under international law and, especially, under the normative content of the right to health, established in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Given that Mexico has ratified the above-mentioned drug conventions and the ICESCR, this article holds that the criminalization of the consumption or possession of drugs for personal use is a violation of the right to health in Mexico.[21]

In order to justify these conclusions, this article is divided into four sections. Part II discusses whether under international law there is a mandatory obligation for States to criminalize the consumption or possession of drugs for personal use. This section is divided into two parts: the first is a brief introduction to the drug control system and conventions, and the second is a discussion of whether international drug control conventions obligate States to criminalize drug use. Part III explains the normative content of the right to health and analyzes whether this right includes protection against the criminalization of drug consumption or possession for personal use. Finally, based on the arguments expounded in the other sections, Part IV is a practical examination of Mexican legislation on drug use and the right to health.

It should be noted that the reasoning in this essay does not exclude the fact that the criminalization of drug consumption or possession for personal use may also violate other fundamental and human rights related to the right to

---

[16] *Id.*

[17] *Id.* at 2-3.

[18] *Id.*

[19] *Id.* at 1.

[20] United Nations Convention against Illicit in Narcotic and Psychotropic Substances, December, 20, 1988, U.N.T.S., available at http://www.unodc.org/pdf/convention_1988_en.pdf.

[21] According to the first paragraph of Article 1 of the Mexican Federal Constitution, every person enjoys the human rights recognized by the Constitution and all the international treaties ratified by the Mexican State.

health, such as freedom of choice, human dignity, privacy, education, non-discrimination, and equality. This article intentionally avoids reference to and a normative analysis of other human rights, with the specific intention of focusing on the relationship between the 1961 Single Convention, the 1988 Convention, and the viability of a health-oriented system.

II. Drug Control and International Law

1. *Drug Control and UN Conventions*

Drug control is established in three international conventions: the 1961 Single Convention, as amended by the 1972 Protocol, the 1971 Convention on Psychotropic Substances (1971 Convention), and the 1988 Convention, which have received almost unanimous international agreement. More than 95% of the United Nations member States have ratified at least one of these treaties.[22] The importance of these drug conventions is that they set the basic legal framework, obligations, tools, and international bodies to monitor and regulate the international drug control system. As established in Article 4 of the 1961 Single Convention, their primary goal is to "limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs."[23]

The main body of this international drug control system is the United Nations Commission on Narcotic Drugs (UNCND), an intergovernmental commission of the Economic and Social Council with fifty-three members.[24] This agency serves as a political branch and is made up of several offices. The most important of these offices is the U.N. Office on Drugs and Crime (UNODC), which provides assistance to governments in strengthening drug control and gives legal expert opinions on the matter. [25] The organization's mission is to "contribute to the achievement of security and justice for all by making the world safer from crime, drugs, and terrorism."[26] Also, the 1961 Single Convention created the International Narcotic Control Board (INCB), an independent committee of thirteen experts to monitor States' compliance to the obligations under this drug control regime.[27]

---

[22] The 1961 Convention has 186 State parties; the 1971 Convention has 183 State parties, and the 1988 Convention has 182 State parties. *See* United Nations Treaty Collection, *Database*, treaties.ung.org (April 6, 2012, 3:30 PM), http://treaties.un.org/.

[23] Single Convention on Narcotic Drugs, 1961, *supra* note 2, at article 4.

[24] *Id.* at articles 5, 8. *See* http://www.unodc.org/unodc/en/commissions/CND/02-membership.html.

[25] U. N. Office on Drugs and Crime [UNODC], *UNODC Strategy 2008-2011: Towards Security and Justice for all: Making the World Safer Crime, Drugs, and Terrorism*, 7, available at http://www.unodc.org/documents/about-unodc/UNODC-strategy-July08.pdf.

[26] *Id.*

[27] Single Convention on Narcotic Drugs, 1961, *supra* note 2, at articles 4, 9.

Some civil organizations have argued that drug control conventions and their monitoring authorities lean heavily towards drug prohibitions and law enforcement.[28] For instance, the Beckley Foundation has commented that the treaties are "overwhelmingly prohibitionist in their approach, and, as such, in favor of punishment."[29] Similarly, Human Rights Watch has stated that the conventions "contain weak language on the treatment and prevention of drug use while obliging states to adopt strict law enforcement measures."[30] According to these two organizations, the drug control treaties aim at resolving the drug problem principally by punishing its production and consumption. Although international treaties leave room for States to have the discretional power to decide whether to punish drug possession for personal use, these organizations suggest that the specific obligations and guidelines established in the three conventions are only useful for a system of sanctions and punishment approach system.[31]

Despite the opinion of these organizations, some academics have asserted that drug control convention provisions expressly obligate States to provide adequate treatment facilities for drug addicts and abusers.[32] For them, regardless of the fact that almost all the provisions of the treaties are structured to criminalize both the supply and the demand of drugs, the 1961 Single Convention and the 1988 Convention clearly mandate that the parties shall take the necessary measures to educate, rehabilitate, and reintegrate drug abusers.[33] Also, it should be noted that the INCB itself has stated that drug conventions set minimum standards[34] and establish safeguard clauses for States,[35] with phrases like "subject to its constitutional limitations."[36] For the INCB, each State has broad discretionary powers to incorporate convention provisions into domestic laws, because "there are wide differences between countries and regions in community tolerance or intolerance towards drug-related

---

[28] *See* Jonathan Cohen, *Injecting Reason: Human Rights and HIV Prevention for Injecting Drug Users*, 15 (2G) Human Rights Watch 7 (2003) available at http://dspace.cigilibrary.org/jspui/handle/123456789/22415.

[29] Damon Barrett et al., Beckley Foundation Drug Policy Program, Report 13: Recalibrating the Regime: The Need for a Human Rights-Based Approach to International Drug Policy 9 (2008) available at http://www.ihra.net/files/2010/06/16/BarrettRecalibratingTheRegime.pdf.

[30] Cohen, *supra* note 28, at 51.

[31] Saul Takahashi, *Drug Control, Human Rights, and the Right to the Highest Attainable Standard of Health: By No Means Straightforward Issues*, 31 Hum. Rts. Q. 748, 750 (2009).

[32] *See* Richard Davenport-Hines, The Pursuit of Oblivion: A Global History of Narcotics 254 (2001).

[33] *Id.*

[34] International Narcotics Control Board [INCB], *Report of the International Narcotics Control Board 2007*, Chapter I, 1 , U.N. Doc. E/INCB/2007/1, U.N. Sales No. E.08.XI.1 (March 5, 2008), available at http://www.incb.org/pdf/annual-report/2007/en/chapter-01.pdf.

[35] INCB, *Report of the International Narcotics Control Board 2008*, *supra* note 1, at 6.

[36] Single Convention on Narcotic Drugs, 1961, *supra* note 2, at Article 36.

offences and offenders [including drug addicts], and those differences have an impact on the way the conventions are implemented."[37]

Most countries have a prohibitionistic drug regime. For these countries, the best way to deter drug traffic and use is by punishing any stage of the production line, including the producer, the intermediary, and the consumer.[38] The objective is to protect public health[39] by banning the cultivation, manufacture, purchase, sale, distribution, possession, and consumption of several narcotic and psychotropic drugs that may affect the health of individuals and, in consequence, the health and security of society. Public health is "what we, as society, do collectively to assure the conditions for people to be healthy."[40]

On the contrary, with the same intention to preserve public health, other countries have chosen a less repressive legal system, aimed at sanctioning certain behaviors of the drug trafficking process (the purchase and sale of certain narcotics), and oriented at preventing the use of drugs while educating, rehabilitating and reintegrating drug abusers.[41] As UN Special Rapporteur Anand Grover said regarding everyone's right to enjoy the highest attainable standard of physical and mental health:

> …the current international system of drug control has focused on creating a drug free world, almost exclusively through use of laws, enforcement policies and criminal sanctions. Mounting evidence, however, suggests this approach has failed… while drugs may have a pernicious effect on individual lives and society, this excessively punitive regime has not achieved its stated public health goals, and has resulted in countless human rights violations.[42]

The Netherlands is a good example of a non-repressive approach towards drug consumption. The core features of the Dutch system are established in the Opium Act, as amended in 1976 and again in 1995, which is rooted in the general concept of harm reduction. For the Dutch government, the main concerns related to drugs are public health and the correlative minimization

---

[37] INCB, *Report of the International Narcotics Control Board 2007*, *supra* note 34, at 1.

[38] *See* Luis Díaz Müller, El imperio de la razón. Drogas, salud y derechos humanos 28 (1994).

[39] *Id.*

[40] Comm. for the Study of the Future of Public Health, Institute of Med., The Future of Public Health (1998); *see* also Tony McMichael & Robert Beaglehole, *The Global Context of Public Health*, *in* Global Public Health 2 (2003) ("Broadly defined, public health is the art and science of preventing disease, promoting population health, and extending life through organized local and global efforts."); Fraser Brockington, World Health 131 (2nd ed. 1968) (defining public health as "[t]he application of scientific and medical knowledge to the protection and improvement of the health of the group").

[41] Díaz Müller, *supra* note 38, at 28.

[42] *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, 2, U.N. Doc. A/65/255 (August 6, 2010).

of risks and hazards of drug use rather than the suppression of all drugs.[43] In other words, as noted in the 1976 parliamentary debate on the Opium Act reforms, the primary elements of Dutch drug policy are: *a)* the central aim is the prevention or alleviation of social and individual risks caused by drug use;[44] *b)* there must be a rational relation between those risks and policy measures;[45] *c)* repressive measures against drug trafficking (other than the trafficking of cannabis) is a priority;[46] and *d)* the government recognizes the inadequacy of criminal law with respect to other aspects (*i.e.*, apart from trafficking) of the drug problem.[47]

Therefore, according to the Opium Act, the possession and use of certain kinds and quantities of drugs is not sanctioned by criminal law.[48] The statute distinguishes between "hard drugs" (heroin, cocaine, amphetamines, and LSD) and "soft drugs" (such as marijuana and hashish).[49] The former are illegal and the law sanctions their possession with intention to sell, the selling, and their importation and exportation while the latter are tolerated by the State to some extent.[50] For example, possession, cultivation, processing, manufacturing, sale, supply, or transporting less than 5 grams of marijuana have been decriminalized in the Netherlands; above that quantity, the sanction will depend of the amount of drug and the specific offense.[51]

2. *International Conventions, Drug Use, and Addictions Treatment: A Criminalized System?*

Drug conventions establish a complex mandatory framework for adherent nations. For instance, the treaties mandate that States take specific actions to stop the production of opium, control the manufacture market of psychotropic drugs, or supervise the trade and distribution of some controlled substances. However, the main international requirement is to criminalize certain behaviors (*i.e.* possession, production, purchase, and cultivation) leading to the supply and demand of drugs.

---

[43] Benjamin Dolin, Parliament of Canada, National Drug Policy: The Netherlands 3 (2001) available at http://www.parl.gc.ca/Content/SEN/Committee/371/ille/ library/dolin1-e.htm.

[44] Tim Boekhout van Solinge, *Dutch Drug Policy in a European Context*, 29(3) Journal of Drug Issues 511, 512 (1999), available online at: www.cedro-uva.org/lib/boekhout.dutch.html.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] Government of the Netherlands, Drug Policy in the Netherlands, available online at: http://www.government.nl/issues/alcohol-and-drugs/drugs (August 15, 8:35 AM).

[49] *Id.*

[50] *Id.*

[51] *Id.*

Article 3 of the 1988 Convention establishes that States shall adopt the necessary measures to criminalize the following intentional conducts under domestic law:

> 1. (a) (i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the previsions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;
>
> ...
>
> (iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in (i) above;
>
> …
>
> 2. Subject to its constitutional principles and the basic concepts of its legal system, each party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;
>
> …

Article 36 (a) of the 1961 Single Convention affirms that subject to its own constitutional limitations, each State:

> [S]hall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offenses shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

For the objective of this article, the first conclusion that can be drawn from these provisions is that drug use itself is not a behavior that is prohibited or sanctioned by the conventions. Drug conventions do not use this concept as a sanctioned behavior. Nevertheless, it is possible to argue that an addict's or non-addict's drug use is implicitly forbidden through the prohibition of possession, purchase, or cultivation of drugs.

In first place, as explained by the INCB, international drug conventions do not accept the existence of a "right" to possess narcotic drugs or psychotropic substances unless they are used for medial or scientific purposes.[52] Therefore, besides medical uses, a person might possess, purchase or cultivate drugs for

[52] *Id.*

only four logical scenarios: to keep the drugs,[53] to donate them,[54] to sell or exchange them, or to consume them. These scenarios depend on the individual's intentions: whether to obtain economic benefits or for personal use. Hence, when legislation prohibits the possession of drugs for personal use, these logical scenarios (including consumption itself) are indirectly criminalized. If a person does not keep, use or donate the drug,[55] what other action can be done? The answer is none. Criminalizing the possession of drugs for personal use is just another way to punish consumption itself.

Along this line of thought, if it is accepted that prohibiting possession of drugs indirectly punishes consumption, it could be argued that drug use is a criminal offense under Article 3.2 of the 1988 Convention. The convention clearly declares that possession of drugs for personal use is contrary to the 1961 Single Convention. Moreover, Article 36 of the 1961 Single Convention prohibits the possession of drugs regardless of their intended purposes. The recognition of this prohibition is important, because the indirect criminalization of drug use affects the legal system in two ways: first, it sets a very high burden on the exercise of a right (the right to control one's body), and, second, it can be considered an indirect punishment of an addiction. Some people consume drugs because they suffer from substance dependence and, in these cases, States must support and rehabilitate the individual, instead of punishing the "medical condition."

Despite this general rule, the conventions establish two exceptions for this possession/consumption prohibition. According to Article 3.2 of the 1988 Convention, each State has power to determine whether constitutional principles and basic legal concepts allow governments to criminalize possession and, indirectly, drug use. It is true that Article 3.2 of the 1988 Convention uses the term "shall" when ordering the criminalization of personal possession of drugs; however, this mandatory provision is subject to a safeguard clause: "subject to its constitutional limitations". In other words, drug possession for personal use is an illegal behavior under international law, but it is not an obligation for States to incorporate it as a criminal offense in their

[53] The term "keep" refers to the logical possibility to retain the drugs with the only intention to hold or preserve them and, in consequence, without use them or sale, exchange, or donate them. The Merriam-Webster Dictionary defines the term as the action to "restrain from departure or removal," "to retain in one's possession or power," and "confine oneself to." *See* Merriam-Webster Dictionary, *Dictionary Online: keep*, available at http://www.merriam-webster.com/dictionary/keep (April 19, 2012 11:25 AM).

[54] The term "donate" refers to the trade of drugs without economic benefits. The Merriam-Webster Dictionary defines the term as the action to make a "free contribution," and "the making of a gift." *See* Merriam-Webster Dictionary, *Dictionary Online: donation*, available at http://www.merriam-webster.com/dictionary/donation (April 19, 2012 11:38 AM).

[55] Donate, sale or exchanges of drugs are not legal action under international law, because involve an economical benefit that is prohibited expressly in the 1961 Single Convention. *See* Single Convention on Narcotic Drugs, 1961, *supra* note 2, at article 36.

domestic systems. Each State has the discretional power to decide whether the prohibition of drug use violates their domestic constitutional principles.

The second exception is established in Articles 3.4(c) and (d) of the 1988 Convention and 36.1(b) of the 1961 Single Convention:

> Article 3.4
>
> …
>
> (c) Notwithstanding the preceding subparagraphs, in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.
>
> (d) The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of an offense established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social integration of the offender.
>
> Article 36
>
> …
>
> (b) Notwithstanding the preceding subparagraph, when abusers of drugs have committed such offenses, the parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, aftercare, rehabilitation and social reintegration in conformity with paragraph 1 of Article 38.

These provisions affirm that States may establish alternative measures for possession and, therefore, drug use in the following circumstances: *a)* an individual commits a minor offense, regardless of the purpose of the behavior; *b)* an individual commits a minor offense and is a drug abuser, regardless of the purpose of the behavior; *c)* an individual possesses, purchases, or cultivates drugs for personal use; and *d)* an individual possesses, purchases, or cultivates drugs for personal use and is a drug abuser. Alternative measures include education, rehabilitation, social integration, treatment and/or aftercare, and they can be implemented by the State as a substitute legal consequence, instead of conviction or criminal punishment, or in addition to these criminal sanctions.

International bodies have said that these provisions are the legal bases for a public health approach to drug control. The UNODC affirms that drug conventions encourage that a health-oriented approach be adopted for both illegal drug consumption and drug dependence rather than solely relying on a sanction-oriented approach: "in the case of nondependent drug users, a health-oriented approach may involve: providing education, reliable information, brief motivational and behavioral counseling, and measures to facilitate social reintegration and reduce isolation and social exclusion. In the case of drug dependent individuals it may also involve more comprehensive

social support and specific pharmacological and psychosocial treatment, and aftercare."[56]

Similarly, the INCB insists that for drug offenses related to possession, purchase, or cultivation for personal use, each State may apply other measures as alternatives to conviction and punishment.[57] The INCB states that drug conventions establish a sharp difference between offences related to drug trafficking and use of illegal drugs, and offences committed by drug abusers or others.[58] As noted by the INCB, treaties acknowledge that to be effective: "a State's response to offences by drug abusers must address both the offences and the abuse of drugs (the underlying cause)."[59]

Summarizing, we can arrive at the following conclusions:

a) Under international law, certain serious behaviors related to the supply and demand of drugs, such as the production, manufacture, cultivation, possession, distribution, purchase, and sale of drugs, are considered criminal offenses when committed intentionally. The sanction is imprisonment or other penalties that deprive a person of his or her freedom.
b) As a general rule, when an individual or a group of individuals possesses, purchases or cultivates drugs solely for personal use, each State shall take measures to criminalize these behaviors.
c) The criminalization of a wide variety of behaviors related to the supply and demand of drugs, regardless of the purpose, is subject to each State's constitutional principles. Hence, each State has the power to decide whether the possession of drugs for personal use is a criminal offence in its own domestic system.
d) Notwithstanding the illegal nature of the behavior, each State may decide to apply measures other than conviction or punishment when the individual commits a minor offense according to domestic law.
e) When the possession, purchase, or cultivation of drugs is for personal use, each State has the power to decide whether to apply measures like the offender's treatment, education, aftercare, rehabilitation, or social integration, or to apply these measures in addition to conviction or punishment.
f) Additional measures may be taken when the offender is a drug abuser, regardless of whether the offender commits the acts for personal use or not.
g) Drug conventions encourage the adoption of a variety of educational and medical measures to prevent drug consumption.

[56] UNODC, *From Coercion to Cohesion, supra* note 5, at 1.

[57] INCB, *Report of the International Narcotics Control Board 2007*, *supra* note 34, at 4.

[58] *Id.*

[59] *Id.*

III. Drug Control and the Right to the Highest Standard of Health

The main conclusion that can be reached from the above section is that each State has the power to decide whether to prohibit the possession and, therefore, the personal consumption of drugs. Despite the fact that under international law drug possession for personal use[60] is a criminal offense, each State is generally free to criminalize this behavior for two reasons: first, because it is subject to constitutional principles and, second, because drug conventions allow States to decide whether the possession of drugs for personal use, regardless of a person's being a drug abuser or not, is an action that deserves criminal sanction. As noted, drug treaties stipulate that in these circumstances, States should apply alternative measures such as treatment, education, aftercare and/or social rehabilitation.

In this sense, if drug consumption is not a mandatory criminal offense in all situations: to what extent are States truly free or have unconditional discretional powers to sanction personal use of drugs in their domestic legislation? The answer is that States have several restrictions to do so, because the physical and mental treatment and the rehabilitation of drug users and addicts is a State obligation under the right to the highest standard of health. In other words, given that drug use in itself is not an absolute criminal offense under drug conventions, international law does not only encourage nations to provide physical and mental support to drug users as a substitute of convictions and punishment, but it establishes that these treatments are mandatory State obligations according to Articles 25.1 of the Universal Declaration of Human Rights (Universal Declaration) and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

1. *International Law and the Right to Health*

The right to the highest attainable standard of health or right to health is a fundamental and indispensable human right recognized in a wide variety of international treaties.[61] As the Committee on Economic, Social and Cultural Rights (CESCR) has affirmed, the enjoyment of the highest standard of

[60] Given its objective, this article will only address the exception for personal use and not the other exclusion prohibition related to minor offenses.

[61] The right to health is recognized in several international and regional conventions: Universal Declaration (Article 25.1), International Covenant on Economic, Social and Cultural Rights (Article 12); International Convention on the Elimination of All Forms of Discrimination against Women (Article 12); International Convention on the Elimination of All Forms of Racial Discrimination (Article 5(e)(iv)); Convention on the Rights of the Child (Article 24); European Social Charter (Article 11); African Charter on Human and Peoples' Rights (Article 16); and Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Article 10).

health is an essential element to live a "life in dignity"[62] and is closely related to and dependent upon the fulfillment of other human rights.[63] It should be noted that many scholars have argued that the language of drug treaties provides little guidance as to the specific scope of State obligations under this right.[64] For some academics, the legal scope of the right is ambiguous[65] and its minimum content and core obligations are undefined.[66]

Nevertheless, since its promulgation, the CESCR's General Comment No. 14 asserts that it can no longer be argued that right to health is unduly vague under international law.[67] In this general comment, the CESCR suggested the normative content of Article 12 of the ICESCR and the scope of this right. The following normative elements are the most important:

a) The right to health is not correlative to the right to be healthy.[68] Good health is a factor of the enjoyment of this right, but it is not its entirety. The right to health refers to the enjoyment of a variety of goods, facilities, services, and conditions necessary for its fulfillment.[69]

---

[62] U.N. Committee on Economic, Social and Cultural Rights [CESCR], *General Comment No. 14*: *The Right to the Highest Attainable Standard of Health (Article 12)*, 1, E/C.12/200/4 (August 11, 2000) available at http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En.

[63] *Id.* at 2.

[64] David P. Fidler, International Law and Infectious Diseases 14 (1999).

[65] Lawrence Gostin & Jonathan Mann, *Toward the Development of a Human Rights Impact Assessment for the Formulation and Evaluation of Public Health Policies*, in Health and Human Rights 54 (Jonathan M. Mann et al. eds., 1999) (noting that the concept of a human right to health "has not been operationally defined"); *id.* at 197 ("[T]he right to health is an international human right because it appears in treaties, but the right is so broad that it lacks coherent meaning and is qualified by the principle of progressive realization."); Virginia Leary, Concretizing the Right to Health: Tobacco Use as a Human Rights Issue, in Rendering Justice to the Vulnerable 161, 162 (Fons Coomans et al. eds., 2000) ("The efforts to clarify the right to health have often been either too theoretical or, alternatively, too detailed and unfocused, resulting in the widespread view that the right to health is an elusive concept and difficult to make operational.").

[66] The essential minimum core content of an economic, social, or cultural right "corresponds with an absolute minimum level of human rights protection, a level of protection which States should always uphold independent of the state of the economy or other disruptive factors in a country." Aart Hendriks, *The Right to Health in National and International Jurisprudence*, 5 Eur. J. Health L. 389, 394 (1998). For a discussion of the appropriateness of having core obligations in light of extremely limited national budgets, *see* Audrey Chapman, *Core Obligations Related to the Right to Health*, in Core Obligations: Building a Framework for Economic, Social, and Cultural Rights 195 (Audrey Chapman & Sage Russell eds., 2002).

[67] *See* But cf. Alicia Ely Yamin, *Not Just a Tragedy: Access to Medications as a Right Under International Law*, 21 B.U. Int'l L.J. 325, 336 (2003) (arguing after the promulgation of General Comment 14, that "it can no longer be argued that the content of the right to health is unduly vague for implementing legislation or enforcement, or that it sets out merely political aspirations").

[68] CESCR, *General Comment No. 14, supra* note 62, at 3.

[69] Office of the United Nations High Commissioner for Human Rights & World

b) The notion of the highest attainable standard of health takes into account both the individual's biological and socio-economic preconditions and a State's available resources.[70]

c) The right to health is related to and dependent on the realization of other human rights as food, housing, work, education, non-discrimination, and privacy.[71] In this sense, the CESCR has said that the right includes "underlying determinant of health", such as safe and potable water, adequate sanitation facilities, trained and professional medical personnel, essential drugs and so on.[72]

d) The right to health implies certain freedoms and entitlements.[73] These freedoms include the right to control one's body and health, and the right to be free from interference, such as non-consensual medical treatment. These entitlements include the "right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health,"[74] the right to the prevention, treatment and control of diseases; to have access to essential medicines; to maternal, child and reproductive health; and to health-related education and information.[75]

e) The exercise and enjoyment of this right need to be available (functioning public health and health-care facilities, goods, services and programs),[76] accessible (health facilities, physically and economically accessible goods and services without any kind of discrimination),[77] and acceptable (all health facilities, goods and services must be adhere to medical ethics and be culturally appropriate).[78] Moreover, facilities, goods and services that respect and fulfill the right to health must have an appropriate level of quality ("scientifically and medical appropriate and of good quality").[79]

Given the normative content of the right to health, the CESCHR affirms that States have general and specific obligations.[80] In general terms, the immediate obligations are to guarantee the right without any kind of discrimina-

---

Health Organization, The Right to Health. Fact sheet no. 31, at 5, U.N. Sales No. GE.08-41061 (2008) available at http://www.ohchr.org/Documents/Publications/Factsheet31.pdf.

[70] CESCR, *General Comment No. 14, supra* note 62, at 3.

[71] *Id.* at 2.

[72] *Id.* at 4.

[73] *Id.* at 3.

[74] *Id.*

[75] Office of the United Nations High Commissioner for Human Rights, *supra* note 69, at 3-4.

[76] CESCR, *General Comment No. 14, supra* note 62, at 4.

[77] *Id.*

[78] *Id*. at 5.

[79] *Id.*

[80] *Id.* at 9.

tion and to take the necessary, deliberate, concrete, and targeted steps toward the progressive[81] and full realization of the right to health.[82] These obligations can be divided into actions of respect, protection, and fulfillment.[83]

More specifically, the CESCHR has argued that States have a group of core obligations to ensure the satisfaction of the minimum essential levels of each right set forth in the ICESCR.[84] With regard to the right to health, the CESCHR sets out the following: *a)* to ensure the right of access to health facilities, goods, and services; to the minimum essential food which is nutritionally adequate; and to basic shelter, housing and sanitation, as well as an adequate supply of safe and potable water;[85] *b)* to provide essential drugs, immunizations against major diseases, and education and access to information concerning the main health problems in the community;[86] *c)* to ensure an equal distribution of health facilities, goods, and services;[87] *d)* to provide appropriate training to health personnel,[88] and *e)* to take measures to prevent, treat, and control epidemic and endemic diseases.[89]

The CESCHR also details the content of the State's specific legal obligation to respect, protect, and fulfill the right to health. These are some examples:

a) Respect. States must refrain from denying or limiting equal access of all persons, including prisoners or detainees to the highest level of health.[90] Moreover, States should abstain from enforcing discriminatory public policies, and to refrain from prohibiting or impeding traditional preventive care, healing practices and medicines, and from applying coercive medical treatments.[91]
b) Protect. States must adopt legislation and/or other measures to ensure equal access to health care or treatments provided by third parties.[92]

---

[81] Progressive realization does not mean that a State is free to adopt any kind of measures. The Special Rapporteur of the right to health explains that progressive means that the measures taken by a state have to be intended to achieve the full enjoyment and exercise of this right, with the acknowledge of resources availability. *See* U.N. Human Rights Council [HRC], *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt,* 17, A/HRC/4/28 (January 17, 2007) available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/102/97/PDF/G0710297.pdf.

[82] *Id.*

[83] CESCR, *General Comment No. 14 (2000)*, *supra* note 62, at 9.

[84] *Id.* at 12.

[85] *Id.* at 13.

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.*

[90] *Id.* at 10.

[91] *Id.*

[92] *Id.*

c) Fulfill. States must take positive measures to enable and assist individuals and communities to enjoy the right to health. These measures should facilitate (ensure access to), provide (ensure the enjoyment of), and promote the right (take actions to create, maintain, and restore health).[93]

Furthermore, Article 12.2 of the ICESCR provides a non-exhaustive catalogue of examples of State obligations, such as the "reduction of the stillbirth rate and of infant mortality" (Article 12.2(a)); "the improvement of all aspects of environmental and industrial hygiene" (Article 12.2(b)) and, most importantly for this Article, "the prevention, treatment and control of epidemic, endemic, occupational and other diseases" (Article 12.2(c)).[94]

2. *Criminalization, Drug Consumption, and the Right to Health: A Violation of International Law?*

Any person, even if the person uses drugs, is entitled to the right of health. States cannot deny drug users access to health-related facilities, goods, and services. For instance, States must not reject a drug user access to medical treatment (physical and psychiatric) or refuse to provide him or her with essential medicines to help an individual that consumes a certain kind of narcotic. Moreover, States are obligated to establish public policies (administrative or legislative measures) to prevent drug use. The education, treatment, and rehabilitation of drug users are State obligations under the right to health.

Based on these arguments, the relevant questions are why drug users have the right to be treated and rehabilitated by States —as specific legal obligations under international law— and whether it is possible for States to criminalize drug possession for personal use or drug use itself, regardless of the normative content of the right to health.

A. *Drug Users, State Obligations, and the Right to Health*

The concept of drug user is complex. It encompasses at least three kinds of groups:[95] drug users that are not drug abusers or addicts, drug abusers, and drug addicts or people with a "substance dependence". A drug user is an individual who consumes drugs on an irregular or regular basis and does not present the symptoms of an abuser or addict.[96] A drug abuser is a person with a "substance abuse" problem characterized by a regular drug consumption that: *a)* develops a partial physiological tolerance to and dependence on

[93] *Id.* at 11.

[94] *Id.* at 5.

[95] Sana Loue, *The Criminalization of the Addictions,* 24 J. Legal Med. 281, 282 (2003).

[96] *Id.*

the drug; *b)* presents euphoric or similar behavior, and *c)* results in a failure to fulfill his or her most important obligations at work, school, or home and has recurring social or interpersonal difficulties that were triggered or are exacerbated by substance use.[97]

Addiction is a "chronically relapsing [disorder] characterized by compulsive drug taking, an inability to limit the intake of drugs, and the emergence of a withdrawal syndrome during cessation of drug taking (dependence)."[98] The World Health Organization (WHO) has abandoned the term "addiction" and it has defined "dependence" as "a state, a psychic and sometimes also physical [state], resulting from the interaction between a living organism and a drug, characterized by behavioral and other responses that always include a compulsion to take the drug on a continuous or periodic basis in order to experience its psychic effects, and sometimes to avoid the discomfort of its absence."[99] This "substance dependence"[100] is characterized by the presence of a combination of at least some of the following elements: *a)* a tolerance to[101] and a withdrawal[102] from drugs; *b)* a use of the substance in increasingly larger amounts or over a longer period of time; *c)* a persistent desire or unsuccessful attempts to reduce the amount or frequency of using the substance; *d)* a significant amount of time dedicated to obtaining, using or recovering from the use of drugs; *e)* the elimination or lessening of social, recreational, or occupational activities due to the use of the substance; and/or *f)* continuing use of the substance despite knowing it is a persistent or recurrent physical or psychological problem.[103]

In sum, the WHO and medical research has classified abuse and dependence (addiction) on drugs as a disease. Consequently, States are obligated to take the appropriate measures to prevent, treat, and control this disease. The legal basis for these obligations is the minimum content of the right to health discussed above and, specifically, Article 12.2(c) of the ICESCR which establishes that States shall take measures for "[t]he prevention, treatment and control of epidemic, endemic, occupational and other diseases". As explained in the previous section, drug conventions encourage States to

---

[97] American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) 199 (2000).

[98] George F. Koob et al., *Neuroscience of Addiction,* 21 Neurosci. 1 (1998).

[99] Loue, *supra* note 95, at 282.

[100] "A maladaptive pattern of substance use, leading to clinically significant impairment or distress." *See* American Psychiatric Association, *supra* note 97, at 192.

[101] "Tolerance is characterized by a need of increased amounts of the substance to achieve either intoxication or desired effect or by a diminished effect of the substance with the use of the same amount." *Id.* at 192.

[102] "Withdrawal is manifested by a set of symptoms resulting from the cessation of, or reduction in use of, a particular substance or by the use of the same or a closely related substance to avoid these symptoms." *Id.* at 201.

[103] *Id.* at 197-98. *See* Loue, *supra* note 95, at 282.

treat and rehabilitate users (not to punish them) and mandate specific obligations against the abuse of drugs. Article 38 of the 1961 Single Convention affirms that: "[t]he parties shall give special attention to and take all practicable measures for the prevention of abuse of drugs and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved and shall co-coordinate their efforts to these ends."

Furthermore, this article suggests that States have the following general and specific obligations regarding drug users. First of all, States cannot discriminate and make an overall distinction between people who do not use drugs and those who do. As noted, drug users are entitled to the right to health like everybody else. The fact that an individual consumes an illegal substance is not enough to deny him or her from enjoying and exercising a human right. The CESCHR has stated that the wording "other status" in Article 2.2 of the ICESCHR includes health as prohibited grounds for discrimination.[104] Therefore, States "should ensure that a person's actual or perceived health status [including drug abuser and addicts] is not a barrier to realizing the rights under the Covenant."[105]

However, States can make reasonable distinction between non-users and drug users, for the sole purpose of achieving the highest level of health of the latter group. In other words, given that drug users suffer from a disease (drug abusers and addicts) or are in a position to potentially fall victim to a disease (drug users), a State can take special measures to advance the needs of each specific group and assign certain resources to educate, treat, control, and rehabilitate them. Also, in order to respect and fulfill the right to health, States should refrain from denying the right to health to prisoners or detainees who suffer from substance abuse or addiction, and should incorporate a holistic public health policy to promote saying no to drugs through preventive education. As mentioned above, a health-approach system is more efficient that a sanction-coercive one.

B. *The Criminalization of Drug Use and the Right to Health*

Based on the above arguments, this article argues that the criminalization of drug use itself or the possession of drugs for personal use is a violation of international law and the right to health. Drug users can be classified into two groups: the first one is made up of individuals that produce/cultivate/purchase/possess drugs for commercial purposes and also consume them;

---

[104] See U.N. Committee on Economic, Social and Cultural Rights [CESCR], *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), 8, E/C.12/GC/20 (July 2, 2009)*, available at http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.GC.20.doc.

[105] *Id.*

and the second one is a group of individuals that possess/produce/purchase drugs for the sole intention of using them (personal use).

Regarding the first group, as explained in the second section of this essay, drug conventions mandate the criminalization of several actions, such as possession, purchase, cultivation, sale, and importation of drugs, with the objective to avoid illegal drug trafficking. In this sense, under international law, States have a compelling interest in prohibiting, for instance, drug possession. In this case, what is being prohibited is the intention and potential condition of commercializing drugs and not drug use itself; the drug user status is not the criminal offense. Obviously, drug users sanctioned for commercial drug-related activities must be entitled to their exercise of the right to health.

Nevertheless, States cannot criminalize the conduct of the second group of drug users. Under international law, States have discretional power to criminalize personal use. Drug conventions do not impose a mandatory obligation to sanction drug use or possession for personal use; on the contrary, drug treaties subject this prohibition to the constitutional principles of each State (margin of appreciation) and encourage States to take alternative measures. In consequence, criminalizing these conducts can be a straight-forward violation of the obligations to respect and fulfill the right to health (if the State has recognized this human right or at least ratified the ICESCR). In other words, States do not have the absolute obligation to criminalize such actions, but do have the general obligation to provide the highest level of health for all people, including drug users. Therefore, the criminalization of drug use or possession for personal use (an indirect way of sanctioning drug use) is a disproportionate restriction of this human right.

States can argue that they have a compelling interest in restricting or limiting the enjoyment and exercise of the right to health: to avoid drug trafficking. Moreover, States can claim that prohibiting drug possession for personal use would lower the demand for drugs and improve the health of the population. These arguments are misleading. First, because this prohibition imposes a high cost on drug users who, in some cases, suffer from a disease (substance abuse or addiction). States are simply sanctioning a medical condition and not a behavior that is harmful to society.[106] Second, there is a significant amount of evidence which asserts that education, treatment, and rehabilitation is a more effective way to reduce illegal drug use and allay the potential social harm.[107] The restriction of the enjoyment of the right to health by punishing drug users would not survive close scrutiny under Article 4 of the ICESCR. The only possibility for a State to regulate drug use or the posses-

[106] The US Supreme Court, in *Robinson v. California,* 370 U.S. 660 (1962), held that a law which made "status" of narcotic addiction a criminal offense violated the cruel and unusual punishment clause of the Fourteenth Amendment, because the statute is just merely sanctioned an illness which may be contracted innocently or involuntarily.

[107] Chandler et al., *supra* note 14, at 184.

sion of drugs for personal use is through measures other than conviction or punishment, measures that also need to be analyzed under the principle of proportionality.[108]

IV. Mexico and the Criminalization of Drug Use

To apply the reasoning and arguments presented in the previous sections, this segment of the article is a practical analysis of Mexican federal legislation on drug control, which is regulated in several federal and state statutes. This article will only focus on federal laws and, specifically, on the provisions related to drug possession and use because most cases are prosecuted under federal jurisdiction.[109]

The Mexican Constitution safeguards the right to health. Article 4, paragraph one, of the Mexican Constitution states that "every person has the right to health protection." The right is not limited to being healthy; instead, the normative content of the right to health is exactly the same as that defined under international law. Article 1 of the Mexican Constitution establishes that every person enjoys the human rights recognized in the Constitution and international treaties ratified by the State. This means that the Constitution gives constitutional status to a wide variety of human rights[110] and, implicitly, accepts its international normative content.[111] Having said that, this article argues that Mexican legislation violates international law and the normative content of the right to health, because the Federal Criminal Code (FCC) and the Federal Health-Care Law (FHCL) criminalize the possession of drugs for personal use without taking reasonable alternatives into account.

As a general rule in Mexico, federal law prohibits the possession of a wide-ranging diversity of narcotic drugs and psychotropic substances. In other words, Mexico has never granted the general right to possess drugs. Article 195 of the FCC forbids the possession of drugs for commercial activities.[112]

---

[108] *See* INCB, *Report of the International Narcotics Control Board 2007*, *supra* note 34, at 5.

[109] Ana Paula Hernández, *La legislación de drogas en México y su impacto en la situación carcelaria y los derechos humanos*, Dissertation-FLACSO (2010).

[110] To see the Mexican Supreme Court opinion about this matter, *see* the Contradicción de Tesis 21/2011-PL and Contradicción de Tesis 293/2011.

[111] Mexico is a party to drug conventions and the ICESCR, which were ratified as follows: the 1961 Single Convention on April 18, 1967; 1971 Convention on February 20, 1995; and the 1971 Convention on April 11, 1990. *See* Treaty Collection, *Database*, treaties.ung.org (April 10, 8:30 PM), available at http://treaties.un.org/.

[112] "Artículo 195. Se impondrá de cinco a quince años de prisión y de cien a trescientos cincuenta días multa, al que posea alguno de los narcóticos señalados en el artículo 193, sin la autorización correspondiente a que se refiere la Ley General de Salud, siempre y cuando esa posesión sea con la finalidad de realizar alguna de las conductas previstas en el artículo 194, ambos de este código." [A penalty from five to fifteen years in prison and a fine between one hundred and three hundred days of minimum wage shall be imposed on the person who

Before the FCC was amended in 2009, Article 195 established that the "Ministerio Público" [Public Prosecutor] shall not present criminal charges against a person who possessed a certain amount of drugs, if that person was a drug addict and the amount of the drugs was proportional to that needed for personal use.

However, in 2009, with the alleged intention to comply with the mentioned drug conventions and international obligations under the right to health, the Federal Congress amended Articles 195 and 199 of the FCC and Articles 13 and 473 to 482 of the FHCL to establish that any drug abuser or addict being prosecuted for drug trafficking or other crimes is entitled to medical treatment and rehabilitation.[113] In this respect, it has changed the entire regime for drugs addicts.

Interestingly, Article 478 of the FCHL establishes that the Public Prosecutor cannot press charges against a person who possesses a certain amount of a drug listed in Article 479 of the FCHL.[114] However, it would be a criminal offense and, therefore, punishable, for a person to have more than the exact quantities of drugs mentioned in said article: for instance, more than 2 grams of opium, 5 grams of marijuana, 50 milligrams of heroin and 500 milligrams of cocaine. Likewise, if the drug is not included on the FCHL list, the person shall be prosecuted under Articles 194 and 195 of the FCC, despite his or her substance dependence.

Regardless, this article considers the FCHL provisions a violation of international laws and the right to health, for two main reasons. First, as explained, a health-care approach is mandatory under international law. When a nation is not internationally bound to criminalize the use or possession of drugs for personal use, but bound by the ICESCR, a State adherent to this convention should prefer a system that focuses on the respect and fulfillment

---

possess any of the narcotics described in Article 193, without the authorization established in the Federal Healthcare Law, and as long the individual possesses said drugs for any of the intentions explained in Article 194, both of which are found in this Criminal Code.] *See* Código Penal Federal [C.P.F] [Federal Criminal Code], as amended in August 20, 2009, Diario Oficial de la Federación [D.O.], 14 de Agosto de 1931 (Mex.).

[113] For instance, Article 487 of the Federal Health-Care Law establishes: "El Ministerio Público o la autoridad judicial del conocimiento, tan pronto identifique que una persona relacionada con un procedimiento es farmacodependiente, deberá informar de inmediato y, en su caso, dar intervención a las autoridades sanitarias competentes, para los efectos del tratamiento que corresponda." [The Public Prosecutor or the judicial authority who identified that a person who is being prosecuted is a drug abuser or an addict, shall immediately inform the judge and, in this case, allow the health-care authorities to participate in order to provide the appropriate medical treatment.] *See* Ley General de Salud [L.G.S.] [Federal Health-Care Law], *as amended* in April 24, 2013, Diario Oficial de la Federación [D.O.] 7 de febrero de 1984 (Mex.).

[114] The drugs are opium, marijuana, heroin, cocaine, LSD, MDA, and methamphetamines. *See* Ley General de Salud [L.G.S.] [Federal Health-Care Law], *as amended* in April 24, 2013, Article 479, Diario Oficial de la Federación [D.O.] 7 de febrero de 1984 (Mex.)

of the right to health. Second, legislation does not make a necessary distinction between drug users without an addiction, drug abusers, and drug addicts. This conceptual division is an essential step towards treating and controlling a disease: substance abuse and dependence (Article 12.2(c) of the ICESCR). It is true that Article 479 of the FHCL allows the possession of a certain amount of drugs for personal use and, to a certain extent, enforces a sphere of freedom; but it is also true that many drug abusers and addicts need much more than these amounts. Legislation benefits occasional drug users instead of drug abusers and addicts.

The Mexican Supreme Court has held that Articles 478 and 479 of the FHCL do not violate the equal protection clause and constitutional right to health. In the cases of *Amparo en Revisión* 563/2010,[115] *Amparo en Revisión* 576/2010,[116] and *Contradicción de Tesis* 454/2011,[117] the Court concluded that the normative constraints on drug possession for personal use are reasonable, because the objective of the regulation is to avoid the trafficking of specific drugs, to protect public health, and to recover State power/strength and social peace in the country. The Court emphasized that drug possession restrictions (in number and quantity) grant the community greater benefit than a person's freedom to possess and use drugs. Legislation does not aim at sanctioning the use of any particular kind of drug, but to prevent the indiscriminate possession of narcotics.

In this sense, although the Mexican government has a compelling interest in prohibiting drug possession in several specific circumstances, I question these Mexican Supreme Court opinions and suggest that legislation is disproportionate. The FHCL and the Court analyses focus on the amount of drugs and not on the existence of substance dependence; in other words, a person's possessing 6 grams of marijuana is more important than his or her disease. As explained above, the normative content of the right to health under in-

---

[115] *See* "Igualdad y derecho a la salud. El artículo 479 de la Ley General de Salud, no es violatorio de los citados principios constitucionales al limitar la cantidad de narcóticos que debe considerarse para su estricto e inmediato consumo personal," Primera Sala de la Suprema Corte de Justicia [S.C.J.N.] [First Chamber of the Supreme Court of Justice], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXXIII, Febrero de 2011, Tesis 1a./J. 73/2010, Página 471 (Mex).

[116] *See* "Farmacodependencia. Constituye una causa excluyente del delito condicionada a las dosis máximas establecidas en el artículo 479 de la Ley General de Salud," Primera Sala de la Suprema Corte de Justicia [S.C.J.N.] [First Chamber of the Supreme Court of Justice], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXXIII, Febrero de 2011, Tesis 1a./J. 74/2010, Página 368 (Mex).

[117] *See* "Farmacodependencia. Constituye una causa excluyente del delito prevista en el artículo 15, fracción IX, del Código Penal Federal, condicionada a la posesión de narcóticos y en las cantidades establecidas en la tabla prevista en el artículo 479 de la Ley General de Salud," Primera Sala de la Suprema Corte de Justicia [S.C.J.N.] [First Chamber of the Supreme Court of Justice], Semanario Judicial de la Federación y su Gaceta, Décima Época, Libro XI, Agosto de 2012, Tesis 1a./J. 43/2012, Página 341 (Mex).

ternational and constitutional law compels Mexico to offer treatment and rehabilitation to all drug abusers and addicts.

The prosecution of a person who, for instance, keeps more than the permitted amount of cocaine at home and there is no indication that he or she sells drugs, does not increase social benefits. Instead, the State is punishing a sick individual just because he or she does not fulfill a formal, restricting legal requirement that is partially related to public health. The public prosecutor should have the power to analyze the existence of the following elements on a case by case basis: a) drug abuse or substance dependence; b) the amount of drugs recovered; and c) unlawful behaviors such as production, manufacture, cultivation and distribution of narcotics with the intent to commercialize them. If the authority has sufficient evidence of the last element, it should present criminal charges, while ensuring treatment for the abusers or addicts. In the other scenario, the prosecutor must evaluate the proportionality between the drugs that were found and the person's physiological tolerance to and dependence on the drug.

In sum, to ensure the enjoyment of the right to health, the procedure for prosecuting drug abusers or addicts should be more flexible and focus on the protection of the individual and not on the amount of narcotics. As noted, Mexico has ratified the CESCR and other international and regional conventions that recognize this right; therefore, it is obligatory to respect, protect, and fulfill all its normative content under Article 1, paragraphs one, two and three, of the Mexican Federal Constitution.

V. Conclusion

The balance between the protection of human rights and drug control is a difficult scenario for States to maintain. It is challenging not only in the legal arena, but also in a much broader sense: drug use and its causes and effects are not only legal problems, but also social, cultural, economic, and political dilemmas. The arguments explained in this essay do not intend to diminish the tough position most countries face concerning drug production and use. Instead, the purpose of this article is to highlight legal arguments that support a wider-ranging concept of the right to health. This essay shows that under international law States should at least take this right into account in every decision regarding drug control. The right to the highest standard of health, including people that commit illegal actions, deserves careful government analysis. This right is not a programmatic privilege, but an essential human right.

Recibido: 7 de noviembre de 2012.
Aceptado para su publicación: 16 de agosto de 2013.

Mexican Law Review
New Series
VOLUME VI
Number 2

THE SECURITY COUNCIL AND THE ILLEGAL TRANSFER OF SMALL ARMS AND LIGHT WEAPONS TO NON-STATE ACTORS

Gustavo Mauricio Bastien Olvera*

Abstract. *Small arms and light weapons continue to wreak havoc at an international level, both in areas of conflict and in those at peace. In order to combat this phenomenon, several lines of action need to be explored in the context of multilateral diplomacy. One possible solution lies in arms embargoes sponsored by the United Nations Security Council (UNSC), the main topic of this article. The author addresses several issues in relation to the scope and objectives of existing regional instruments as well as the Arms Trade Treaty, which could enter into force but —unlike UNSC arms embargoes— would bind only ratifying countries.*

Key Words: *Illicit arms trade, disarmament, United Nations Security Council, sanctions, organized crime.*

Resumen. *Las armas pequeñas y ligeras son las causantes de grandes estragos a nivel internacional. Por ello, se presenta la necesidad de proponer diversas líneas de acción en el ámbito de la diplomacia multilateral para combatir este fenómeno, siendo los embargos de armas del Consejo de Seguridad de la Organización de Naciones Unidas (CSONU), el principal tema de análisis de este artículo. Se abordan los aspectos relacionados con el alcance y los objetivos de los instrumentos regionales ya existentes y del Tratado sobre Comercio de*

* MA in Public International Law from Leiden University; BA in International Relations from the National Autonomous University of Mexico (UNAM). He has served as an Adviser to the Mexican Minister of the Interior and as an Analyst for International Security at the Ministry of Foreign Affairs of Mexico. Also, he has attended several disarmament meetings in Guatemala, Panama, The Hague and in New York where he was part of the Mexican Delegation to the Fourth Biennial Meeting of States to Consider the Implementation of the United Nations Programme of Action to prevent, combat and eradicate the illicit trade of small arms and light weapons. He has published with the Olof Palme Research and Analysis Center on Peace, Security and Development, the Amsterdam Law Forum and the International Relations Journal of the UNAM. Currently, he works at the Office of International Relations of the Deputy Minister of Prevention and Citizen Participation of the Interior Ministry. The author would like to thank Dr. Erik V. Koppe, from the Grotius Center for International Legal Studies for his valuable comments. Email: *gmbastien@gmail.com*.

Armas que podría entrar en vigor, pero que, a diferencia de los embargos de armas del CSONU, no sería vinculante para todos los países, salvo aquellos que lo ratifiquen.

Palabras clave: *Tráfico de armas, desarme, Consejo de Seguridad, sanciones, crimen organizado*.

Table of contents

I. Introduction

The illegal manufacture, transfer and use of small arms and light weapons jeopardize social development in several countries. This is a problem that prevents the full development of civilian populations, thus endangering respect for human rights and the ability of governments to implement social welfare in areas in which it is most needed. Small arms and light weapons are the most widely-used weapons in 46 out of 49 international armed conflicts since the 1990's.[1] During the last decade, an average of 52,000 deaths have taken place each year in armed conflicts.[2]

[1] U.N. Development Programme, Light Weapons and the Proliferation of Armed Conflicts, 1 (Apr. 1, 1999), the report does not specify the type of weapons used in the other three conflicts.

[2] Small Arms Survey, Direct Conflict Deaths, *available at* http://www.smallarmssurvey.

That said, some experts argue that not all small arms and light weapons transfers are by definition destabilizing.[3] This is because some non-state actors have sought small arms supplies to help preserve human rights and fight for democracy in a given country. For the purposes of this work, however, non-state actors[4] will be understood to mean those entities that "fuel armed conflicts and intend to destabilize and topple governments"[5] and not those that are seeking to have democratic regimes or preserve human rights. The reason for this (as analyzed in more detail below) is that the United Nations Security Council (UNSC) has recognized that the illegal traffic[6] of small arms and light weapons to organized crime poses a threat to international peace and security.[7]

This analysis begins with a conceptual study of small arms and light weapons, including their definition, main characteristics and features, including manufacture, transfer and use. A discussion follows of international standards implemented to control their transfer, including but not limited to those that govern transfers to non-state actors. As shown below, the Arms Trade Treaty (ATT) is currently the only universal and legally-binding instrument that covers these transfers. The last section discusses the UNSC arms embargoes, which are currently the only universal and legally-binding mechanisms to curb illegal transfers of small arms and light weapons to non-state actors. New reforms can be implemented, which will be presented as conclusions.

II. Small Arms and Light Weapons, a Global Problem

1. *Introduction*

First, the advantages of small arms and light weapons include their low cost and easy acquisition; easy transport; the ability to be handled and activated by individuals. These features explain why these weapons are the most cost-effective in the world.

It is also interesting to note that, compared with weapons of mass destruction, like nuclear, chemical or biological weapons, small arms and light weapons are commonly transferred and used by illegal groups. One reason for this

org/armed-violence/conflict-armed-violence/direct-conflict-deaths.html (last visited Jul. 14, 2011).

[3] Zeray Yihdego, The Arms Trade and International Law 163 (Hart, 2007).

[4] The Stockholm International Peace Research Institute [hereinafter SIPRI] also refers to these entities as non-governmental forces.

[5] Lucy Mathiak and Lora Lumpe, , *Government Gun-Running to Guerrillas*, *in* Running Guns: The Global Black Market in Small Arms, 75 (Lora Lumpe comp., 2000).

[6] The term "illegal transfers" refers to all commercial transactions that do not fall under the scope of legal mechanisms on arms transfers.

[7] S.C. Res. 1373, U.N. SCOR 56th Sess., U.N. Doc. S/RES/1373 (September, 28, 2001).

is that the materials used to construct weapons of mass destruction are highly regulated, whereas those used in the manufacture of small arms and light weapons have few restrictions.

Similarly, there are currently over 875 million small arms and light weapons currently available; of this total, governments control only about 26% percent[8]. Based on these figures, it is unsurprising to discover that these weapons cause 1,000 deaths[9] per day, creating a dangerous epidemic that, if left unattended, can jeopardize the well-being of entire communities.

2. *Manufacture, Transfer and Use of Small Arms and Light Weapons*

The first issue we shall consider are the small arms and light weapons produced by governments and private companies. If we add up both types of productions, governmental and private, the United States of America (US), France, the Russian Federation, the United Kingdom (UK) and Saudi Arabia are home to the world's largest manufacturers and exporters of these types of weapons. Weapons production and export represent significant earnings for these countries. The U.S. alone exports more than the other four countries combined, about USD 732 million.[10]

For large producers, the manufacture of small arms and light weapons represents a significant source of employment. Not only do they provide direct work in factories, but also indirect employment such as that generated by various arms fairs, gun shops, pawn shops, among others. It's not unsurprising that employment is a recurrent argument used by producing countries to block efforts to stop the manufacture of small arms and light weapons. There are currently over 1,250 small arms and light weapons manufacturers, both private and public, in more than 90 countries worldwide.[11]

A study by the Defence Committee of the British Parliament[12] shows that at least 300,000 jobs, directly or indirectly, depend on weapons manufacture. Based on this figure, the study's author, Gideon Burrows, estimated that exports would drop by 50% and result in the loss of 40,000 jobs.[13]

Weapons manufacture benefits more than just developed countries; in recent years, illegal arms manufacturing in developing nations, by handcrafting

---

[8] Gun Violence: The Global Crisis, International Action Network on Small Arms 3 (2007).

[9] *Id.*

[10] *Guns and the City*, 2007 Small Arms Survey Y.B. (Graduate Institute of International and Development Studies) Annex 3.

[11] *Rights at Risk*, 2004 Small Arms Survey Y.B. (Graduate Institute of International and Development Studies) 9.

[12] H. of C., The Defence Industrial Strategy, Seventh Report 2005-2006, 29 (UK, 2006), *available at* http://www.berr.gov.uk/files/file33168.pdf (last viewed May 12, 2013).

[13] Gideon Burrows, The No-Nonsense Guide to the Arms Trade 88 (Verso, 2002).

them, has greatly benefited producers. In most cases, these manufacturers are located in impoverished areas where the production of small arms and light weapons is often the sole (or most secure) source of work for numerous families. Another factor is the speed with which weapons can be manufactured compared to other products, *e.g.*, the cultivation of grain, a more profitable business that requires much longer periods to produce profits.

In addition to illegal handcraft, there is also the factor of illegal industrial production[14] realized by organized crime which represents a significant threat not only to individual nations but entire regions.[15] At this time, many groups have been identified in this business, including the Revolutionary Armed Forces of Colombia (FARC, in Spanish); the Liberation Tigers of Tamil Eelam; the Moro Islamic Liberation Front in the Philippines; and the self-declared Republic of Moldova Pridnestrovie,[16] to name just a few large-scale manufacturers of small arms and light weapons.[17] Among the issues these actors face in the manufacturing process is the recruitment of qualified personnel for fabrication, manufacturing, the need to maintain secured areas, and of course their involvement in actions in which such weapons can be used.

The transfer of small arms and light weapons relies heavily on arms brokers who take advantage of various international and domestic legal loopholes to close deals between manufactures and end users. Brokers generally do not own the arms, they only have the contacts and limit their activities to establish the supply chain mechanism between producers and users. In contrast, arms dealers possess the weapons and have direct contact with them while transferring them.

The main problem with illegal brokering emerges when the broker supplies weapons to states or non-state actors either under an arms embargo or for an illegal purpose.[18] In order to make business, illegal brokers use diverse strategies, including the creation of phantom companies, apocryphal registration of shipping and communication lines, and bribes to government officials.[19] Once the arms are in the buyers' possession, they earn a percentage of

---

[14] Illegal industrial production of small arms and light weapons refers to weapons that are illegally manufactured on a large scale, unlike handcrafted production, which can only be realized one weapon at a time.

[15] The issue of organized crime as a threat to international peace and security was identified by the UN Security Council in the following regions: Guinea-Bissau, Kosovo and Sierra Leone (S.C., Annual Report to the General Assembly (covering the period from 1 August 2009 to 31 July 2010), U.N. Doc. A/65/2 (2010)).

[16] Internationally regarded as a separatist territory of the Republic of Moldova.

[17] These groups produce semi-automatic pistols, sub-machine guns, rocket launchers and grenade launchers, among others. *Risk and Resilience,* 2008 Small Arms Survey Y.B. (Graduate Institute of International and Development Studies) 15.

[18] G.A. Report of the Group of Governmental Experts to consider further steps to enhance international cooperation in preventing, combating and eradicating illicit brokering in small arms and light weapons, 1, U.N. Docs. A/62/163 (2007).

[19] Burrows, *supra* note 13, at 108.

the total value. This modus operandi allows the same dealer to often supply weapons to opposing groups.[20]

According to the SMALL ARMS SURVEY 2008, Canada, France, Germany, Saudi Arabia and the U.S. are the largest importers of small arms and light weapons in the world.[21] These imports, however, are legal and comply with international law. For the purposes of this research, only the transfer of weapons to organized crime groups will be analyzed.

Unlike large-scale orders for arms and other military equipment made by states, which can often be extremely costly, organized crime groups rely on retail purchases of small arms and light weapons. This can be seen by analyzing the average price of an *Avtomat Kalashnikova* model 1947, better known as an AK-47, in Latin America (USD $500); whereas in Africa and other regions, this same weapon is sold for less than USD $30. In this line of thought lies the assumption that a higher financial income of the criminal organization, such as those operating in Latin America, would mean weapons are more expensive.

3. *Illegal Transfers of Small Arms and Light Weapons*

It is notable that small arms and light weapons that fall into the hands of organized crime pass through various transfer processes. The first is a purchase or sale agreement in compliance with the laws of the sovereign nation where the transaction takes place. These same weapons later enter the black market to be eventually re-purchased illegally by end-users.

Whereas there are many reasons why small arms and light weapons are transferred illegally in such significant volume, several key recent developments have influenced this phenomenon:[22]

Remnants of the Cold War: During this period, the threat of nuclear weapons and wars in proxy countries of the two super-powers were key elements to define the international environment. The weapons used in these proxy wars, were manufactured in territories that would later become independent countries[23] and distributed mostly in areas of conflict in Africa, Southeast Asia and Latin America. After the Cold War, high manufacturing levels would generate a surplus of weapons both in manufacturing and end-using countries, leading to huge profit margins for corrupt officials who engaged in the unlawful trade of surplus weapons to end-users.[24]

---

[20] Douglas Farah, Merchant of Death 39-44 (Wiley ed. 2007).

[21] *Risk and Resilience*, *supra* note 17, at 108.

[22] UNIDIR, Curbing Illicit Trafficking in Small Arms and Sensitive Technologies: An Action Oriented Agenda 14 (Péricles Gasparini & Daiana Belinda eds. 1998).

[23] The two countries with the most registered weapons per soldier are Ukraine and the Czech Republic at a rate of 5.9 and 10 weapons per soldier, respectively. *In* 2008 Small Arms Survey Y.B., *supra* note 17, at 87.

[24] William Godnick, *Illicit Arms in Central America* (Monterey Institute of International Studies, Working Paper, 1998).

Monetary gains: The production and illicit sale of weapons is a highly profitable business in which all participants end with a significant margin, including the manufacturer, broker and dealer. It is estimated that the illegal arms trade, which supplies most weapons to non-state actors, represents approximately fifteen to twenty percent of total arms transfers, or approximately USD 6 billion.[25]

These illicit transfer to non-state actors thus represent a complex problem. However, as presented in the next chapter, regional efforts have been made to tackle this issue.

III. International Regulations on Small Arms and Light Weapons Transfers

1. *Introduction*

There is the need to analyze how the international community has dealt with the problem of illicit transfers of small arms and light weapons, bearing in mind that present-day conflicts are different than those with which the United Nations was designed to resolve.[26] The only legally-binding provision currently in force, although not yet universal, is the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (CTOC), in effect since 2005 and ratified by 97 countries.[27] Although the Arms Trade Treaty (ATT) was enacted, it still needs to enter into force, which will happen ninety days after the fiftieth ratification.[28]

The so-called "micro-disarmament," another term the disarmament negotiations on small arms, has gained prominence in recent discussions at the UN level; however the only universal and legally-binding mechanisms to curb the illegal transfer of small arms and light weapons to non-state actors are the UNSC arms embargoes. This section analyzes current regulations on small arms and light weapons transfers and their evolution.

As will be seen, the current regional instruments are inconsistent in terms of their legal commitment towards states. Therefore, first there is the need to

---

[25] *Profiling the Problem*, 2001 Small Arms Survey Y.B. (Graduate Institute of International and Development Studies) 167-168.

[26] Jozef Goldblat, Arms Control: The New Guide to Negotiations and Agreements 46-47 (PRIO/SIPRI 2002).

[27] Status of ratification, Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, UN Treaty Collection, Chapter XVIII, Penal matters, as last reviewed on May 12, 2013.

[28] In accordance with Article 21 of the ATT, it shall be open for signature at the UN Headquarters in New York by all States from 3 June 2013 until its entry into force.

analyze the prevention of illicit transfer of small arms and light weapons to non-state actors as an issue of customary international law.

The Statute of the International Court of Justice (ICJ) recognizes custom as one of the sources of international law, by stating that the Court shall apply: "[I]nternational custom, as evidence of a general practice accepted as law."[29] In this sense, the concept of international custom seems to be very broad. Nevertheless, the ICJ itself has narrowed the precedent after several case rulings, including the Nicaragua case, as analyzed below.

In line with the above, the ICJ also stated that the elements of international custom include duration, uniform and general practice, and *opinio juris et necessitates*.[30] In this section, the main focus will be on these last two elements. With repect to the establishment of rules as customary law, the ICJ concluded that "the conduct of States should, in general, be consistent with such rules."[31]

In this sense, Petersen concludes "that practice is nothing more than an auxiliary in identifying customary law."[32] Also, Kirgis affirms that customary law can either be backed up by an *opinio juris* without state practice or the other way around.[33] Thus, there is not a clear consensus regarding the importance of each element.

In addition, the ICJ has recognized[34] that for the creation of a new rule of customary international law, states acts should "have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved."[35] In the Nicaragua case, the ICJ made a further ruling and added that for a new customary rule to be established, it "must be accompanied by the *opinio juris sive necessitates*."

On the other hand, there is the Thirlway approach to the *opinio juris*, that mentions that it needs to be deduced from States actions regarding the alleged custom.[36] By doing this identification, then it can be understood that in order to have *opinio juris*, there is the need first to have states actions or prac-

---

[29] Statute of the International Court of Justice Article 38, June 26, 1945. I.L.M [hereinafter ICJ Statute].

[30] This term refers to an action that is carried out as a result of a legal obligation. *See* Fisheries case (UK v. Nor.), 1951 I.C.J. (December, 18); *see also* Asylum case (Colom. v. Peru), 1950 I.C.J. (November, 20).

[31] Military and Paramilitary Activities (Nicar. v. U. S.), 1986, I.C.J. 98, para. 186 (June 27).

[32] Niels Petersen, *Customary Law without Custom? Rules, Principles and the Role of State Practice in International Norm Creation*, 23 American University International Law Review 276, 295 (2008).

[33] Frederic Kirgis, *Custom on a Sliding Scale*, 81 The American Journal of International Law 144, 149 (1987).

[34] *See* North Sea Continental Shelf Cases (F.R.G. v. Den. & F.R.G v. Neth.), 1969 I.C.J. 51 & 52 (February 20).

[35] *Id.* at 43, para. 74.

[36] Thirlway, Hugh, *The Sources of International Law*, *in* International Law, 95, 103 (M. Evans ed. 2010).

tice. This idea is opposite to what Kirgis mention on the existence of *opinion juris* without State practice.

Having said this, the ICJ recognized in its Nicaragua ruling that when arms are supplied to assist certain non-state actors such as armed opposition groups, those transfers may violate customary international law under the scope of the non-intervention principle. The ICJ, found:

> [T]hat no such general right of intervention, in support of an opposition within another State, exists in contemporary international law. The Court concludes that acts constituting a *breach of the customary principle of non-intervention* will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations… The Court therefore finds that… *supply of weapons*… constitutes a clear breach of the principle of non-intervention[37] (Emphasis added).

To arrive at this conclusion, the ICJ first analyses the *opinio juris* regarding the violation of the non-intervention principle by means of the transfer of arms to non-state actors. For this, it recalls the UNGA resolutions 2625 (XXV) regarding the Friendly Relations Declaration, adopted without a vote on 24 October 1970 which, among other things, recognized that: "…no state shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State."

In this sense, for the ICJ there was a general acceptance of this principle, but not legally binding, especially because the above resolution was adopted without a vote. Nevertheless, it is useful to recall the argument made by the US State Department regarding the practice of using UNGA resolutions as proof of customary law. It says that states may vote in favor of a resolution or support it "for reasons having nothing to do with a belief that the propositions in it reflect customary international law."[38]

Although the ICJ relied on more than just the UNGA resolutions, it also analyzed the possibility that the American arms supply fell under the scope of a new norm in case that the non-intervention principle was terminate. Especially, considering that "example of trespass against the principle are not infrequent."[39] The ICJ concluded, however, that the USA could not justify its conduct pursuant to "a new right of intervention or a new exception to the principle."[40]

---

[37] *See* Military and Paramilitary Activities (Nicar. v. U. S.), 1986, I.C.J. 98, 99 para. 209-242 (June 27).

[38] John Bellinger III, *U.S. Initial Reactions to ICRC Study on Customary International Law*, Department of State, United States of America, November 3, 2006.

[39] *See* Military and Paramilitary Activities (Nicar. v. U. S.), 1986, I.C.J. 98, 96 para. 202 (June 27).

[40] *Id.* at 98, para. 207.

In addition, the Draft Articles on States' Responsibility for Internationally Wrongful Acts of the International Law Commission, which have been invoked as a source of international law by the ICJ,[41] can also be applied to arms transfers. Article 16, in particular, reads as follows:[42] "Article 16. Aid or assistance in the commission of an internationally wrongful act: A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so…"

Even though the above article only covers arms transfers between States, it is important to recognize that these transfers may be diverted to the illicit market, thus falling into the hands of outlawed non-state actors. The Commentaries to this Articles further suggest that the provision of aid or assistance is not limited to the prohibition of the use of force, but rather the possibility of considering the transfer of arms that could be used to commit serious human rights violations as prohibited.[43] This idea, if the Draft Articles ever become an international treaty,[44] would use the precepts set forth in several regional provisions to establish an international standard.

Although only politically binding, another international mechanism worth mentioning is the United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade of Small Arms and Light Weapons in All Its Aspects (PoA).[45] The PoA mechanism was adopted in 2001 and has since held Biennial Meetings of States in which it has requested annual reports on implementation and Review Conferences every five years.

In sum, there has been a significant improvement in the area of promoting international assistance and cooperation among UN Member States.[46] During its last Review Conference, the States agreed on a six-year plan to further develop its implementation.[47]

2. *Substantive Scope of Treaty Law and Regional Regulations*

In this section, we analyze the Arms Trade Treaty and diverse regional agreements that address the problem of illicit transfers of small arms and

---

[41] The ICJ invoked a preliminary version of the Draft Article in the Gabčíkovo-Nagyamaros Project (Hungary/Slovakia), 1997 I.C.J., 36 para. 50.

[42] G.A. Report ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Report of the 53rd session, Article 16, U.N. Doc. A/56/10 (2001).

[43] ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, YBILC, Vol. II., 67 para. 9 (2001).

[44] G.A. Res. 56/83, U.N. GAOR 56th Sess., U.N. Doc. A/RES/56/83 (2002).

[45] G.A., Programme of Action to Prevent, Combat and Eradicate the Illicit Trade of Small Arms and Light Weapons in all its Aspects, U.N.Doc. A/CONF.192/15 (2001).

[46] G.A., Programme of Action Implementation Support Unit, Matching Needs and Resources: 2012-2014 (2012).

[47] G.A., Report of the United Nations Conference to Review Progress made in the implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade of Small Arms and Light Weapons in all its Aspects, U.N.Doc. A/CONF.192/2012/RC/4 (2012).

light weapons, as well as the lack of a universal and legally-binding instrument on this topic.[48] As will be seen, uniform criteria do not yet exist regarding either the definition of "arms transfers" that is also defined as arms trade, for example. Likewise, not all agreements cover the same scope; some only include arms whereas others also cover ammunitions and other related material. In addition, not every country located in any given region is a party to these agreements.

The ATT mentions that its regulations shall apply to conventional arms, such as small arms and light weapons, but does not specify the characteristics of these weapons.[49] In the future, problems may arise as every region has its own definition regarding "small arms" and "light weapons."

Currently, there are twenty regional instruments intended to combat the illegal transfer of small arms and light weapons. Due to their regional character, however, they are not applied worldwide. The only legally binding and universal mechanisms enacted to curb the transfer of small arms and light weapons for non-state actors are the arms embargoes approved by the UN Security Council. All these issues will be covered below. First we need to compare the scope of each regional agreement by analysing whether the ban on small arms and light weapons transfers is comprehensive or has loopholes.

The first region to enact a legally-binding instrument that addresses the role of these actors was the Americas, with its Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Explosives, Ammunition and Other Related Materials[50] (CIFTA) in 1997. It is legally binding for all member States[51] and the Organization of American States is the depository body. Unfortunately, the CIFTA only refers to "firearms" (including ammunition) but fails to address "small arms" and "light weapons."

In 1998, the European Union approved its Code of Conduct on Arms Exports[52] which, as it name suggests, covers a wide range of weapons, including small arms and light weapons.

With respect to Africa, the African Union has not yet adopted a legally-binding instrument concerning the combat of illicit transfers of small arms

---

[48] The only universal, but not legally binding instrument that seeks to combat the illegal transfer of small arms and light weapons is the International Instrument to Enable States to Identify and Trace, in a timely and reliable manner, illicit small arms and light weapons, adopted by the United Nations General Assembly (U.N.G.A.) in 2005.

[49] G.A., Final United Nations Conference on the Arms Trade Treaty, Article 2, U.N. Doc. A/CONF.217/2013/L.3 (March 27, 2013).

[50] Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Explosives, Ammunition and Other Related Materials, Nov. 14, 1997, O.A.S.T.S. No. A-63.

[51] Only four out of the thirty-four OAS members have not ratified this treaty: Canada, Jamaica, St. Vincent and Grenadines, and the USA. As a result, this treaty does not include the largest exporter of small arms and light weapons in the region, the United States of America.

[52] European Union Code of Conduct on Arms Export, June 5, 1998, No. 8675/2/98 [hereinafter EU Code of Conduct].

and light weapons: Instead, it enacted the Bamako Declaration as an African Common Position on the illicit proliferation, circulation and trafficking of small arms and light weapons[53] in 2000. This treaty recommends a series of non-binding measures to be taken in order to further combat this problem.

No instrument exists in Asia that includes every country in the region. For this reason, these treaties must be analyzed within a sub-regional context. First, we have the League of Arab States (LAS), which not only includes membership of Asian states, but also some North African nations. Decisions made by the LAS Council are binding pursuant to the Pact of the League of Arab States.[54] The Council adopted Resolutions 6625 and 6447 in 2004 and 2006, respectively, both in regard to Arab Coordination for Combating the Illicit Trade in Small Arms and Light Weapons.

Another Asian sub-regional body that addresses this issue is the Association of Southeast Asian Nations (ASEAN), which so far has only adopted non-binding instruments in this area, such as the Manila Declaration on the Prevention and Control of Transnational Crime, adopted in 1998, by which states expressed their political will to limit the illegal trade in firearms,[55] once again limiting the instrument's scope by failing to define "small arms" and "light weapons." It should also be mentioned that efforts have been realized by the Shanghai Cooperation Organization (SCO), which includes China and Russia, among other members. In 2010, it agreed on a Joint Declaration with the UN about the importance of increasing cooperation in areas such as illicit arms transfers,[56] without making any specific reference to small arms and light weapons.

In the South Pacific and Oceania region, the Pacific Island Forum has dealt with this issue by means of the Forum Island Country on Small Arms and Light Weapons and the Control of Ammunition project, implemented through its Pacific Islands Law Officers' Network to enhance cooperation in order to prevent the illicit transfer of small arms, light weapons and ammunition.[57] In theory at least, it is the most comprehensive regional agreement in terms of scope, including small arms, light weapons and ammunition.

---

[53] Organization of African Unity, Bamako Declaration on an African Common Position on the illicit proliferation, circulation and trafficking of small arms and light weapons, Dec. 1, 2000, I.L.M. [hereinafter Bamako Declaration], http://2001-2009.state.gov/t/ac/csbm/rd/6691.htm.

[54] League of Arab States, Pact of the League of Arab States, article 7, March 22, 1945.

[55] Association of Southeast Asian Nations [ASEAN], Asia Regional Ministerial Meeting on Transnational Crime, *Manila Declaration on the Prevention and Control of Transnational Crime*, para. 2 (March 23-25, 1998) [hereinafter Manila Declaration].

[56] Shanghai Cooperation Organization [SCO] & U.N. Secretary-General, *Joint Declaration on Cooperation*, para. 2 (April 5, 2010).

[57] Pacific Islands Forum Secretariat [PIFS], Forum Regional Security Committee completes meeting 35/09 (June 11, 2009).

3. *Formal Scope of Treaty Law and Regional Regulations*

As mentioned above, twenty regional agreements are currently in effect to combat the illicit transfer of small arms and light weapons. However, not all these agreements take into consideration the issue of preventing arms transfers to non-state actors, something addressed in greater detail below.

In an attempt to include non-state actors, the ATT refers to them as "organized groups" engaged in arms trafficking.[58] In this sense, it should be noted that the drafters of the Treaty decided not to mention the term "organized crime," as it appears in the CTOC itself.

On a regional level, Article 7 of CIFTA, establishes that State parties shall adopt all necessary measures to prevent illicit firearms from falling into the hands of private individuals or businesses.[59] Meanwhile, Criterion Four of the EU Code of Conduct on Arms Exports establishes that "Member States will not issue an export licence if there is a clear risk that the intended recipient would use the proposed export aggressively against another country."[60] Thus, by using the word *recipient*, drafters left the door open to include not only countries or States, but also other actors, such as non-state actors. If not, they would have used the word *country*, as at the end of the aforementioned sentence. This Code of Conduct would be later updated into the legally binding Common Position 2008/944/CFSP, adopted on 8 December 2008,[61] which also includes the same Criterion Four that legally binds all Member States.

The Bamako Declaration expects countries to "Accept that trade in small arms[62] should be limited to governments and authorized registered licensed traders."[63] In the Arab region, Article 33 (6) of the Arab Model Law on Weapons, Ammunitions, Explosives and Hazardous Material[64] prohibits the transfer of weapons to unlicensed private individuals. In contrast, the Manila Declaration clearly expresses an intent to fight organized criminal activities.[65]

The EU Code of Conduct on Arms Exports establishes that after assessing the "recipient country's attitude toward… human rights… Member States

---

[58] *See* G.A., Final United Nations Conference on the Arms Trade Treaty, Article 11, U.N. Doc. A/CONF.217/2013/L.3 (March 27, 2013).

[59] *See* Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Explosives, Ammunition and Other Related Materials, article 7 (2), Nov. 14, 1997, O.A.S.T.S. No. A-63.

[60] *See* EU Code of Conduct, *supra* note 52, Criterion Four.

[61] Council Common Position defining common rules governing control of exports of military technology and equipment (EC) No. 2008/944/CFSP of 8 December 2008 (2008).

[62] It is noteworthy that the drafters did not include "light weapons" in this sentence, which is included in every other part of the Bamako Declaration.

[63] *See* Bamako Declaration, *supra* note 53, at article 4 (i).

[64] League of Arab States [L.A.S.], *Arab Model Law on Weapons, Ammunitions, Explosives and Hazardous Material*, (2002).

[65] *See* Manila Declaration, *supra* note 55.

will not issue an export license if there is a clear risk that the proposed export might be used for internal repression."[66] In addition, the OSCE Principles Governing Conventional Arms Transfers not only take into consideration respect for fundamental freedoms in the recipient country, but also requests its members to "avoid transfers which would be likely to be used to violate or suppress human rights and fundamental freedoms."[67]

In Central America, the Code of Conduct on the Transfer of Arms, Ammunition, Explosives and Other Related Material, besides covering more than the transfer of small arms and light weapons, refers specifically to certain human rights. For example, it mentions that transfers from or to States should not be realized if the recipient States: "Commit and/or sponsor human rights violations, restrict political participation and lack democratic governments."[68] Given the political turmoil experienced by the region in the 1980's, this language is not surprising.

In sum, the regional instruments analysed in the last section demonstrate States' willingness to recognize that countries that export arms should take into account the human rights situation in recipient countries. This in itself can open the door to the future adoption of the Draft Articles for the purpose of establishing worldwide legally-binding rules that would address this issue head-on. The next section addresses how the UN Security Council arms embargoes can be used as a legal mechanism to prevent the illegal transfer of small arms and light weapons to non-state actors.

IV. UNSC and Arms Embargoes to Non-State Actors

1. *Introduction*

Based on Article 26 of the UN Charter, the UNSC is responsible "for the establishment of a system for the regulation of armaments," which has not only focused on disarmament efforts, but also on arms control negotiations. This was reinforced with the request made by the UNGA to the UNSC, while acting under Article 11 of the UN Charter, to consider negotiations to "formulate… practical measures to provide for the general regulation and reduction of armaments."[69]

---

[66] EU Code of Conduct, *supra* note 52, Criterion Two.

[67] Organization for Security and Co-operation in Europe [O.S.C.E.], *Principles Governing Conventional Arms Transfers*, Article 4, DOC.FSC/3/96 (November 25, 1993) [hereinafter OSCE Principles].

[68] U.N. Conference to Review Progress Made in the Implementation of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects, *Working paper submitted by Nicaragua: Code of Conduct of Central American States on the Transfer of Arms, Ammunition, Explosives and Other Related Material*, Article 1, A/CONF.192/2006/RC/WP.6 (June 30, 2006) [hereinafter Central American Code of Conduct].

[69] G.A. Res. 41 (I), U.N. GAOR 1st Sess., U.N. Doc. A/RES/41(I) (December 14, 1946).

Article 47 of the UN Charter also establishes "a Military Staff Committee to advise and assist the Security Council on… the regulation of armaments, and possible disarmament." Nevertheless, this body has been qualified as having "little relevance"[70] within the structure of the UNSC, specially because it does not have an agenda of items to discuss.

2. *Substantive Scope*

Regarding the scope of arms embargoes, it is first worth mentioning that the council focuses on two types of weapons at the moment of implementing different disarmament and arms control measures. With respect to weapons of mass destruction, the Security Council has a Committee established under resolution 1540[71] of 2004 that specifically focuses on preventing the proliferation of these weapons. This Committee is responsible for reporting on the implementation of this resolution, which calls states, *inter alia*, to refrain from helping non-State actors[72] to develop, acquire, manufacture, possess, transport, transfer, or use nuclear, chemical or biological weapons and their delivery systems.

This body established four working groups[73] to review the implementation of this resolution, which also requires all member states to establish domestic controls to prevent the proliferation of such weapons. The resolution requested to intensify international cooperation in this area in accordance with international non-proliferation treaties in force as well as promote universal adherence to these treaties.

That said, resolution 1540 did not include small arms and light weapons in its scope, despite earlier recognition by the UNSC of the potential threat posed by terrorists**.**

Aside from weapons of mass destruction, not a single body specifically covers only small arms and light weapons proliferation, even though the UNSC acknowledged in resolution 1373 (2001) the threat to international security

[70] Murray, P., Peacekeeping and Stability Operations Institute and US Army War College, Renewing the United Nations Military Staff Committee (2009), available at http://pksoi.army.mil/PKM/publications/perspective/perspectivereview.cfm?perspectiveID=5 (last visited August 12, 2013).

[71] This resolution was unanimously adopted after the A. Khan nuclear terrorist network was dismantled in 2004. *Cfr.* Collins, C. & D. Frantz, Fallout from the AQ Khan Network and the Clash of National Interests at International Atomic Energy Agency [IAEA] Symposium on International Safeguards Preparing for Future, (Nov. 2, 2010), available at http://www.iaea.org/safeguards/Symposium/2010/Documents/PapersRepository/201274978938219803076 6.pdf.

[72] The resolution defines these as: individuals or entities, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution.

[73] The working groups are on: (i) Monitoring and national implementation; (ii) Assistance; (iii) Cooperation with international organizations; and, (iv) Transparency and media outreach.

that the illicit transfer of small arms and light weapons represents. In that ruling, the UNSC adopted the following paragraph:[74]

> Notes with concern the close connection between international terrorism and transnational organized crime… *illegal arms trafficking*… and in this regard emphasizes the need to enhance coordination of efforts on national, sub-regional, regional and international levels in order to strengthen a global response to this serious challenge and *threat to international security*;

This was not the first time the UNSC addressed the small arms issue. Besides references in several arms embargoes (as discussed below), the UNSC under the Presidency of the Netherlands held its first[75] open debate about "small arms"[76] in 1999. In the end, the UNSC did not adopt a resolution but agreed to a so called "Presidential Statement" a non-legally binding declaration made by the current UNSC President; thus the UNSC could have further commit by seeking a legally binding resolution or at least a request to the Secretary-General to report on the issue. That said, important steps were taken to prevent non-state actors from acquiring illegal arms, in particular terrorists:[77] "The Security Council emphasizes that the prevention of illicit trafficking is of immediate concern in the global search for ways and means to curb the wrongful use of small arms, including their use by terrorists."

Despite this first effort, the UNSC remained silent and failed to consider an open debate on this issue until August 2001, under the Presidency of Colombia, which had chaired the PoA meeting the year before. Since 2010, the UNSC has held yearly open debates[78] on small arms, excluding 2007; these have resulted in the adoption of Presidential Statements. And since 2007 it has requested a biennial report from the Secretary-General.[79] It is also important to mention that the only regional debate on this issue was held in 2010, when the UNSC discussed the illicit trade of small arms and light weapons in Africa.[80]

The primary responsibility of the UNSC, in accordance with Article 24 of the UN Charter, is "the maintenance of international peace and security."

---

[74] *See* S.C. Res. 1373, *supra* note 8.

[75] S.C. [Press] SC/7114 (August 2, 2001).

[76] In that occasion, even though the main topic of the debate did not consider light weapons, they were also addressed by states during the exchange of views.

[77] S.C. President, Statement on small arms, U.N. Doc. S/PRST/1999/28 (September 24, 1999).

[78] The verbatim records of the open debates since 2001 are [specifically for search in U.N. Doc. nomenclature]: S/PV.4355, 2 August 2001; S/PV.4623, 11 October 2002; S/PV.4720, 18 March 2003; S/PV.4896, 19 January 2004; S/PV.5127 17 February 2005; S/PV. 5390, 20 March 2006; S/PV.5881, 30 April 2008.

[79] S.C. President, Statement on Small Arms, U.N. Doc. S/PRST/2007/24 (June 29, 2007).

[80] See S.C. Presidential, Statement of Central African Region, U.N. Doc. S/PRST/2010/6. (March 19, 2010).

One of its tasks in this regard is to decide what is a threat to international peace, and shall apply different measures to prevent the aggravation of a given situation.[81]

In order to achieve this objective in accordance with Article 41 of the Charter, the UNSC may call upon member States to apply measures not involving the use of force to maintain or restore international peace and security. These measures are known as sanctions, and one example are arms embargoes. In this way, sanctions are meant to pressure States to meet objectives set by the UNSC without resorting to the use of force. In such a way, sanctions imposed by the UNSC are important instruments to enforce its decisions.

These sanctions shall be decided with an affirmative vote of nine members, including the concurring votes of permanent members. In other words, each permanent member has veto power regarding approval. For the purpose of understanding the evolution of arms embargoes, it is important to analyze both their commonalities and differences.

Related to the subject matter of the embargo and compared to other UN instruments on arms control, the UNSC does not specify any particular kind of arms or weapons to be considered under the embargo. Instead, it establishes that the embargo is for: "arms and related materiel of all types, including weapons and ammunition." So, first, it is not clear how the UNSC defines "weapons," either as part of a broader category which includes arms or as a specific materiel related to arms. Secondly, it also includes ammunition, in contrast to the position taken by some permanent members in other forums such as the ATT negotiations, in which the inclusion of ammunition was opposed.[82] However, it can be identified that the UNGA requested, few months before the adoption of Resolution 197, for the adoption of measures to prevent the illicit transfer of ammunitions.[83]

Regarding the above, arms embargoes have explicitly excluded small arms and light weapons from their scope, and merely advise states to exercise caution while transferring those arms to recipient states, as happened with the embargo to North Korea in 2009.[84]

3. *Formal Scope*

At this point it would be helpful to comment on the difference between two types of embargoes classified by the SIPRI[85] as voluntary and mandatory

---

[81] U.N. Charter arts. 30, 39 & 40.

[82] Both, China and Russia, did not support the inclusion of ammunitions on a possible Arms Trade Treaty. *See* Sarah Parker, United Nations Institute for Disarmament Research [UNIDIR], Analysis of States' Views on an Arms Trade Treaty 7 (2007).

[83] G.A. Res 65/67, U.N. GAOR 65th Sess., U.N. Doc. A/RES/65/67 (Jan. 13, 2011).

[84] S.C. Res. 1874, U.N. SCOR 63rd Sess., U.N. Doc. S/RES/1874 (Jun. 12, 2009).

[85] Stockholm International Peace Research Institute [SIPRI] & Department of Peace

arms embargoes, both adopted under Chapter VII. Voluntary embargoes are those imposed by the UNSC when it "Calls upon all States" to refrain from supplying arms; meanwhile mandatory embargoes are established when the UNSC "Decides that all Member States" shall stop the transfer of arms. Two main differences exist between them: the first pertains to the rigor of the decision and the second, the targeted entity. Voluntary embargoes address all States in general while mandatory ones only apply to Member States. This latter may be due to the fact that the UNSC can request compliance by member states, but its decisions are binding only on UN members pursuant to that set forth in Article 25 of the UN Charter.

Another difference, besides its compulsory status, relates to the targeted entity. Sometimes arms embargoes are directed at a specific State, whereas other times they target specific groups of individuals or terrorist/criminal organizations under the umbrella of non-state actors.

Universal arms embargoes are new within the UN agenda. This is revealed by the fact that during the past 20 years, almost 90 percent of all UNSC arms embargoes had been implemented.[86] This is a significant percentage if we consider that sanctions were first imposed by the League of Nations in 1935 against Italy in response to its invasion of Ethiopia.[87]

In 1965, the UNSC discussed the situation in Southern Rhodesia (now Zimbabwe) in the light of the recent declaration of independence that its "illegal authorities" made from the UK. The UNSC effectively recognized the situation as a threat to international peace and security and approved a series of sanctions under resolution 217 (1965). In this sense, the very first paragraph by which the UNSC implemented an arms embargo read as follows: "8. Calls upon all States to refrain from any action which would assist and encourage the illegal regime and, in particular, to desist from providing it with arms, equipment and military material…"

Meanwhile, the most recent arms embargo declared by the UNSC related to Libya, approved in February 2011, after a general uprising and subsequent repression by Qadhafi forces. On that occasion, the UNSC issued the following ruling:[88]

> Arms embargo
>
> 9. Decides that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment…

---

and Conflict Research, Uppsala University, United Nations Arms Embargoes. Their Impact on Arms Flows and Target Behavior (2007).

[86] *See* Yihdego, *supra* note 3, at 105.

[87] George Baer, Test Case: Italy, Ethiopia, and the League of Nations 23 (Leland Stanford Junior University, 1976).

[88] S.C. Res. 1973, U.N. SCOR 65th Sess., U.N. Doc. S/RES/1973 (March 17, 2011).

As can been seen, the UNSC's arms embargo mechanism has evolved positively since it was first implemented. The first and most notable change was the way in which member States were called upon to stop arms transfers; first in 1965 by means of an invitation to "desist from providing;" then in 2011 as a request to take all necessary measures to prevent the direct or indirect supply, sale or transfer of arms. Even though this last phrase can be seen as a broader and more robust expression, the "desist from providing arms" language has also been used by the ICJ in the Genocide Convention case in 1993.[89]

Prohibited actions include, *inter alia*, the supply, sale or transfer of arms. These terms, however, cover a broad scope, and some transactions may not be covered at all, as suggested by some Member States in the most recent Arms Trade Treaty negotiations within the UNGA, *e.g.*, lease, loans or gifts.[90] The above could thus be understood as a translation of non-binding measures applied by the UNGA into binding measures applied by the UNSC. The "other assistance" term also fails to cover many types of private activities related to arms transfers such as arms brokering or the use of intermediaries who do not own or have any direct contact with arms.

Another innovation is that it takes into account the direct or indirect supply by nationals from Member States. In this way, it not only focuses on state-to-state transfers, but also on private corporations. As analyzed below, the application of this obligation in particular depends completely on the legislative framework adopted by each country.[91] This approach was first used in 1993, when the UNSC approved an arms embargo on Haiti, and has been used ever since.[92]

Unfortunately, the above only applies to supplier states and not recipients, as the embargo only mentions the name of the targeted state, in this case Libya, and not Libyan nationals or any other state-related entity. For this reason, additional wording that mentions non-state actors is needed to facilitate the effectiveness of embargoes.

It would also be useful to analyze the position of permanent members which as noted above, have veto power and are themselves big arms suppliers. From 1946 to 2008, this veto power was invoked a total of 261 times in relation to arms embargoes.[93] Since no nation needs to explain why it vetoes

---

[89] The ICJ in its Ruling of 8 April 1993: "(q) That Yugoslavia (Serbia and Montenegro) and its agents and surrogates are under an obligation to cease and desist immediately from all support of any kind - including the provision of… arms, ammunition…" *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)) Provisional Measures.* I.C.J. Reports 1993.

[90] Sarah Parker, United Nations Institute for Disarmament Research [UNIDIR], Analysis of States' Views on an Arms Trade Treaty 7 (2007).

[91] *Id.*

[92] S.C. Res. 841, U.N. SCOR 47th Sess., U.N. Doc. S/RES/841 (Jun. 16, 1993).

[93] S. Bailey, *Changing Patterns in the Use of the Veto in the Security Council*, Global Policy Forum

a resolution, no one knows how many vetoes were related to the fact that the opposing country or countries exported arms. One of the last occasions in which this could be clearly identified occurred in July 2008,[94] when China and Russia opposed a resolution to approve an arms embargo against Zimbabwe, as China was the African nation's main arms supplier.[95]

With respect to international supervision of these embargoes, once they are imposed on a State or group of individuals, the UNSC has the power to create a subsidiary body to monitor its implementation, known as the Sanctions Committee. Once this committee is established, it can call for the creation of an Experts Group to analyze the onsite situation and make sure that the embargo is not being breached. It must also be mentioned that this Group must periodically report to the UNSC.

Pursuant to the above and in accordance with Article 25 of the UN Charter, Member States are obliged to comply with UNSC rulings, including arms embargoes. The effectiveness of these embargoes, however, depends largely on their implementation by states. The UNSC states that its "resolutions are inconsiderate of the legal institutional and political weakness of… supplier states."[96]

In compliance with UNSC resolutions that establish arms embargoes, we must also recall that states should submit periodic reports to the UNSC about their national implementation of arms embargoes, as well as the legislative and administrative measures taken either by individuals, private corporations or tribunals. In this way, States are committed to do something about implementation; otherwise, their reports would be worthless and they risk violating their international treaty obligations under the UN Charter.

In contrast to the first arms embargo, the UNSC now considers the possibility of breach under certain conditions. In the last part of the treaty text, it states that the embargo shall not apply to sales and supplies approved in advance by the corresponding Committee. This requires analysis of the UNSC subsidiary rules, like those covering the Sanctions Committee or the Peacekeeping Operations.

Each Sanctions Committee establishes its own guidelines for its daily work. These guidelines establish that each committee shall: *a)* monitor the embargo; *b)* seek from all Member States information regarding actions they have

---

(2008), available at http://www.globalpolicy.org/security-council/tables-and-charts-on-the-security-council-0-82/use-of-the-veto.html (last viewed May 19, 2011).

[94] D. Nasaw, *China and Russia veto Zimbabwe Sanctions*, The Guardian, July 11, 2008 available at http://www.guardian.co.uk/world/2008/jul/11/unitednations.zimbabwe (last viewed May 19 2011).

[95] According the UN Commtrade Database, China alone exported small arms and light weapons with a value of $370,539 to Zimbabwe, representing 65% of the total small arms and light weapons imported in 2007 to that African country (*See* UN Commtrade Database, available at http://comtrade.un.org).

[96] *See* Yidhego, *supra* note 3, at 111.

taken to implement it effectively; *c)* examine information regarding alleged violations; and identify possible cases of non-compliance; and *d)* rule on exemptions.[97]

It is also important to mention that an arms embargo targeting non-state actors did not lead to the immediate creation of a Sanctions Committee on three occasions: the arms embargoes to Liberia in 1992; Darfur, Sudan in 2004; and more recently to Lebanon in 2006. The latter was monitored by the UN Peacekeeping Operation in the field;[98] the one in Darfur was not supervised until one year later, when the specific Sanctions Committee[99] was created. The same situation also occurred with Liberia which had no supervisory body until 1995,[100] during which its UN Peacekeeping Operation was in charge.[101] Since 2001, the Secretary-General has recognized the need to have an "extensive monitoring mechanism for arms embargoes and to consider the imposition of secondary measures in cases of proven violations."[102] This occurred after the conclusion of the Bonn-Berlin process that analyzed different ways to better implement UNSC sanctions.

Besides states, one actor that can request an exception to an embargo is the UN Peacekeeping Mission deployed by the UNSC in the targeted state or other UN agencies, as the case may be. For this reason, the Principles and Guidelines for UN Peacekeeping Operations should be followed. Nevertheless, the only reference these guidelines make is under its Logistics section, and it mentions that the Chief of Mission Support (CMS) has "direct access to all available means of acquiring items,"[103] and arms should be considered among those items. It then further explains that the CMS acts under the supervision of the Mission Head, who has direct contact with the UN Department of Peacekeeping Operations, which is the final arbiter for contacting the appropriate Sanctions Committee regarding prior notification.

---

[97] Working guidelines of the Security Council Committee pursuant to resolutions 751 and 1907 concerning Somalia and Eritrea, 30 March 2010, S.C. Res. 751, U.N. SCOR 46th Sess., U.N. Doc. S/RES/751 (Apr. 24, 1992); S.C. Res. 1907, U.N. SCOR 52nd Sess., U.N. Doc. S/RES/ 1907 (Dec. 23, 2009).

[98] The United Nations Interim Force in Lebanon, established in 1978, has as its mandate since 2006, to prevent the entry in Lebanon without its consent of arms or related materiel, according to S. C. 1701, U.N. Doc. S/Res/1701 (August 11, 2006).

[99] The Sanctions Committee for Darfur was created in 2005 upon resolution 1591.

[100] The Sanctions Committee for Liberia was created in 1995 upon resolution 985.

[101] The United Nations Observer Mission in Liberia was in operating from 1993 to 1997, and had as its mandate "to assist in the monitoring of compliance with the embargo on delivery of arms and military equipment to Liberia", S.C. Res. 866, U.N. SCOR 47th Sess., U.N. Doc. S/RES/866 (Sep. 22, 1993).

[102] Secretary General, Letter to the President of the General Assembly, U.N. Doc. A/56/529 (2001).

[103] United Nations Peacekeeping Operations [U.N. D.P.K.O.], United Nations Peacekeeping Operations: Principles and Guidelines (2008).

In addition, the Military Staff Committee established by the first UNSC resolution ever,[104] in accordance with the UN Charter, is also responsible for overseeing the implementation of arms embargoes. This committee, however, has not even adopted its rules of procedure and has spent the last five years reforming its working methods.[105]

4. *Sanctions Targeted at Non-State Actors*

There are several notable discussion topics involving targeted sanctions, such as arms embargoes and non-state actors. Among those topics, we find the matters of applicability, the scope of embargoes, compliance and breaches committed by them. The fact that these types of embargoes may also raise several questions regarding the applicability of international law in diverse domestic or regional courts is discussed below.

An arms embargo on a non-governmental armed force or terrorist group would be applicable in case its activities represent a threat to international peace and security. In addition, the application of Resolution 1540 would be inadequate, as the most common type of weapon used by these groups are small arms and light weapons, not weapons of mass destruction. In this way, a total arms embargo on these entities would be appropriate. It is thus interesting to see how the UNSC has adopted new measures against non-state actors by establishing targeted sanctions against individuals or entities associated with these groups, applying measures that until recently were only used against states.

In contrast to that established in arms embargoes against states regarding the boundaries of specific territories, transnational non-state actors operate freely across borders. For this reason, the UNSC eliminated the requirement that the arms embargo applies only "to the territory under [non-state actor] control"[106] and changed it to the phrase "to these entities,"[107] without specifying any location.

This idea could also be applied if the UN Security Council considers the application of arms embargoes to one important type of transnational group: drug cartels. This is because these organizations represent a significant threat to international security.[108] Within the complex illicit drug chain, small arms and light weapons are used with greater frequency during transportation. The period of transportation is the one in which they both, arms and drugs match, although sometimes in opposite directions, In other words, drugs en-

[104] S.C. Res. 1, U.N. SCOR 1st Sess., U.N. Doc. S/RES/1(Jan. 25, 1946).

[105] *S.C. Annual Report 2009-2010*, U.N. Doc. S/65/2, 163.

[106] S.C. Res. 1333, U.N. SCOR 55th Sess., U.N. Doc. S/RES/1333 (December 19, 2000).

[107] S.C. Res. 1390, U.N. SCOR 56th Sess., U.N. Doc. S/RES/1390 (January 16, 2002).

[108] *See* S.C. Res. 1373, *supra* note 7.

ter from one end and guns go out the other, and vice versa. These two products together represent the highest percentage of black market merchandise in the world.[109]

The idea of applying an embargo to a non-state actor without considering its location differs from how arms embargoes are applied to non-state actors operating in a single country, as shown in the case of the Revolutionary United Front (RUF), a rebel group in Sierra Leone. This embargo was clearly applied "to non-governmental forces *in* Sierra Leone"[110] (emphasis added). By limiting the embargo to just Sierra Leone, the UNSC apparently underestimated the possibility of the RUF fleeing across the border to buy arms, just as they did before the embargo was authorized.[111]

Another development is that non-state actors are not just members of one specific group, but include a wide range of affiliated actors. For this reason, the UNSC establishes that arms embargoes should apply to non-state actors "and other associated individuals, groups, undertakings and entities,"[112] once again, without mentioning location. Although this is good language with broad scope, it is disappointing that the provision has been applied only once since 2002 in resolutions concerning the Taliban

Regarding how states comply with these restrictions through their national law making bodies, there are widely opposing views, as shown by what happened in Europe in 2010, when the European Court of Justice contested the implementation of UNSC sanctions on individuals' frozen assets.[113] For this reason, a challenge to the ruling could likely occur if the arms embargo includes actors that may invoke a violation of their human rights for being blacklisted without having a fair trial.[114]

If the UNSC is challenged, then there will be a debate on the protection of human rights in the fight against terrorism, while applying a smart sanction that supposes to target a specific group and not a whole country.

Interestingly, the administrative process in which these lists are created or updated involves a government's assumption that an individual or entity is linked with a terrorist group. This allegation is then submit to members of

---

[109] Daniel Camacho, *Interrelationship between Drug Trafficking and the Illicit Arms Trade in Central America and Northern South America* , *in* Curbing Illicit Trafficking in Small Arms and Sensitive Technologies: An Action Oriented Agenda, *supra* note 22.

[110] S.C. Res. 1171, U.N. SCOR 52nd Sess., U.N. Doc. S/RES/1171 (1998).

[111] In October 1997, the RUF leader, Foday Sankoh was detained in Nigeria on arms charges, in: Letter dated 97/10/15 from the Permanent Representative of Sierra Leone to the United Nations addressed to the Secretary-General (S.C., Letter from the Permanent Representative of Sierra Leone to the United Nations addressed to the Secretary-General, 2, U.N. Doc. S/1997/800 (1997)).

[112] *See* S.C. Comm Res 1267, Guidelines for the conduct of its work, January 26, 2011.

[113] *Kadi case*, Judgment, Eur. Ct. J., Seventh Chamber, T-85/09 (2010) 179 [hereinafter Kadi case].

[114] *Id.*

the sanctions committee for consideration, at which point they must decide if the names are to be included within 10-days.[115]

How do members of this committee determine whether or not to include a certain individual or entity? Especially, when a member state lacks diplomatic representations in areas in which the UNSC has a great influence.[116] This thought, is in line with what the ECJ concluded about the procedure of requesting for a removal from the blacklist by saying that it is a political process and not a well-defined research.[117]

To overcome this situation, the UNSC went a step forward by appointing in 2010 an ombudsperson for the Taliban Sanctions Committee, while recognizing "the need to combat by all means… including applicable international human rights... threats to international peace and security caused by terrorist acts."[118]

In conclusion, arms embargoes targeting non-state actors, and particularly those operating in a transnational basis could be applicable more often. In sum, arms embargoes remain the only universal and legally-binding rules enacted to prevent the illicit transfer of small arms and light weapons to non-state actors.

V. Conclusions and Recommendations

After reviewing the main issues of arms embargoes implemented by the UNSC, we recommend the following:

First, with respect to real threats to international peace and security, the UNSC should reform arms embargoes applicable to non-state actors, individuals and all associated entities, which are the main cause of threats to international peace and security. These actors include but are not limited to transnational organized crime groups like drug cartels, pirates or human traffickers, all of them users of small arms and light weapons.

This work has shown that there is currently no universal and legally-binding instrument that covers small arms and light weapons transfers to non-state actors. Therefore, those arms embargoes implemented by the UNSC to non-state actors are currently the only universal and legally binding mechanisms to prevent the acquisition of small arms and light weapons by these type of actors.

These rules, however, have not been applied consistently; for this reason, they need to be reformed. This is especially true in light of the fact that the arms embargo against the Taliban, resolution 1267 (1999), was deemed am-

---

[115] S.C. Comm Res 1267, Guidelines for the conduct of its work, 26 January 2011.

[116] *I.e.* Peru, which was a non-permanent member of the UNSC for the 2006-2007 period and has only one embassy in the Middle East: Israel.

[117] Kadi case, *supra* note 113, at 323.

[118] S.C. Res. 1904, U.N. SCOR 58th Sess., U.N. Doc. S/RES/1904 (December 17, 2009).

biguous, and its Committee was forced to draft an ancillary document to fully explain its terms.[119] It is thus recommended that arms embargos are drafted in more detail or supplemented by documents that explain the terms to all those Sanctions Committees that could implement an arms embargo to non-state actors. If done properly, this may help facilitate a common practice for the future.

It can also be seen that the activities performed within the framework of the 1540 Committee have prevented the acquisition of weapons of mass destruction by terrorist groups. Since the main weapons used by non-state actors have been small arms and light weapons, the UNSC should discuss the possible inclusion of these armaments into the scope of the 1540 Committee. In this way, States would be obligated to refrain from providing any support to non-State actors in their attempt to illegally transfer and acquire small arms and light weapons.

This research has also identified that illicit transfers of small arms and light weapons to non-state actors, is a frequent theme in a several topics discussed at the UNSC and should receive the same treatment as other frequent themes. For this reason, the UNSC should implement a review mechanism of arms embargo. This mechanism could focus solely on the implementation of arms embargoes and prevention of the illicit transfer of small arms and light weapons.

The UNSC should implement this mechanism as it has with other issues, including the protection of children in armed conflict, issue which is frequent in different situations that are being analyzed by the UNSC. Therefore, this theme is now discussed in a special working group created specifically to "review progress in the development and implementation of the action plans and make recommendations to the Council."[120]

Pursuant to Article 53 of the UN Charter,[121] the UNSC should also collaborate with other international organizations and regional agencies that implement their own arms embargoes, such as the ECOWAS or the EU, as well as with organizations like the International Civil Aviation Organization, World Customs Organization or Interpol, all involved in the implementation of arms embargoes. Coordination would allow the UNSC to implement better and more robust embargoes. This can be accomplished through regular, open debates and meetings coordinated with these organizations.

Finally, as commented above, in 2001 the Bonn-Berlin process[122] reviewed the progress made on the implementation of sanctions, and specially-targeted

---

[119] *See Explanation of Terms: Arms Embargo, Committee Pursuant Resolution 1267 (1999)* available at http://www.un.org/sc/committees/1267 (last viewed May 12, 2013).

[120] S.C. Res. 1612, U.N. SCOR 59th Sess., U.N. Doc. S/RES/1612 (July 26, 2005).

[121] The article reads as follows: "The Security Council shall, where appropriate, utilize… regional arrangements or agencies for enforcement action under its authority."

[122] M. Brzoska, Bonn International Center for Conversion, Results of the Bonn-Berlin Process (2001).

arms embargoes. Over ten years have passed, however, and the dynamics of international security have changed, requiring a new process that can integrate the comments and recommendations of prior embargoes, especially those targeting non-state actors.

It would be useful to create an internet site that includes all relevant information in relation to arms embargoes. The Office for Disarmament Affairs of the UN Secretariat currently administrates a site on the Programme of Action Implementation Support System[123] which, although its mission is to be a "*one-stop shop* for anyone working on small arms in the UN context," still lacks thematic section on the work of the UNSC and small arms.

[123] U.N. Office for Disarmament Affairs, Implementation Support System, available at http://www.poa-iss.org.

Recibido: 13 de marzo de 2013.
Aceptado para su publicación: 14 de junio de 2013.

Mexican Law Review
New Series
VOLUME VI
Number 2

SUSTAINABLE DEVELOPMENT AND ENVIRONMENTAL LEGAL PROTECTION IN THE EUROPEAN UNION: A MODEL FOR MEXICAN COURTS TO FOLLOW?

Luis A. Avilés*

Abstract. *Over the past several decades, sustainable development as a paradigm for balanced development has made its way into the constitutional regimes of many nations. The justiciability of sustainable development, however —particularly in the context of environmental legal protection— remains problematic for many legal systems, including Mexico. This article traces the evolution of sustainable development within an international context; analyzes its influence on treaties that led to the European Union; and evaluates the use of environmental protection by the European Union's Court of Justice (referred to hereinafter as "ECJ"). An analysis of the interplay of the concept of sustainable development in the primary and secondary legislation of the European Union as interpreted by the ECJ leads us to the following conclusion: regarding the legal protection of the environment in the European Union, sustainable development may be viewed as a general principle of law that articulates a series of sub-principles contained in the treaties. These sub-principles include the precautionary principle and the "polluter-pays" principle. We also conclude that the unsystematic use of these sub-principles in the secondary legislation of the European Union weakens the ECJ's coherent handling of the concept in its decisions. This article also suggests that Mexican judges would be well advised to carefully study sustainable development as employed by the ECJ in cases involving constitutional and international collective environmental claims which may arise under the recent amendments to the Amparo Law.*

Key Words: *Sustainable development, environmental protection, justiciability, European Union, Mexico, Amparo, general principle of law.*

Resumen. *El concepto de desarrollo sustentable como paradigma para el desarrollo balanceado se ha arraigado en los regímenes constitucionales de diversos sistemas jurídicos nacionales durante las pasadas décadas. No obstante, la seguridad jurídica del concepto de desarrollo sustentable, particularmente en*

* Associate Dean, University of Puerto Rico Law School. Professor Avilés is the former Chairman of the Puerto Rico Electric Power Authority. He has a J.D. from Harvard Law School and an LL.M. in European Law from Université Pantheon-Assas Paris II. He may be reached at *luis@avilesgroup.com*.

el contexto de la protección legal del ambiente, continúa siendo problemática para muchos sistemas jurídicos, incluyendo el mexicano. Este artículo traza la evolución del concepto de desarrollo sustentable en el orden jurídico internacional y estudia su incursión en los tratados que han dado paso a la Unión Europea, antes de enfocarse en el manejo del concepto en el contexto de la protección legal del ambiente por el Tribunal de Justicia de la Unión Europea. El análisis de la interacción del concepto de desarrollo sustentable entre la legislación primaria y secundaria de la Unión Europea, según interpretada por el Tribunal de Justicia de la Unión Europea, nos lleva a la conclusión de que, respecto a la protección legal del ambiente, el desarrollo sustentable puede visualizarse en el orden jurídico europeo como un principio general de derecho que articula una serie de sub-principios enunciados en los tratados, tales como el principio de precaución y el principio de que el contaminador paga. Concluimos también que la compleja utilización de esos principios en la legislación primaria y secundaria ha dado lugar a un problema de incoherencia en la formulación de la legislación secundaria que debilita el manejo coherente del concepto por el Tribunal de Justicia en sus decisiones. Este trabajo sugiere además que el estudio cuidadoso de la articulación del concepto de desarrollo sustentable por el Tribunal de Justicia de la Unión Europea podría ser de ayuda a los magistrados mexicanos que tengan ante sí reclamos medio-ambientales colectivos de corte constitucional o internacional, que por vez primera podrían ser acogidos en razón de las enmiendas recientes a la Ley de Amparo.

Palabras clave: *Desarrollo sustentable, protección del ambiente, seguridad jurídica, Unión Europea, México, Amparo, principio general de derecho*.

Table of contents

I. Introductory Remarks

The idea of sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs"[1] became widely accepted when coined in the 1970s, not

[1] U.N. World Commission on Environment and Development, *Our Common Future: Report of*

only by environmentalists but also by supranational organizations such as the United Nations and the European Community. Environmentalists hoped that the new generation of policy and lawmaking could help establish the balance called for by sustainable development by factoring environmental externalities into the economic development decision process.[2] They also hoped that sustainable development could impact legal rules and principles and influence the adjudication of legal disputes calling for a balancing of interests between economic development and environmental protection in a zero-sum fashion.[3] In other words, the justiciability of sustainable development, particularly in the context of environmental protection, remains problematic for many legal systems. This hope has not materialized, and some environmentalists now believe that sustainable development has just become a euphemism for naked development.[4] In fact, many Latin American countries including Mexico as well as supranational organizations such as the European Union have attempted, with varying degrees of success, to adjudicate sustainable development in their own tribunals.

Many parallels can be drawn between Mexico and the European Union (hereinafter, the "EU") regarding the role of sustainable development in the legal protection of the environment. The EU places sustainable development at the heart of its core mandate: the establishment of an internal market. Article 3(3) of the Treaty of the European Union states:

> The Union shall establish an internal market. It shall *work for the sustainable development of Europe* based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, *and a high level of protection and improvement of the quality of the environment*. It shall promote scientific and technological advance[5] (Emphasis added).

As we will see later, the Treaty does not explicitly define the concept of sustainable development; the concept was incorporated into the secondary legislation and the ECJ has assumed the task of defining its boundaries.

The Mexican Constitution mandates that: (1) "[t]he State shall lead national development and guarantee that it is integral and sustainable,"[6] and (2) "[u]nder the criteria of social equity and productivity, the State shall sup-

---

the World Commission on Environment and Development, chap. 2, paragraph 1, Annex to U.N. Doc. A/42/427 (Aug. 4, 1987) [Hereinafter Our Common Future or Brundtland Report].

[2] *See, e.g.*, David Barnhizer, *Waking From Sustainability's "Impossible Dream": The Decisionmaking Realities of Business and Government*, 8 Geo. Int'l Envtl. L. Rev. 595 (2006); James L. Huffman, *Markets, Regulation, and Environmental Protection*, 55 Mont. L. Rev. 425(1994).

[3] *Id.*

[4] *Id.*

[5] Treaty of the European Union, 2008 O.J. (C 115) 16, article 3(3) [hereinafter TEU].

[6] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, art. 25, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.).

port and encourage both private sector and non-profit enterprises, subjecting them to the rules dictated by the public interest and to the use of productive resources for the benefit of all, ensuring both their conservation and the environment."[7] That constitutional mandate is implemented in Mexico's General Law of Ecological Equilibrium and Protection of the Environment (the "Ecology Law").[8] Article 1 of the Ecology Law establishes that the object of the Law is to "foster sustainable development"[9] and defines the term.[10]

Furthermore, Article 4 of the Mexican Constitution states in no uncertain terms that: "Every individual has the right to live in a healthy environment for her development and welfare."[11] This fundamental right is articulated in the provisions of the Ecology Law.[12] In this way, the Mexican Constitution firmly establishes every individual's fundamental right to a healthy or wholesome environment, thus making it susceptible to *amparo* under Mexican law.[13] The *amparo* action is Mexico's unique legal action that gives its citizens the right to remedy harm caused by governmental violations of the constitutional rights afforded to them by the Mexican Constitution.[14] The Amparo Law was recently amended to incorporate not only basic rights granted by the Constitution, but also to redress violations of individual human rights established under international treaties and signed by Mexico.

As such, some commentators have argued that the constitutional right to an adequate environment as well as all environmental human rights recognized by Mexico as part of its international obligations are now justiciable

---

[7] *Id.*

[8] Ley General del Equilibrio Ecológico y la Protección del Ambiente [L.G.E.E.P.A.] [Ecology Law], *as amended*, Diario Oficial de la Federación [D.O.], 28 de enero de 1988 (Mex.).

[9] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, art. 1, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.).

[10] Sustainable development is "the process, measurable by concrete criteria and indicators of environmental, economic and social character that tends to improve the quality of life and the productivity of people, and that is based on appropriate measures for the preservation of ecological equilibrium, environmental protection and the advantageous use of natural resources in such a way as to not impair the needs of future generations ". *Id.* at article 3(XI).

[11] *Id.* article 4 (our translation). We must note that the 2012 reform of Article 4 of the Mexican Constitution refers to *medio ambiente sano,* which can be translated into English as "healthy " or "wholesome " environment.

[12] Ley General del Equilibrio Ecológico y la Protección del Ambiente [L.G.E.E.P.A.] [Ecology Law], *as amended*, art. 1, Diario Oficial de la Federación [D.O.], 28 de enero de 1988 (Mex.).

[13] *See,* Juan Pablo Guñido Gual, *La seguridad jurídica: un componente de la sustentabilidad. El Poder Judicial, el teorema de Coase y la eficiencia en el derecho ambiental*, 11 Medio Ambiente & Derecho, Revista Electrónica de Derecho Ambiental (2004) *available at* http://huespedes.cica.es/aliens/gimadus/11/seguridad.htm.

[14] Ley de Amparo, Reglamentaria de los Artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicano [L.A.] [Amparo Law], *as amended*, Diario Oficial de la Federación [D.O.], 10 de enero de 1936 (Mex.).

under the amended Amparo Law.[15] Moreover, the use of foreign precedents in the *amparo* action is not new under Mexican law, as commentators have pointed out an increased tendency by Mexican courts to use such precedents in the adjudication of constitutional disputes.[16] For this reason, we believe that present conditions are ripe for Mexican constitutional courts to benefit from the ECJ's experience in handling the difficult task of incorporating the principle of sustainable development into its legal framework.

This article traces the integration of sustainable development as adopted by the United Nations in the Rio 92 Declaration into the EU's legal framework, with particular emphasis its reception by the ECJ. First, we will analyze its integration into primary and secondary legislation; next we will explore the handling of sustainable development by the ECJ in the context of environmental legal protection especially with respect to how the ECJ makes it justiciable. In sum, sustainable development has become a general principle of European law by means of sub-principles of environmental protection such as the "polluter-pays" and the precautionary principle. We also propose that EU institutions and the ECJ need to more coherently articulate environmental protection principles in their legislative and judicial acts in order to achieve the finer balance between economic development and environmental protection called for by sustainable development.

II. Sustainable Development: From Stockholm 1972 to Rio 1992

Since it first appeared, the concept of sustainable development has perplexed development professionals, mainly because of its ambiguity. The international importance of the concept arises from its development in the UN's Stockholm Declaration on the Human Environment and the establishment of the World Commission on Environment and Development.[17] In 1987, the Commission issued a Report entitled "Our Common Future" (also known as the Brundtland Report), which for the first time recommended the use of sustainable development as a means of tackling the complex relationship between development and environmental damage, as well as the gap between

---

[15] *See,* E. García Ibarra et al., *Reforma constitucional al "Juicio de Amparo ". ¿El medio ambiente como derecho humano fundamental?*, Contribuciones a las Ciencias Sociales, diciembre 2011 (Spain), *available at* www.eumed.net/rev/cccss/16/. We must note, however, that article 180 of the Ecology Law requires that the affected parties exhaust the administrative remedies by invoking the revision procedure established in article 176 of the Ecology Law. Ley General del Equilibrio Ecológico y la Protección del Ambiente [L.G.E.E.P.A.] [Ecology Law], *as amended*, article 176, 180, Diario Oficial de la Federación [D.O.], 28 de enero de 1988 (Mex.).

[16] *See,* Eduardo Ferrer Mac-Gregor & Rubén Sánchez Gil, *Foreign Precedents in Mexican Constitutional Adjudication*, 4 Mexican Law Rev. 293 (2011).

[17] *See*, United Nations Conference on the Human Environment, *Declaration on the Human Environment,* U.N. Doc. A/CONF.48/14 Corr. 1 (June 16, 1972).

rich and poor countries. The Brundtland Report defined sustainable development as follows:[18]

> 1. Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:
>
> • the concept of "needs", in particular the essential needs of the world's poor, to which overriding priority should be given;[19] and
>
> • the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.[20]

However, the true impetus for the establishment of sustainable development came in the UN's 1992 Declaration on Environment and Development, which stipulated twenty-seven principles with "the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people" around the articulation of sustainable development.[21] The first four principles shed new light on the definition of the concept:

> Principle 1. Human beings are at the center of concern for sustainable development. They are entitled to a healthy and productive life in harmony with nature.[22]
>
> Principle 2. States have, in accordance with the UN Charter and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[23]
>
> Principle 3. The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.[24]
>
> Principle 4. In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.[25]

---

[18] U.N. World Commission on Environment and Development, *Our Common Future: Report of the World Commission on Environment and Development*, chap. 2, ¶ 1, Annex to U.N. Doc. A/42/427 (Aug. 4, 1987) [hereinafter, Brundtland Report].

[19] *Id.*

[20] *Id.*

[21] General Assembly, *Report of the United Nation Conference on Environment and Development*, U.N. Doc. A/CONF. 151/26 (June 13, 1992); 31 I.L.M. 874 (1992).

[22] *Id.* at 1.

[23] *Id.*

[24] *Id.* at 2.

[25] *Id.*

In Principle 1, the word *entitled* could be understood as part of the State's duty or positive obligation to protect humans' rights to health and life. Principle 2 articulates a *good neighbor policy* inasmuch as it recognizes the State's sovereign right to exploit its natural resources, but imposes the responsibility of ensuring their exploitation does not cause damages to the other States. Principle 3 limits the State's right to development (hence the use of the word *must*), by imposing an inter-generational equitable duty to balance current needs with the needs of future generations. Finally, Principle 4 announces the principle of integration of environmental protection into the *development process*.

The announcement by the community of nations of these principles has led to a major debate[26] in all fields of human inquiry that incorporate the idea of development, including the fields of international cooperation, human rights, trade, economics[27] and urban and strategic planning.[28] The adoption of these principles by policy makers has been less successful; even when the idea of sustainable development as a balancing act between economic development and environmental protection seems logical, "it is not always easy to grasp its normative content and its practical implications."[29] Nonetheless, both the European Union (in the treaties and secondary legislation) and Mexico (in its Constitution and the Ecology Law)[30] have made serious efforts to utilize sustainable development as a legal principle in the resolution of legal disputes that mediate conflicts between development and environmental protection.

---

[26] *See*, Gregory A. Daneke, *Sustainable Development as Systemic Choices*, 29 Policy Studies Journal 514, note 3 (2001) ("Recent years have witnessed a significant re-conceptualization of the perennial problem of environment vs. economics, known as "sustainable development" [SD]. While this basic notion has generated governmental enthusiasm, some institutional development [especially in Europe and Canada] and a good deal of intellectual activity, it remains more a vague agenda rather than a serious set of policy mechanisms. To advance the discussion in the direction of viable processes, sustainability is explored as an issue of "strategic choice").

[27] *See*, Lawrence Wai-Chung Lai & Frank T. Lorne, *The Coase Theorem and Planning for Sustainable Development*, 77 The Town Planning Review 1 (2006). This paper argues that with qualification and modification, the Coase Theorem, as a specific way of modeling transaction costs in the discussion of aspects of market failure, can be applied to a discussion of planning for sustainable development as a desirable and benign human goal through a "win-win" approach. *See also*, David W. Pearce & R. Kerry Turner, Economics of Natural Resources and the Environment 24 (The Johns Hopkins University Press, 1990) (defining sustainable development as maximization of the net benefits of economic development, subject to maintaining the services and quality of natural resources over time, where economic development is broadly construed to include all elements of social welfare).

[28] *See*, Susan E. Batty, *Planning for Sustainable Development in Britain: A Pragmatic Approach*, 77 The Town Planning Review 29 (2006) [hereinafter, Batty].

[29] Nico Schrijver & Friedl Weiss, International Law and Sustainable Development: Principles and Practice 7 (Martinus Nijhoff, 2004) [hereinafter, Schrijver & Weiss].

[30] As already discussed in the Introductory Remarks.

III. European Union's Commitment to Sustainable Development

The evolution of environmental protection by means of law and policy in the EU has been a long and winding road. It started in the 1970s with the Commission's First Communication on Environmental Policy.[31] Just a year after the release of the United Nations Brundtland Report *Our Common Future*, the European Council commenced its shift from mere environmental protection towards sustainable development.[32] It took almost a decade, however, before sustainable development was formally integrated into the European legal order. In 1997, sustainable development became one of the objectives of the European Community in the Treaty of Amsterdam.[33] Although the Treaty did not define the concept, it referred to it as a *general principle* with the implications that connotation may have in the European legal order. Although the concept was not directly associated with the environment, Member States included in the Treaty a separate, *high level of protection principle* in relation to the environment. As one author put it:

> [t]he general principle of a "balanced and sustainable development" was inserted by the Amsterdam Treaty in Article 2… of the Treaty on the European Union without any explicit reference to the environment. The widely accepted interpretation of this principle, which remains quite vague from a legal point of view, is that natural resources should be used in a careful way in order to take into account the economic and environmental interests both of the present and the future generations. The principle of "a high level of protection and improvement of the quality of the environment" was inserted in Article 2 of the Treaty establishing the European Community, thus becoming part of the objectives of the Community. This seems to preclude definitively the adoption of measures aiming at the minimum common denominator of environmental protection, often justified by invoking the safeguard clause allowing Member States to adopt stricter measures, since the insertion in Article 2 of the Treaty implies that the high level of protection must be attained at Community, not at the national level.[34]

Given the formal incorporation of sustainable development in the treaties, the EU institutions commenced an aggressive legislative program[35] based on

---

[31] Noah Vardi & Vincenzo Zeno-Zencovich, *From Rome to Nice: A Historical Profile of the Evolution of European Environmental Law*, 12 Penn St. Envtl. L. Rev. 219, 221-222 (2004).

[32] William M. Lafferty & James Meadowcroft, Implementing Sustainable Development: Strategies and Initiatives in High Consumption Societies 307 (Oxford University Press) (2000).

[33] Treaty of Amsterdam, Article 2, Oct. 2, 1997, O.J. (C 340) 1, 37 I.L.M. 56.

[34] Vardi & Zeno-Zencovich, *supra* note 31, at 236-237.

[35] Under this Program, the European Union issued a series of important "framework directives "such as Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management. The new regulation model called for the issuance of framework

their Fifth Environmental Program "on the review of the European Community programme of policy and action in relation to the environment and sustainable development 'Towards Sustainability'."[36] Despite big hopes for this program, the European Commission in its Communication entitled *Ten Years After Rio: Preparing for the World Summit on 'Sustainable Development' in 2002*,[37] found that little progress had been achieved since the 1992 Rio Agenda. The European Union had shifted from the concept of *environmental protection* to that of *environmental sustainability* by shifting its "focus from the *effects* of the use of natural resources in the development process that are environmentally damaging to the sustainable *use* of natural resources as a whole."[38]

Perhaps knowing that the news coming out of the Rio + 10 Report was not going to be flattering, a few months before issuing the Report the Commission had unveiled its Sixth Environmental Action Program (6EAP),[39] which also focused in the concept of *environmental sustainability* as opposed to *sustainable development*. This Program emphasized the use of the *integration principle* of Article 11 of the Treaty on the Functioning of the European Union (TFEU)[40] as the main tool to incorporate the Union's environmental goals into its legislation. The Program "also acknowledged the importance of transparency, access to environmental information and public participation in environmental decision-making."[41] A 2010 Report released by the European Institute for Environmental Policy draws less than favorable conclusions regarding the achievements and prospects of the 6EAP. The Report questioned whether the initiatives taken at the Member State level were more responsible than the

directives to revise and codify older directives and to leave the technical details of implementing such directives to a series of "daughter directives." One such daughter directive is Council Directive 1999/30/EC of 22 April 1999 laying down limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulates and lead in the ambient air.

[36] Decision No. 2179/98/EC of the European Parliament and of the Council of 24 September 1998 on the review of the European Community programme of policy and action in relation to the environment and sustainable development "Towards sustainability," 1998 O.J. (L 275) (Oct. 10, 1998).

[37] *Communication from the Commission: Ten Years After Rio: Preparing for the World Summit on 'Sustainable Development' in 2002*, COM (2001) 53 final (June 2, 2001).

[38] Victoria Jenkins, *Communication from the Commission: A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development (Commission's Proposal to the Gothenburg European Council) COM (2001) 264 final (May 15, 2001)*, 14 J. Envtl. Law 261, 262-263 (2002).

[39] *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the Sixth Environmental Action Programme of the European Community: 'Environment 2010 Our Future, Our Choice'*, COM (2001) 31 final (Jan. 24, 2001) and Decision No. 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, O.J. (L 242), 10.9.2002.

[40] *Consolidated version of the Treaty on the Functioning of the European Union*, Dec. 13th, 2007, 2008/C 115/01 [hereinafter TFEU.]

[41] Jenkins, *supra* note 38, at 263.

Commission's 6EAP for the few paradigmatic changes to the legal protection of the environment implemented since the Rio + 10 report.[42]

As it stands at present, the Treaty on the European Union[43] (TEU), in its Article 3(3), mandates the establishment of an internal market based on the *sustainable development of Europe*. Such development shall in turn be based on three objectives: 1) balanced economic growth and price stability, 2) a highly competitive social market economy, aiming at full employment and social progress and 3) a high level of protection and improvement of environmental quality.[44] This is a paradigmatic shift from the ordo-liberal market principles that provided the impetus for the original Treaty of Rome.[45]

Sustainable development is not only a paradigm for the internal market. Article 3(5) TEU mandates that the EU shall contribute to "the sustainable development of the Earth"[46] in its international relations. Furthermore, Article 21(2) TEU mandates that the EU, in its external actions,

> …[d]efine and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: … (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty [and]… (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.[47]

To some extent, Article 3(5) TEU echoes the Rio 1992 Declaration in referring to sustainable development as a strategy to eradicate world poverty and conserve natural resources.

In addition, Article 6(1) TEU integrates into the EU legal order the recognition of the rights, freedoms and principles of the EU's Charter of Fundamental Rights. The Charter "shall have the same legal value as Treaties,"[48] although its incorporation does not give any explicit or implicit legislative competences to the EU.[49] Article 37 of the Charter further provides that "[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and en-

---

[42] Sirini Whithana et al., Strategic Orientations of EU Environmental Policy under the Sixth Environment Action Programme and Implications for the Future Final Report (Institute for European Environmental Policy) (May 2010), *available at* http://www.ieep.eu/assets/556/Strategic_Orientations_of_6EAP_-_Revised_report_-_May_2010.pdf.

[43] TEU, *supra* note 5.

[44] *Id.* Article 3(3).

[45] C. Barnard, The Substantive Law of the EU: The Four Freedoms 21 (2007).

[46] TEU, *supra* note 5, article 3(5).

[47] *Id.* article 21(2).

[48] *Id.* article 6(1).

[49] *Id.*

sured in accordance with the principle of sustainable development."[50] Thus, European citizens are entitled to partake in the benefits of EU legislation, which integrates in its policies (*but not in its actions*) the high level of environmental protection principle.

Procedurally, the high level of environmental protection principle is to be achieved in the policies and activities of the EU institutions by means of the integration clause of Article 11 TEU: "Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."[51] The Treaty on the Functioning of the European Union (TFEU) stipulates the institution-specific guidance regarding its environmental policy objectives. Article 191 (1) TFEU establishes that:

> 1. Union policy on the environment shall contribute to pursuit of the following objectives:
> — preserving, protecting and improving the quality of the environment,
> — protecting human health,
> — prudent and rational utilization of natural resources,
> — promoting measures at an international level to deal with regional or worldwide environmental problems, and in particular combating climate change.[52]

Article 191(2) TFEU establishes the sub-principles under which these environmental policies shall be formulated *and measured against*:

> Union policy on the environment shall aim at a high level of protection taking into account the *diversity of situations in the various regions* of the Union. It shall be based on the *precautionary principle* and on the *principles that preventive action* should be taken, that *environmental damage should as a priority be rectified at source and that the polluter should pay*.[53]
>
> In this context, harmonization measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for noneconomic environmental reasons, subject to a procedure of inspection by the Union.[54]

Thus, the *high level of protection and improvement of the quality of the environment principle* that defines the sustainable development of the EU's internal market according to Article 3(3) TEU must incorporate: (1) the precautionary

[50] Charter of Fundamental Rights of the European Union, proclaimed by the Commission, Article 37, 7 December 2000, Proclamation and Text, 2000 O.J. (C 364) 1.

[51] TEU, *supra* note 5, article 11.

[52] TFEU, *supra* note 40, article 191(2).

[53] *Id.*

[54] *Id.*

principle;[55] (2) the source principle; (3) the polluter-pays principle; (4) the prevention principle; and (5) the safeguard clause. Any EU policy must integrate, in its formulation and execution, elements that correspond to the high level of protection principle as shaped by its corresponding sub-principles. Otherwise, that policy, and the secondary legislation that articulates it, will infringe the Treaties.

The European Union's sustainable development mandate is not only limited to Europe; it is part of the EU's international agenda.[56] We should also note that, in addition to the EU's efforts, EU Member States have also attempted to incorporate sustainable development into their national legal systems and make it subject of judicial review. For instance, the United Kingdom incorporated sustainable development into its urban planning domain, where its application in the planning process was raised to the level of a legal obligation.[57]

---

[55] Marko Ahteensuu, *Defending the Precautionary Principle against Three Criticisms*, 11 TRAMES 366 (2007). "The so-called precautionary principle… that calls for early measures to avoid and mitigate uncertain environmental damages (and health hazards) in the future has come to the fore in risk discourses. A standard formulation of the principle, which was introduced at a conference organized by the Science and Environment Health Network (SEHN) in 1998, states that "[w]hen an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationships are not fully established scientifically)."

[56] Hans Veeder, *The Treaty of Lisbon and European Environmental Law and Policy*, 22 J. Env. L., 285, 287-288 (2010) ("The objectives of the Union have also been updated to include the agenda for relations between the European Union and the world. According to this agenda the European Union shall 'contribute to the sustainable development of the earth, free *and fair* trade' [emphasis added]. The latter is particularly important in view of the important role that developing countries may play in achieving sustainable development. The international agenda for the European Union contains another reference to sustainable development in the Title containing General Provisions on the Union's External Action. According to Article 21 TEU, this action shall 'foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; [and] help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development'. These objectives shall guide external action in general but also the common foreign and security policy of the European Union. This is reinforced by the inclusion of an integration clause in article 21(3) TEU").

[57] Batty, *supra* note 28 ("The delivery of sustainable development is now written directly into the newer constitutions of British government such as those of the devolved Welsh and the Greater London Assemblies. Significantly, sustainable development also appears as the 'core principle underpinning planning' in Planning Policy Statement 1 (PPS 1) Central Government's primary statement of the purpose of the urban planning system (ODPM, 12005). Even more significant is the choice of the subtitle for PPS 1, "Delivering Sustainable Development." The focus then is on implementation. We will see that this policy statement is not just a formalization of the current concern for sustainable development in planning, *but it also imposes on the urban planning system a duty to implement the Government's strategy for sustainable development* (DEFRA,

The objective of sustainable development has also been incorporated into the EU's secondary legislation, particularly in Regulations and Directives issued to Member States.[58] Regulations are directly applicable in Member States. They become national law without the need to pass legislation at the Member State level.[59] Directives, on the other hand, need to be transposed into the national law of each Member State.[60] One well-known Directive is 2009/147/EC on the conservation of wild birds.[61] The Preamble of the Wild Birds Directive asserts that the "[c]onservation of the species of wild birds naturally occurring in the European territory of the Member States is necessary in order to attain the Community's objectives regarding the improvement of living conditions and sustainable development."[62] Another important directive anchored in the principle of sustainable development is the Water Framework Directive (WFD).[63] The WFD incorporates the *river basin approach* to environmental water management and clearly attempts to incorporate the multi dimensional approach of sustainable development in its structure. Commentators have applauded this approach to secondary legislation, while continuing to lament Member States' apparent lack of political will to embrace such legislation more quickly.[64]

2005) and to act proactively to deliver results rather than as a regulatory agency" [emphasis added]).

[58] The principal forms of legislation issued by the EU comes in the forms of Regulations, which are directly binding on Members States and Directives, which are binding on the Member States as to the result sough by the Directive. Directives must be properly transposed into the national laws of Members States within the time frame provided in the Directive. *See*, TFEU, *supra* note 40, article 288.

[59] *See, e.g.*, Regulation 1013/2006 on waste shipments, 2006 O.J. (L 190) 1. Note that some Regulations rely on Member States for the enactment of certain rules. For instance, paragraph 50 of Regulation 1013/2006 mandates that "Member States shall lay down the rules on penalties applicable for infringement of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented."

[60] Transposition is the process where Directives are implemented into enforceable national law. The transposition of environmental Directives into national law has produced significant litigation regarding whether the intention of the Directive is achieved by national legislation. See, *e.g.*, Case 236/85 Commission v. Netherlands (Wild Birds Directive), 1987 E.C.R. 3989 (whether derogation under Article 9 of Directive 79/409/EEC only "where there is no other satisfactory solution" was met by the Dutch national legislation.)

[61] Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the Conservation of Wild Birds (codified version), 2010 O.J. (L 20) 7 [the Wild Birds Directive].

[62] *Id.* at para. 5 of the Preamble.

[63] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, 2000 O.J. (L 327) 1.

[64] SCHRIJVER & WEISS, *supra* note 29, at 574 ("[T]he WFD provides a tangible example of a regional law which seeks to take the concept of sustainable use, a key component of sustainable development, from principle to practice within a particular context. The introduc-

As these Directives demonstrate, the principle of sustainable development (in whatever legal form it takes) is deeply ingrained in the European Union's secondary law. The principle of sustainable development, however, continues to elude environmental lawyers, who still long for a regulatory system that afford effective legal protection for environmental damage. That, notwithstanding, it is ultimately for the courts to determine the proper legal category sustainable development occupies in interpreting disputes where the EU objectives of economic development, social development and environmental protection clash. We shall now consider how the ECJ has articulated the legal principle of sustainable development in the resolution of certain disputes under the Treaties and secondary legislation.

IV. The Reception of Sustainable Development as a General Principle of Law by the Court of Justice of the European Union

Before discussing the ECJ's articulation of the principle of sustainable development in recent decisions, we will examine the role of legal principles in judicial adjudication. Any modern discussion about the difference between legal rules and legal principles must consider the ideas advanced by legal philosopher Ronald Dworkin. For Dworkin, rules are "applicable in al all-or-nothing fashion,"[65] whereas legal principles have "the dimension of weight or importance."[66] Judges use legal rules to justify their reasons for deciding a case in a given way, while principles are always weighted against other principles judicial adjudication. A principle is "a standard to be observed, not because it will advance or secure an economic, political, or social situation, but because it is a requirement of justice or fairness or some other dimension of morality."[67] Policy, on the other hand, is a "kind of standard that sets out the goals to be reached, generally an improvement in some economic, political, or social feature of the community."[68] Legal principles are to be used by courts in weighting their decisions of cases and controversies; policies are decided by legislatures and government agencies. Principles and policies are more often than not intermingled by legal observers, thus producing confusing analysis.

---

tion of a number of innovative approaches, such as a river basin approach and a combined approach to pollution, should be applauded as a positive step towards the sustainable use of EU water resources. It is, however, disappointing that a clear commitment by Member States to achieve 'good' status in all EU waters is lacking. The result is that compliance with the main objective of the WFD will perhaps rely more on uncertain political and public pressure than clear legal commitments").

[65] Ronald Dworkin, Taking Rights Seriously 24 (1978).

[66] *Id.* at 26.

[67] *Id.* at 22.

[68] *Id.*

Much discussion about the *vagueness* of sustainable development and its inability to produce tangible results in the balancing of economic development and environment protection is attributed to: 1) its failure as a mechanism to strike a concrete balance amongst these when applied to actual situations, and 2) the difficulty of deriving legal norms or legal rules that create duties or obligations subject to legal review by courts.

Regarding the first observation, one author rejects the "either-or" dichotomy between developers and environmentalists. He argues that a third variable —social equity— must be included in the logic of the sustainable development decision-making process.[69] It should provide the much sought after balance between development and environmental protection.[70] A less theoretical, but more pungent lament comes from a frequent commentator of EU environmental law when he lays the claim that while "[e]nvironmental protection and sustainable development continue to occupy a prominent place in the objectives of the European Union… *[a]n issue that remains unresolved is the exact weight to be given to the various objectives where they are at odds with each other*."[71]

As to the second observation, one author theorizes that the interface of sustainable development and the legal order could produce three types of legal roles: 1) a standard of behavior; 2) a guiding principle decision makers must use actively in the motivation of a legally-binding decision; and 3) a general optic under which to interpret a given law. He states that:

> There are at least three legal roles that sustainable development could play in a statute. From strongest to weakest, they are the following. First, sustainable development could be used as a general standard of behavior; that is, it could define a limitation that applies to everybody, everywhere. Anyone who acted contrary to the rule could be subject to civil liabilities or criminal penalties. Second, sustainable development could play a narrower, and therefore more limited, role as a factor for administrative decision makers to consider when exercising their discretion and making their decisions. Third, in its weakest form, sustainable development could be neither of these things, and instead function merely as a guide to interpretation of the rest of the statute.[72]

Most legislation aimed at achieving sustainable development uses the concept in the second and third roles described by the author. The main problem with using sustainable development a guideline for real world behavior lies in the perennial question: where does one draw its limits? As Ruhl mentions,

---

[69] J.B. Ruhl, *Sustainable Development: A Five-Dimensional Algorithm for Environmental Law*, 18 Stan. Envtl. L. J. 31, 36 (1999).

[70] *Id.*

[71] Hans Veeder, *The Treaty of Lisbon and European Environmental Law and Policy*, 22 Journal on Environmental Law 285, 287-288 (2010) (Emphasis added).

[72] Bruce Pardy, *Sustainable Development: In Search of a Legal Rule*, 28 Journal of Business Administration and Policy Analysis 391 (2001).

sustainable development is a function of balancing economic, environmental and social equity considerations; there is no agreed-upon scientific model to perform such function that depends in a multiplicity of interconnected variables.[73]

Another author states that even though sustainable development is widely accepted as a principle of international law, it has not crystallized into the actual resolution of international disputes. The reason being that:

> First, normatively, for a legal principle to be dispositive in international dispute resolution, it must not only be a legal principle, but [also] a rule-generating adjudicatory norm. This has not occurred for sustainability because the "principle" of sustainable development itself is not of a sufficiently definitive rule-creating character; it contains a number of competing and even contradictory sub-principles which dilute and dissipate its normative power to command the construction and operation of an institutional dispute resolution regime of its own.[74]

Thus, for Gillroy, the legal principle of sustainable development is a meta-principle of law comprised of four substantive and four procedural sub-principles that may be in competition or contradiction to one another. The four substantive principles are: (1) the prevention principle; (2) the precautionary principle; (3) the sovereignty over internal country resources combined with the duty not to incur in cross-border pollution; and (4) the right to equitable development.[75] The four procedural principles he identifies are "(1) the integration of environment and development; (2) a concern for future generations and their welfare; (3) the principle of common but differentiated responsibility; and (4) the polluter-pays principle."[76]

Gillroy contends that these sub-principles make the principle of sustainable development ineffective in the resolution of international legal disputes because it is impossible for any new principle in international law "to gain *norm* status within any existing regime [of international adjudication] without destroying the normative character and therefore identity of the regime."[77] Can we draw the same conclusion when applying the legal principle of sustainable development to the resolution of disputes in a supranational court such as the ECJ? We will see how the ECJ has articulated the slippery and elusive legal principle of sustainable development in the resolution of disputes under the Treaties.

---

[73] Ruhl, *supra* note 69.

[74] John Martin Gillroy, *Adjudication Norms, Dispute Settlement Regimes and International Tribunals: The Status of "Environmental Sustainability" in International Jurisprudence*, 42 Stan. J. Int'l L. 1, 12 (2006).

[75] *Id.*

[76] *Id.*

[77] *Id.* at 12, 49-50.

The ECJ has not been shy in applying the principles of environmental protection dispersed in the Treaties. Most of the time, the ECJ deals with these principles while interpreting questions of EU law related to the transposition and correct interpretation of Directives and other secondary legislation by Member States. Insofar as these principles become the subject of interpretation and clarification by the ECJ, the *high level of protection principle*, has consistently emerged in its decisions and has thus become deeply entrenched in the EU legal order.

We must point out that the ECJ gave life to the principle of environmental protection even before the Treaties even mentioned the environment. In the 1988 *Danish Bottles* case,[78] the ECJ declared that *environmental protection* could be a mandatory requirement asserted by the Member States in order to limit the free movement of goods under the *Cassis de Dijon*[79] doctrine. The high level of protection principle is currently assured a position in both EU legislation and actions via the integration principle of Article 11 TFEU. In addition, environmental legislation has a firm legal basis in Article 192 TFEU; and the environmental objectives of the EU must be accomplished within the boundaries of the principles announced in Article 191 TFEU. Two recent cases demonstrate the ECJ's approach in interpreting these principles; in this case, the interplay between the polluter-pays and the prevention principle, on the one hand, and the precautionary principle, on the other.

In the 2010 *Raffinerie Meditarranee* Grand Chamber decision,[80] the Court dealt with the interpretation of the *polluter-pays* principle as implemented in Directive 2004/35/EC on "environmental liability with regard to the prevention and remedying of environmental damage."[81] In this case, an Italian

[78] Case 302/86, Commission v. Denmark, 1988 E.C.R. 4627. *See also*, Case 240/83, Procureur de la République v. Association de Defense des Bruleurs d'Huiles Usagées (Waste Oils Case), 1985 E.C.R. 531 (environmental protection is an "essential objective" of the Comunnity policy and the Waste Oils Directive complied with this objective in a proportionate and nondiscriminatory manner). *See generally*, Mathew L. Schemmel & Bas De Regt, *The European Court of Justice and the Environmental Protection Policy of the European Community*, 17 B. C. Int'l & Comp. L. Rev. 53 (1994).

[79] Case 120/78, Rewe Zentral AG v. Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649, 662 (*Cassis de Dijon*). This case introduced the concept of "mandatory requirements," a judge-made exception to the free movement of goods. In paragraph 8, the ECJ stated that "[o]bstacles to movement within the community resulting from disparities between the national laws relating to the marketing of products in question must be accepted insofar as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."

[80] Joined Cases C-379/08 and C-380/08, Judgment of the Court (Grand Chamber) of 9 March 2010, 2010 E.C.R. 0000.

[81] Council Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, 2004 O.J. (L 143) 56.

agency imposed on the defendants a remedial action that both went beyond and was a substantial change from the remedial action established under the consultation process mandated by the Directive. The Italian agency implemented the new, remedial action "without that authority having carried out any assessment, before imposing those measures, of the costs and advantages of the changes contemplated from an economic, environmental or health point of view."[82] In addition, the Italian agency directed preventive orders to parties whose lands were not polluted or had been decontaminated before the effective date of the Directive. In essence, the Italian measures afforded a higher level of environmental protection than the one required by the Directive, an interpretation not inconsistent with a literal reading of Article 193 TFEU.[83] The Court went on to hold that Member States could incorporate the *polluter-pays* principle into national legislation affording more protection than that afforded by the Directive. It held that:

> …Articles 7 and 11(4) of Directive 2004/35, in conjunction with Annex II to the directive, must be interpreted as permitting the competent authority to alter substantially measures for remedying environmental damage [,] which were chosen at the conclusion of a procedure carried out on a consultative basis with the operators concerned [,] and which have already been implemented or begun to be put into effect. However, in order to adopt such a decision, that authority:
>
> — is required to give the operators on whom such measures are imposed the opportunity to be heard, except where the urgency of the environmental situation requires immediate action on the part of the competent authority;
>
> — is also required to invite, inter alia, the persons on whose land those measures are to be carried out to submit their observations and to take them into account; and
>
> — must take account of the criteria set out in Section 1.3.1 of Annex II to Directive 2004/35 and state in its decision the grounds on which its choice is based, and, where appropriate, the grounds which justify the fact that there was no need for a detailed examination in the light of those criteria or that it was not possible to carry out such an examination due, for example, to the urgency of the environmental situation.[84]

For this reason, national authorities can impose a higher standard of protection than that stipulated by the Directive, provided it gives the relevant

[82] Joined Cases C-379/08 and C-380/08, Judgment of the Court (Grand Chamber) of 9 March 2010, 2010 E.C.R. para. 28.

[83] "The protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with the Treaties. They shall be notified to the Commission." TFEU, *supra* note 40, article 193.

[84] Joined Cases C-379/08 and C-380/08, Judgment of the Court (Grand Chamber) of 9 March 2010, 2010 E.C.R. para. 67.

parties an opportunity to be heard, invites the participation and comments of adjacent landowners, and the national measures are grounded in law.

With regards to measures taken against landowners whose lands were not polluted, the ECJ validated the national laws under the *precautionary principle*, after finding that the legislation complied with the general principle of proportionality. The Court held that:

> …Directive 2004/35 does not preclude national legislation which permits the competent authority to make the exercise by operators at whom environmental recovery measures are directed of the right to use their land subject to the condition that they carry out the works required by the authority, even though that land is not affected by those measures because it has already been decontaminated or has never been polluted. However, such a measure must be justified by the objective of preventing a deterioration of the environmental situation in the area in which those measures are implemented or, pursuant to the precautionary principle, by the objective of preventing the occurrence or resurgence of further environmental damage on the land belonging to the operators which is adjacent to the whole shoreline at which those remedial measures are directed.[85]

In another case decided in the same year, *Afton Chemical Limited*,[86] the ECJ restated the level of judicial review it will afford to acts of the EU institutions dealing with complex problems. It also clarified the role of the precautionary principle in the fashioning of European legislation. Regarding judicial review, the ECJ restated in *Afton* that the tests it will use to invalidate such acts are manifest error or abuse of powers:

> 28. [I]n an area of evolving and complex technology…, the European Union legislature has a broad discretion, in particular as to the assessment of highly complex scientific and technical facts in order to determine the nature and scope of the measures which it adopts, whereas review by the Community judicature has to be limited to verifying whether the exercise of such powers has been vitiated by a manifest error of appraisal or a misuse of powers, or whether the legislature has manifestly exceeded the limits of its discretion. In such a context, the Community judicature cannot substitute its assessment of scientific and technical facts for that of the legislature on which the Treaty has placed that task.
>
> ***
>
> 34. However, even though such judicial review is of limited scope, it requires that the Community institutions which have adopted the act in question must be able to show before the Court that in adopting the act they actually exer-

[85] *Id.* at para. 92.

[86] Case C-343/09, Afton Chemical Limited v. Secretary of State for Transport, Judgment of the Court (Fourth Chamber) of 8 July 2010, 2010 E.C.R. ___ (Afton intended to declare invalid the limits imposed by Directive 2009/30 to the additive MMT on grounds of the precautionary principle, pending a full assessment of its health and environmental impact).

> cised their discretion, which presupposes the taking into consideration of all the relevant factors and circumstances of the situation the act was intended to regulate.

With regards to the precautionary principle, the *Afton* Court prescribed its correct application as follows:

> 60. A correct application of the precautionary principle presupposes, first, identification of the potentially negative consequences for health of the proposed use of MMT, and, secondly, a comprehensive assessment of the risk to health based on the most reliable scientific data available and the most recent results of international research (see Case C-333/08 Commission v. France [2010] ECR I-0000, paragraph 92 and case-law there cited).
>
> 61. Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialize, the precautionary principle justifies the adoption of restrictive measures, provided they are nondiscriminatory and objective (see Commission v France, paragraph 93 and case-law there cited).
>
> 62. In those circumstances, it must be acknowledged that the European Union legislature may, under the precautionary principle, take protective measures without having to wait for the reality and the seriousness of those risks to be fully demonstrated (see Commission v France, paragraph 91).

The Court then held that, pending a full scientific assessment, the temporary limitation of the concentration of the additive MMT in combustion fuels on grounds of the precautionary principle was objective and nondiscriminatory and therefore, the EU institutions had made correct use of the precautionary principle in proscribing its use.

Even though the ECJ has embraced its mission of adjudicating EU law on the basis of the principles of environmental protection, the episodic and dispersed articulation of these environmental protection principles cannot be considered a coherent application of the general principle of sustainable development. The EU legislature would help *add flesh to the bones* of the environmental protection by systematically stating in its legislative acts that the interplay of these environmental principles represents the balance called for by the principle of sustainable development established in the Treaties. Absent that announcement, the legal principle of sustainable development calls for environmental protection via the interplay of the environmental protection principles in a scheme that is for the ECJ to determine. In doing so, the ECJ needs to provide a coherent application of the principles of environmental protection spelled out in the legislative acts in order to establish the balancing between economic development and environmental protection called for by sustainable development. The consistent application of this proposal will ensure that sustainable development, as a legal principle, will continue to play

a key role in the development of European environmental law. Perhaps it may inspire other legal systems, including that of Mexico, to follow suit. Unfortunately, the same cannot be said regarding sustainability and the environmental legal protection of the environment in the United States of America.[87]

As mentioned above, Mexico may have established new legal tool for environmental protection with the recent amendments to the *Amparo* Law. In fact, before reaching the *Amparo* law remedies, the affected parties may first attack the particular legislation, rule or administrative decision by first asking for a revision process under Articles 180 and 176 of the Ecology Law.[88] Under the revision procedure, the parties may claim that a particular measure did not comply with sustainable development procedures as set forth in Article 3(XI) of the Ecology Law. According to this provision, sustainable development is "the process, measured by concrete criteria and environmental, economic and social indicators that helps improve life quality and human productivity, and is based on appropriate measures for the preservation of ecological equilibrium, environmental protection and the advantageous use of natural resources in a way that does not impair the needs of future generations."[89] On the other hand, litigants may claim that the measure in question does not comply with substantive principles of environmental policy pursuant to Article 15 of the Ecology Law that include, among others, the polluter-pays principle, prevention principle and the intergenerational equity principle. Once the administrative remedies set forth in the Ecology Law are exhausted, litigants may opt for the *Amparo* action discussed above. Even when no measure is taken, individual human rights recognized by Mexico in international treaties may be the subject of *Amparo* action under the recent amendment to such law.

The almost-certain increase in environmental protection litigation that will arise under the new possibilities afforded by the amendments to the *Amparo* law will present a new challenge to the Mexican judiciary handling these cases. We humbly suggest that a careful study of the articulation of sustainable development by the ECJ might be helpful to Mexican judges dealing with these new cases.

V. Conclusions

The European Union was an early adopter of sustainable development advanced by the United Nations in the Rio 92 Declaration. Sustainable de-

[87] The status of sustainable development in the United States legal system is embryonic at best. *See*, James R. May, *Not at All: Environmental Sustainability in the Supreme Court*, 10 Sustainable Dev. L. & Pol'y 20 (2009).

[88] *See*, Ibarra et al., *supra* note 15.

[89] Ley General del Equilibrio Ecológico y la Protección del Ambiente [L.G.E.E.P.A.] [Ecology Law], *as amended*, art. 3(XI), Diario Oficial de la Federación [D.O.], 28 de enero de 1988 (Mex.).

velopment has decisively made its way into the legal order of the European Union since its appearance in the Treaty of Maastricht.[90] In fact, its hierarchical position within the treaties shows that the principle of sustainable development occupies a privileged position in the EU legal order. The EU principle of sustainable development comprises the principle of high level of protection of the environment, which in turn encompasses the sub-principles known as the precautionary principle, the source principle, the polluter pays principle and the prevention principle, and it is balanced against the economic growth imperative of sustainable development by means of the safeguard clause of Article 192 TFEU.[91] European institutions incorporated these principles in the secondary legislation of the EU, and the ECJ initiated the long process of embroidering these principles into the legal fabric of the EU. The ECJ has begun to place sustainable development in the hierarchy of legal principles that guide the evolution of the European Union, thus fulfilling the larger objective of "creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen."[92] However, we suggest that much work remains to fulfill this objective. Both the European institutions and the ECJ need to more coherently articulate the principles of environmental protection in their legislative and judicial acts in order to achieve a better balance between economic development and environmental protection pursuant to the principle of sustainable development. We further suggest that the advances made by the EU in positing sustainable development as a paradigm for environmental legal protection may serve to inspire and guide other legal systems, including that of Mexico. Mexico's recent amendments to the Amparo Law will, for the first time in its history, allow in principle the adjudication of collective claims seeking redress for environmental harm. Those claims may be based on either alleged violations of Mexico's basic constitutional rights or human rights to the environment stemming from those treaties where Mexico is a signatory. Mexican courts will soon encounter the need to articulate sustainable development as a justiciable principle; further study of the experience of legal systems such as that of the European Union may prove valuable in such adjudication.

[90] Treaty on European Union (EU), 7 February 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253.

[91] TFEU, *supra* note 40, article 192.

[92] TFEU, *supra* note 40, article 1.

Recibido: 11 de julio de 2012.
Aceptado para su publicación: 8 de febrero de 2013.

Mexican Law Review
New Series
VOLUME VI
Number 2

MIGRATION OF RESPONSIBILITY: THE TRUST DOCTRINE AND THE TOHONO O'ODHAM NATION

Karrie A. Gurbacki*

Abstract. *This article discusses the impact of the influx of migrants from Mexico and Central America on the American Southwest. Specifically, it discusses how Native American tribes of the Southwest, especially the Tohono O'odham Nation, have become a magnet for illegal border crossings due to lax enforcement policies on tribal land. As a result, the tribe has encountered a surge in drug-trafficking, violence, and environmental destruction on its reservation. The article first analyzes the trust doctrine between the Native American tribes and the United States federal government. It concludes with a discussion of the monetary and equitable relief available to the Tohono O'odham Nation in the form of damage awards and increased border protection.*

Key Words: *Immigration, Tohono-O'odham Nation, Native American tribes, US-Mexico relations, tribal sovereignty, trust doctrine, American Southwest.*

Resumen. *En este artículo se analiza el impacto de la afluencia de inmigrantes de México y América Central en el suroeste de Estados Unidos. En particular, se analiza cómo las tribus nativas norteamericanas, especialmente la nación Tohono O'odham, que viven en el suroeste se han convertido en un imán para los cruces ilegales de la frontera debido a las políticas de aplicación laxa en tierras tribales. Como resultado, la tribu ha detectado un aumento en el tráfico de drogas, la violencia y la destrucción del medio ambiente en su reservación. El artículo analiza la doctrina de la confianza entre las tribus de nativos americanos y el gobierno federal de los Estados Unidos, y concluye con una discusión de las reparaciones pecuniarias y equitativas a disposición de la nación Tohono O'odham, si desean recuperarse de los daños sufridos por los migrantes y fomentar más patrulla fronteriza.*

Palabras clave: *Inmigración, nación Tohono-O'odham, tribus americanas nativas, relaciones México-Estados Unidos, soberanía tribal, doctrina de la confianza, sudoeste americano.*

* Juris Doctorate Candidate May 2014, Villanova University School of Law; Bachelor of Arts Political Science and Bachelor of Arts International Relations, State University of New York at Geneseo.

Table of contents

I. Introduction

1. *The Immigration Crisis*

For many Americans living in the Southwest, the increase in the flow of illegal immigrants over the past decade has been a significant disruption. For the Tohono O'odham Nation, which partially spans the border of Mexico and Arizona, such trends spell possible disaster for the survival of the Tribe.

Throughout our nation's history, immigration has played a vital role in the development and advancement of American society.[1] Since 2007, when illegal migrants outnumbered those who came here legally for the first time in American history,[2] the number of illegal crossings has decreased. Clearly, immigration still remains a problem reflected by $18 billion spent on immigration enforcement, more than all federal law enforcement agencies combined.[3] Fortunately, both political parties are moving in the direction of

[1] *See* Michal Czerwonka, *Immigration and Emigration*, The New York Times, Feb. 26, 2013, http://topics.nytimes.com/top/reference/timestopics/subjects/i/immigration-and-emigration/index.html.

[2] *See id*. The current wave of immigration is the largest since the 1920s. For example, in 2007, 12 million illegal immigrants entered the United States. *See also* Carolina Moreno, *Border Crossing Deaths More Common as Illegal Immigration Declines*, The Huffington Post, Feb. 26, 2013, http://www.huffingtonpost.com/2012/08/17/border-crossing-deaths-illegal-immigration_n_1783912.html. In 2011, 327,577 migrants attempted to cross the border illegally; a decline from 858,638 in 2007. However, death rates have increased, as 368 out of 327,577 people were discovered in 2011 compared to 398 out of 858,638 in 2007.

[3] *See* Julia Preston, *Huge Amounts Spent on Immigration, Study Finds*, The New York Times, Jan. 7, 2013, http://www.nytimes.com/2013/01/08/us/huge-amounts-spent-on-immigration-study-finds.html?_r=0 (According to a report published Monday by the Migration Policy Institute, a nonpartisan research group in Washington).

comprehensive immigration reform.[4] The immigration debate was brought to the forefront of national media when President Obama won 71 percent of the Hispanic vote in the 2012 presidential election.[5] Although the issue has remained a priority on Obama's agenda, Congress has yet to pass a comprehensive overhaul.[6] Ideally, Obama seeks to first tighten border control and subsequently establish a path to citizenship for the eleven million illegal immigrants currently residing in the United States.[7]

In Arizona, where part of the Tohono O'odham Nation resides, the Supreme Court recently struck down parts of Arizona's SB 1070, Arizona's tough law on illegal immigrants, but left intact a controversial provision requiring police to check the immigration status of people detained and suspected of being in the country illegally.[8] In a later District Court decision concerning the enforcement of the ruling, however, the Court ordered the state to stop enforcing a provision that makes it a crime to transport illegal immigrants inter-state.[9] This move ensured that federal legislation would remain at the forefront for immigration reform, as the decision held that "states cannot impose rules in areas already regulated by federal immigration laws."[10] In effect, the Arizona law and the Supreme Court decision enhanced local

---

[4] *See* Czerwonka, *supra* note 1. In fact, "President George W. Bush for three years pushed for a bipartisan immigration reform bill before giving up in 2007, blocked by conservative opposition."

[5] *See id*. Mitt Romney won just 27 percent. Those results received much media attention, particularly among Republicans who were concerned that the outcome would be an issue in future elections.

[6] *See* Czerwonka, *supra* note 1.

[7] *See id.* Obama has stated that the pathway to citizenship hinges on progress in securing the border. He has indicated that he prefers to work with Congress, rather than propose his own legislation.

[8] *See* Robert Barnes, *Supreme Court Upholds Key Part of Arizona Law for Now, Strikes Down Other Provisions*, The Washington Post, June 25, 2012, http://articles.washingtonpost.com/2012-06-25/politics/35461864_1_immigration-decision-arizona-law-illegal-immigrants. The court held that the following is unconstitutional: the "state cannot make it a misdemeanor for immigrants to not carry registration documents; criminalize the act of an illegal immigrant seeking employment; or authorize state officers to arrest someone on the belief that the person has committed an offense that makes him deportable."

[9] *See* Fernanda Santos, *Arizona Immigration Law Survives Ruling*, The New York Times, Sept. 6, 2012, http://www.nytimes.com/2012/09/07/us/key-element-of-arizona-immigration-law-survives-ruling.html?_r=0 (stating victory for plaintiffs).

[10] *Id.* As Justice Kennedy stated, "Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the state may not pursue policies that undermine federal law." *See id.* (quoting Supreme Court). *See also* Fernanda Santos, *Arizona Immigration Law Survives Ruling*, The New York Times, Sept. 6 2012 (*reporting judge* "employed the same rationale used by the courts in Alabama and Georgia to block similar provisions").

authority to combat illegal immigration provided it remains within Constitutional limitations.[11]

2. *Who Are the Tohono O'odham?*

Historically, the Tohono O'odham Nation occupied much of the American southwest.[12] From the early eighteenth century on, however, Tohono O'odham tribal lands have been occupied by the United States and Mexico.[13] When Mexico gained its independence, it officially asserted rule over the Tribe.[14] Through the Gadsden Purchase in 1853, the Tohono O'odham land was divided into American and Mexican sectors.[15] This agreement continued until the United States created a reservation for the Tohono O'odham in 1974 by executive order.[16]

Today, the Tohono O'odham Nation shares a border with Mexico for 63 miles; about 17% of the Arizona-Mexico border.[17] There are about nine Tohono O'odham communities that lie south of the American border.[18] In the United States, the main reservation is located in Southwestern Arizona near Tucson.[19] In total, the reservation is almost 4,500 square miles, making it the third largest in the United States at about the size of Connecticut.[20] Accord-

---

[11] *See id.* As Obama said, "Going forward, we must ensure that Arizona law enforcement officials do not enforce this law in a manner that undermines the civil rights of Americans, as the Court's decision recognizes."

[12] *See The Official Website of the Tohono O'odham Nation: History and Culture*, http://www.tonation-nsn.gov/default.aspx. "The O'odham inhabited an enormous area of land in the southwest, extending South to Sonora, Mexico, north to Central Arizona, and west to the Gulf of California, and east to the San Pedro River. This land base was known as the Papagueria and it had been home to the O'odham for thousands of years."

[13] *See The Official Website of the Tohono O'odham Nation: History and Culture*.

[14] *See id*.

[15] *See id*. The treaty was aimed at resolving border disputes after the end of the Mexican-American War. However, the treaty has been highly criticized as American imperialistic behavior by forcing Mexico to sell the land to aid in the United States' effort at building a transcontinental railroad. *See* Ignacio Ibarra, *Land Sale Still Thorn to Mexico*, Arizona Daily Star, Feb. 12 2004.

[16] *See* John Dougherty, *One Nation, Under Fire*, High Country News, Feb. 19, 2007.

[17] *See* Susan Bradford, *Illegal Immigration from the Perspective of Arizona's Tohono O'odham Nation*, Aug. 26, 2010, http://susanbradfordpress.wordpress.com/2010/08/26/illegal-immigration-from-the-perspective-of-arizonas-tohono-oodham-nation/. *See also* Amanda Crawford, *Arizona's State-Owned Mexico Border Fence Attracts Donors from Across U.S.*, Aug 2, 2011, http://www.bloomberg.com/news/2011-08-02/arizona-s-state-owned-mexico-border-fence-attracts-donors-from-across-u-s-.html/.

[18] *See id*.

[19] *See id.* (Reporting that the total non-contiguous segments amount to more than 2.8 million acres).

[20] *See id.* (Noting reservation is also second largest in Arizona).

ing to the 2000 U.S. census, 10,201 people live on the reservation.[21] According to Tribal estimates, however, there are 28,000 tribal members living on reservation land in Arizona.[22] It is estimated that only about 1,500 tribal members reside in Mexico.[23] Unfortunately, most Tribe members live in poverty, with unemployment hovering around 42 percent; about 40 percent live below poverty level with a per capita income of $8,000.[24]

3. *The Tohono O'odham Nation: Victims of Migrants*

After the September 11th attacks and the resulting surge in border security, illegal migrants from Mexico have exploited the Tohono O'odham reservation, due to its relatively weaker border security, as the federal government has yet to implement the same technology on the reservation as it has along other parts of the border.[25] There is also evidence that, knowing that the Nation opposed humanitarian aid to migrants, the U.S. government increased border security on either side of Tribal lands more than on Tribal lands, creating a funnel effect that forces migrants to cross through the reservation.[26] There is also some evidence that the reservation bears the brunt of migrant crossings even within Arizona, which has by far more crossings than any other part of the state.[27] As a result, the reservation finds itself at the crossroads of

---

[21] *See The American Indian and Alaska Native Population: 2010*, Census Briefs (January 2012), http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf (observing that the Tohono O'odham has one of the smallest populations of those included in the 2010 Census).

[22] *See The Official Website of the Tohono O'odham Nation: History and Culture*.

[23] *See* Susan Bradford, *Illegal Immigration from the Perspective of Arizona's Tohono O'odham Nation*, Aug. 26, 2010, http://susanbradfordpress.wordpress.com/2010/08/26/illegal-immigration-from-the-perspective-of-arizonas-tohono-oodham-nation/.

[24] *See* Dougherty, *supra* note 17 (amounting to only 33 percent of the U.S. average and far below the $13,000 average for Native American tribes).

[25] *See* Eric Eckholm, *In Drug War, Tribe Feels Invaded by Both Sides*, The New York Times, Jan. 25, 2010.

[26] *See* Hugh Holub, *Tohono O'odham Reservation Deadly Place for Migrants*, Tuscan Citizen.com, Sept. 2, 2010, http://tucsoncitizen.com/view-from-baja-arizona/2010/09/01/tohono-oodham-deadly-place-for-migrants/. Although the Tohodo O'odhams sympathize with the migrants, the number of migrants and associated violence they bring has forced the Tribe to defend themselves by barring water stations and relief groups from entering the reservation. *See id.* It should be noted that, while border security does exist on the region, the high number of illegal immigrants on tribal land are likely to continue until security is on par with the rest of the Arizona border. *See id.*

[27] *See* Dougherty, *supra* note 16 (indicating that as many as 1,500 migrants pass through the reservation per day). Compare with *Immigration in Arizona: Fact Sheet (2012)*, Federation for American Immigration Reform, April 2012, http://www.fairus.org/issue/immigration-in-arizona-fact-sheet (reporting that nearly half of all border crossing occur along the Mexico-Arizona border). The study also reported that, "From 2001 to 2010, an average of 1,374 illegal aliens a day were apprehended in the Arizona border sector. DHS does not know how many

both illegal immigration and drug trafficking.[28] Not only have illegal crossings increased, but migrants are now far more dangerous.[29] Unable to enjoy the peace and security it once enjoyed, the Tribe must now contend with land "swarming with outsiders, where residents are afraid to walk in the hallowed desert, and some members, lured by drug cartel cash in a place with high unemployment, are ending up in prison."[30] Many tribal members have been bribed into smuggling marijuana through the reservation, some of whom end up in prison.[31] This problem is exacerbated by the fact that in some remote areas, police may not arrive for hours.[32] In 2009, 319,000 pounds of marijuana were seized on the reservation.[33] In 2003 and 2004, more than one hundred tribal members were arrested on drug-related charges.[34]

In addition to their fear of drug smugglers, Tribe members also resent federal agents' random and occasionally humiliating searches.[35] As more illegal migrants' have crossed the reservation, the number of federal and state border control agents on reservation land has increased.[36] Such changes have meant tighter controls and more checkpoints, making it difficult for the 1,500 tribal members in Mexico to reach important facilities and unite with family members on the American side.[37] In fact, for many tribal members in Mexico,

---

illegal aliens successfully entered Arizona each day during that period" (Concluding that the average number of crossings in Arizona nearly equals the highest number of crossings on tribal land; for this reason, the majority must therefore occur on reservation land).

[28] *See* Andrea Filzen, *Clash on the Border of the Tohodo O'odham Nation*, Pulitzer Center, Feb. 22, 2013, http://pulitzercenter.org/reporting/clash-border-tohomo-o%E2%80%99odham-nation-migration-Mexico-Arizona-Native-Americans (reporting that, consequently, the O'odham "way of life as well as O'odham attitudes towards undocumented migrants" has been altered).

[29] *See id*. (Arguing that in past years, migrants only requested basic necessities such as food and water from the Tribe). Now, "it has gotten pretty dangerous, where there are more people crossing and they want more than water and food-for example, your truck or things on your lawn, and to that extent, Tohono O'odham people are not open to helping because they don't know who they're helping and that might cause further problems." *See id*. (Quoting Ofelia Zepeda, professor of linguistics at the University of Arizona).

[30] *See* Eckholm, *supra* note 25.

[31] *See id.* (As Ned Norris, the tribal chairman, stated "Drug smuggling is a problem we didn't create, but now we're having to deal with the consequences").

[32] *See id.*

[33] *See id.* (Also noting that "hundreds of tribal members have been prosecuted in federal, state, or tribal courts for smuggling drugs or humans, taking offers that reach $5,000 for storing marijuana or transporting it across the reservation").

[34] *See* John Dougherty, *One Nation, Under Fire*, High Country News, Feb. 19, 2007, http://www.hcn.org/issues/340/16834.

[35] *See* Eckholm, *supra* note 25.

[36] *See id. See also* Cherokee Nation v. Georgia, 30 U.S. 2. *Due to the* Treaty of Hopewell, the Court has held that the Tribe had given up partial autonomy and was a domestic, dependent nation, dependent upon the federal government as a ward to its guardian. As a result, federal and state law enforcement has a right to enter tribal land to protect individuals.

[37] *See id.*

access to medical, educational and social services on their reservation in the United States is essential.[38]

Even with these concerns, however, many Tribe members agree that not enough is being done by the federal government to stop illegal immigration.[39] Migrants not only demand provisions from the Tribe, they also frequently steal tribal possessions like clothes, food, electronics and bicycles.[40] Tribal members are frequently robbed, have their cars stolen and homes burglarized.[41] Items of historic and cultural significance are often vandalized.[42] Elderly tribal members now avoid walking in the desert, even in daytime.[43] These individuals have abandoned cultural rituals, such as the ingestion of traditional foods for fear of harm.[44] Verna Miguel, sixty-three years old, says she no longer enters the desert after she was stopped three years ago by a group of migrants, beaten, and had her car stolen.[45]

While federal officials view their work and increased presence as a necessity, many tribal members resent their presence.[46] Many tribal members criticize the Border Patrol's abuse and cultural ignorance.[47] Despite these allega-

---

[38] *See* Dougherty, *supra* note 34. Because Mexico does not recognize the Tohono O'odham Nation, it does not provide social service for Tribe members. Members also frequently cross the border "to perform sacred ceremonies, visit summer homes, hunt and collect herbs and plants" (explaining necessity of border crossing for Mexican Tohono O'odham members).

[39] *See* Brady McCombs, *O'odham Leader Vows No Border Fence*, Arizona Daily Star, Aug. 19, 2007, http://azstarnet.com/news/local/border/o-odham-leader-vows-no-border-fence/article_42e728a3-4314-5efb-a500-8d3c4b6a4b4b.html (stating that "the problem of illegal immigration is a problem of the United States of America. It's not the Tohono O'odham Nation's problem").

[40] *See* Dougherty, *supra* note 34 (reporting that "nothing on the reservation, it seems, is safe from being stole—clothes, food, vehicles, cell phones, electronics and, increasingly, bicycles, which allow immigrants to cross the desert more quickly than hiking would").

[41] *See* Andrea Filzen, *Clash on the Border of the Tohono O'odham Nation, Clash on the Border of the Tohodo O'odham Nation*, Pulitzer Center, Feb. 22, 2013, http://pulitzercenter.org/reporting/clash-border-tohomo-o%E2%80%99odham-nation-migration-Mexico-Arizona-Native-Americans.

[42] *See* Susan Bradford, *Illegal Immigration from the Perspective of Arizona's Tohono O'odham Nation*, Aug. 26 2010, http://susanbradfordpress.wordpress.com/2010/08/26/illegal-immigration-from-the-perspective-of-arizonas-tohono-oodham-nation/. As one Tribe member stated, "the drug runners are destroying our reservation, sacred sites and [vandalizing indigenous pictographs]."

[43] *See* Eckholm, *supra* note 25.

[44] *See id.*

[45] *See id.*

[46] *See id.* (Reporting that the once tranquil reservation now feels like a "militarized zone"). Barriers and surveillance have forced most of the smugglers to enter on foot, making them more vulnerable to detection. *See id.* (Noting the increase in border patrol success, "but the large busts… are also a measure of the continued trade and profits reaped by the cartels").

[47] *See* Dougherty, *supra* note 34. One Tribe leader stated, "Abuse of the people increased. The Border Patrol would hold them at gunpoint and sometimes run them off the road." *See id.*

tions, however, the Tribe acknowledges that they have neither the resources nor expertise to prevent illegal border crossings.[48] Although it has received funding from the Department of Homeland Security, there has not been adequate reimbursement for tribal costs.[49] With as many as 1,500 migrants crossing tribal lands each day, the lives of some tribal members are constantly interrupted.[50] The Tohono O'odham Tribe widely criticizes the inadequate efforts realized by the Border Patrol to restore peace and order.[51]

In addition to the violence and criminal effects of migrants' drug-trafficking, these border crossings also create enormous environmental problems that the Tribe must ultimately resolve.[52] For example, in 2005 more than 1,400 abandoned or wrecked vehicles were towed off the reservation.[53] It is also estimated that each migrant leaves behind more than eight pounds of litter amounting to 13,000 pounds per day.[54] Furthermore, the Tribe has criticized the Border Patrol as being disrespectful of tribal lands, as they too often fail to remedy damages caused by their pursuit of illegal migrants.[55] Not only does the Border Patrol "make their own roads and go wherever they want to go," but they have been known to disturb archeological sites.[56] Worse

---

[48] *See* Eckholm, *supra* note 25. *See also* Bradford, *supra* note 42. As one Tribe member stated, the Tribe has had to invest millions of dollars, money that they do not have, in tribal police to protect against immigrant drug traffickers for which has not been compensated by the federal government. *See id.*

[49] *See* Brady McCombs, *O'odham Leader Vows No Border Fence*, Arizona Daily Star, Aug. 19, 2007, http://azstarnet.com/news/local/border/o-odham-leader-vows-no-border-fence/article_42e728a3-4314-5efb-a500-8d3c4b6a4b4b.html (observing that, in 2007, the Tribe received one million dollars from the Department of Homeland Security and spent three million).

[50] *See* Dougherty, *supra* note 34 (as one tribal member explained, "they come at all hours of the day and night. They pound on your windows asking for food and water").

[51] *See id*. In 2004, the Tohono O'odham police reported that 111,264 immigrants entered the reservation, with 84,010 arrested by either the police or Border patrol (quoting Tribes reactions as "if this was happening in Tucson, or any other metropolis, a state of emergency would be declared").

[52] *See id*. (Stating, for example, that the Tribe has removed more than eighty tons of trash from 128 sites from 2004 until 2007).

[53] *See id.* (Reporting that thousands of cars, usually stolen from nearby cities, are used to transport migrants and drugs across the reservation). *See also* Dougherty, *supra* note 34. (Noting that more than 3,000 bicycles have been found abandoned in the northern and eastern parts of the reservation).

[54] *See* Paul Cicala, *Immigrants Leaving Mounds of Trash on Tohono O'odham Indian Sacred Lands*, TuscanNewsNow.com, Nov. 27, 2002, http://www.tucsonnewsnow.com/Global/story.asp?S=1029934 (noting that this amounts to almost five million pounds of waste per year).

[55] *See* Brady McCombs, *O'odham Leader Vows No Border Fence, O'odham Leader Vows No Border Fence*, Arizona Daily Star, Aug. 19, 2007, http://azstarnet.com/news/local/border/o-odham-leader-vows-no-border-fence/article_42e728a3-4314-5efb-a500-8d3c4b6a4b4b.html.

[56] *See* Dougherty, *supra* note 34 (quoting one Tribe member's view of recent Border Patrol behavior).

still, the Tribe regularly encounters migrant corpses rotting in the desert, as more migrant remains are found on the reservation than any other part of the Arizona-Mexico border.[57] Tribal members say that these health and environmental issues might take decades, if not longer, to repair.[58] As a result of the danger and destruction posed by migrants, the federal government needs to increase its efforts to protect the traditional lifestyle once enjoyed by the Tohono O'odham Nation.[59]

On the other hand, Tribal Chairman Ed Norris urges the Border Control to work with the Tribe to reach solutions, rather than imposing changes made without their consent.[60] Many tribal members view the Department of Homeland Security as inconsiderate of tribal sovereignty and other issues.[61] "We want to be at the table with them. We want to be able to participate in the decisions that are being made that are going to impact us as a people, impact our land, impact anything that's going to happen as a Nation."[62] Overall, however, the Tribe hopes to see increased enforcement efforts at the border to combat the source of the problem, not just clean up the effects.[63]

As Mr. Norris stated, "I hope in my lifetime we can go back to the way it used to be, where people could go and walk in the daylight on our own land."[64] Many tribal members worry that the corruption and influence of the migrants have caused the Tribe to lose touch with its culture and historical

---

[57] *See* Todd Miller, *Shadow Wolves, Border Militarization, and the Tohono O'odham Nation,* NACLA, June 22, 2011, https://nacla.org/blog/2011/6/22/shadow-wolves-border-militarization-and-tohono-oodham-nation.

[58] *See* Dougherty, *supra* note 34. *See also* Bradford, *supra* note 42. As one Tribe member stated, "the real problem is that the federal government is failing to properly secure the border."

[59] *See* Eric Eckholm, *supra* note 26. *See also* Miller, *supra* note 57. To date, the Tribe has supported "on-reservation immigration checkpoints, integrated radar and camera systems, surveillance towers, local police and DHS protection and limited National Guard deployment."

[60] *See* Brady McCombs, O'odham Leader Vows No Border Fence, *O'odham Leader Vows No Border Fence,* Arizona Daily Star, Aug. 19, 2007, http://azstarnet.com/news/local/border/o-odham-leader-vows-no-border-fence/article_42e728a3-4314-5efb-a500-8d3c4b6a4b4b.html.

[61] *See* Andrea Filzen, *Clash on the Border of the Tohono O'odham Nation,* Pulitzer Center, Feb. 22, 2013, http://pulitzercenter.org/reporting/clash-border-tohomo-o%E2%80%99odham-nation-migration-Mexico-Arizona-Native-Americans. As O'odham police officer Brown reports, "A lot of them don't understand sovereignty issues, they don't understand reservations, they don't understand any of it so they come out here thinking that they, you know, pretty much are untouchable… they started to be resented when Border Patrol stops tribal members to see if they are illegal immigrants. We're both brown. We look a lot alike." *See id.*

[62] Brady McCombs, *O'odham Leader Vows No Border Fence,* Arizona Daily Star, Aug. 19, 2007, http://azstarnet.com/news/local/border/o-odham-leader-vows-no-border-fence/article_42e728a3-4314-5efb-a500-8d3c4b6a4b4b.html (quoting Mr. Norris).

[63] *See* Dougherty, *supra* note 34 (quoting one Tribe member as stating "We would prefer that the Border Patrol and National Guard stay at the border and send migrants away before they cross over. We really feel strongly about this").

[64] Eckholm, *supra* note 25.

teachings.[65] As one member stated, "If these things are not done, we will be lost as a people."[66]

II. Analyzing Tohono O'odham Claims against the Federal Government

The federal trust relationship, as described below, was established as the result of three significant Supreme Court cases during the nineteenth century.[67] As a result, the Tohono Tribe may have a claim for statutory relief for property damage, as well as injunctive relief due to the common law trust claims.

1. *Statutory Claims for Property Damage*

Under current jurisprudence, the Tohono Nation could sue the federal government seeking statutory relief in the form of monetary damages for property damage incurred as the result of migrant activities.[68]

A. *Recovery under 18 U.S.C.A. § 1160*

The Tohono O'odham could assert a statutory claim for relief under Pyramid Lake Paiute Tribe of Indians v. Morton ("Pyramid Lake"),[69] in which the Pyramid Lake Paiute Tribe sued the Secretary of the Interior ("Secretary") contending that a regulation issued by the Secretary improperly diverted water away from Pyramid Lake.[70] Pyramid Lake is located on tribal property and has historically been a significant resource for the Tribe.[71] The Tribe argued that the Secretary's action was a breach of its trust responsibility and an abuse of discretion.[72] The court held that the burden of proof for the diversion of water had to be justified by the Secretary which, in this particular

---

[65] *See* Dougherty, *supra* note 34.

[66] *Id.*

[67] *See* Cherokee Nation v. Georgia, 30 U.S. 1 (1831); *see also* Worcester v. Georgia, 31 U.S. 515 (1832); see also United States v. Kagama, 6 S.Ct. 1109 (1886).

[68] *See* supra notes 38-44 and accompanying text (describing property damages to Tohono O'odham Tribe from migrants).

[69] *See* generally Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252 (1972).

[70] *See id.* at 255 (arguing that regulations mandate water be diverted to Truckee-Carson Irrigation District in Nevada).

[71] *See id.* at 256 (reporting that the Tribe lives on the shores of Pyramid Lake and uses the lake for fishing).

[72] *See id.* at 255 (stating that the Secretary "illegally and unnecessarily" diverted water away from Pyramid Lake).

case, failed to do so.[73] In regard to the trust responsibility, the court also stated that the United States "has charged itself with moral obligations of the highest responsibility and trust.[74] Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."[75]

Relying on Pyramid Lake as precedent, the Tohono Tribe could sue the federal government for breach of fiduciary duty and trust responsibility under 18 U.S.C.A. § 1160.[76] This statute proclaims the following:

> Whenever a non-Indian, in the commission of an offense within the Indian country takes, injures or destroys the property of any friendly Indian the judgment of conviction shall include a sentence that the defendant pay to the Indian owner a sum equal to twice the just value of the property so taken, injured, or destroyed.
>
> If such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the Treasury of the United States. If such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the Treasury. But no Indian shall be entitled to any payment out of the Treasury of the United States, for any such property, if he, or any of the nation to which he belongs, have sought private revenge, or have attempted to obtain satisfaction by any force or violence.[77]

Under this statute, the Tohono O'odhams could possibly recover damages to property, such as the cars, homes and other small items that are frequently stolen or damaged from migrant activities.[78] It may also be possible, although less likely, to recover for damages to tribal property from trash, including many stolen cars and migrant corpses that are left abandoned on tribal property.[79] For such a claim to be successful, the Tribe would have to argue that their land has been physically damaged or suffered diminished aesthetic value due to waste left behind by migrants.[80] It should be noted, however, that this

---

[73] *See id*. at 256 (holding that the Secretary failed to justify the action as a "sound exercise of discretion" under the rational basis test).

[74] *Id.* (citing Seminole Nation v. United States, 316 U.S. 286, 297(1942); Navajo Tribe of Indians v. United States, 364 F.2d 320 (1966)).

[75] *Id*. (Concluding that the trust responsibility can provide a basis to sue only if a fiduciary duty is implied).

[76] *See* Blackfeather v. US, 23 S.Ct. 772 (1903) (reporting text of 18 U.S.C.A. § 1160).

[77] *See* 18 U.S.C.A. § 1160 (West 2012) (indicating possible statute Tribe could cover damages under).

[78] *See* supra notes 39-44 and accompanying text (describing property damage to Tohono O'odham property on account of migrants).

[79] *See* supra notes 51-56 (discussing environmental impact to tribal property as a result of migrant activity).

[80] *See* 18 U.S.C.A. § 1160 (West 2012) (denoting language of the applicable statute).

statutory claim cannot be used to force the federal government to increase its border patrol efforts or stop migrants from crossing tribal lands.[81]

Unfortunately, the Tohono O'odhams cannot rely on strong case precedent to support a § 1160 claim for damages. There are only three cases in which an Indian tribe or member has sought to recover damages under § 1160, and two of the suits were brought under an earlier version of the statute.[82] The main distinction is that this earlier version of the statute began by stating "Whenever, in the commission, by a *white person*, of any crime, offence, or misdemeanor within the Indian country..." (Emphasis added).[83]

In United States v. Perryman, an Indian sought to recover damages for the value of twenty-three cattle stolen off of his property by an African-American.[84] The Court held that the defendant in this case could not be sentenced under the former statute, as he was not "a white person."[85] For this reason, a member of the Tohono O'odham nation, as a non-white, could not seek to recover damages under the former version of the statue.[86] The current statute states that Indians may recover damages to property as a result of non-Indian activities.[87] Consequently, Indians can bring claim not just against whites, but against any race or background, including migrants of Hispanic origin.

---

[81] *See* Rodina Cave, *Simplifying the Indian Trust Responsibility*, 32 Ariz. St. L.J. 1399, 1415-16 (2000) (However, monetary damages provide inadequate relief).

[82] *See* 18 U.S.C.A. § 1160 (West 2012) (laying out terms of statute).

[83] *See* United States v. Perryman, 100 U.S. 235 (1879) (reporting the full statute as the following: "Whenever, in the commission, by a white person, of any crime, offence, or misdemeanor within the Indian country, the property of any friendly Indian is taken, injured, or destroyed, and a conviction is had for such crime, offence, or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed"). The accompanying section of the statute prevents Indians from recovery of damages if the individual Indian or tribe has sought revenge for the act. *See also id*. (Reporting related statute limiting recovery).

[84] *See id*. at 236 (describing how both an African-American and a white man stolen cattle from the claimant). The white man's charge was dropped, while the African American was found guilty of the offense and imprisoned. *See id*. (Reporting procedure).

[85] *Id*. at 238 (holding this interpretation is consistent with Congressional intent). "We cannot but think that Congress meant just what the language used conveys to the popular mind... It was, no doubt, thought if the United States made themselves liable only for such depredations as were committed by the whites, these and other Indians would be less likely to tolerate fugitive blacks in their country. Hence, as a means of preventing the escape of slaves, the change in the law was made. Although the reason of the change no longer exists, Congress has seen fit to keep the law as it was" (concluding African-Americans and other non-white cannot be liable under statute).

[86] *See id.* (Holding that claimant cannot recover unless he is within statutory terms).

[87] *See* § 1160 (implicating "Whenever a non-Indian, in the commission of an offense within the Indian country takes, injures or destroys the property of any friendly Indian" language).

The second case that may be relevant to a claim under § 1160 is Blackfeather v. United States,[88] in which an Indian sought to recover damages for destruction and theft of livestock and other personal property that was taken by United States citizens and soldiers during the Civil War era.[89] The Court analyzed the Indian's claim under both the predecessor to § 1160 and a treaty signed with the Shawnee Tribe, of which the claimant was a member.[90] The Court held that the language implicated by the applicable treaties conferred a claim for damages for the Tribe as a whole, not individual members of the Tribe.[91] Therefore, because the Court reached its holding based on treaty language alone, it is still possible for an individual member of a tribe, such as the Tohono O'odham, to bring a statutory claim by relying solely on statutory language.[92] It is important to note, however, that the applicable language here is almost identical to the statute's current version--unlike the language used

[88] *See* generally Blackfeather v. US, 23 S.Ct. 772 (1903).

[89] *See id*. at 733 (reporting that "The petitioner asks to recover and collect from the United States the several amounts of money thereafter set out at length in payment for the destruction, loss, forcible taking, carrying, and driving away of livestock, farm products, household goods, money, and other personal property of divers descriptions and kinds belonging to, owned, and possessed by, and the property of, the said Shawnee Indians, by white and United States citizens and soldiers, in the state of Kansas and the Indian territory, at divers times and places in the year 1861, and all the time up to and including the year 1866... [for] varying in amounts from as high as $7,000 down to $75, and aggregating $530,945.14").

[90] *See id*. (Describing how Shawnee Nation claimed damages under articles 11 and 14 of the treaty of May 10, 1854 (10 Stat. at L. 1053, 1057). Article 11 provides a means of compensation for property damage. *See id*. ("All Shawnees who have sustained damage by the emigration of citizens of the United States, or by other acts of such citizens, shall, within six months after the ratification of this treaty, file their claims for such damages with the Shawnee agent, to be submitted by him to the Shawnee council, for their action and decision, and the amount in each case approved shall be paid by said agent: *Provided*, the whole amount of claims thus approved shall not exceed the said sum stipulated for in this article. *And provided*, that if such amount shall exceed that sum, then a reduction shall be made *pro rata* from each claim until the aggregate is lowered to that amount. If less than that amount be adjudged to be due, the residue, it is agreed, shall be appropriated as the council shall direct"). Article 14 mandates that the tribe acknowledge its dependence on the United States and abide by its laws. *See id*. ("The Shawnees acknowledge their dependence on the government of the United States, and invoke its protection and care. They will abstain from the commission of depredations and comply, as far as they are able, with the laws in such cases made and provided, as they will expect to be protected and to have their rights vindicated").

[91] *See id*. at 378 (concluding that, "We see nothing in the act... appropriating moneys for the payment of 'claims of certain members of the Shawnee Tribe of Indians,' which affects the conclusion we have reached that the [acts] refer to tribes, and not individuals. The act of 1860 appropriates, in terms, money to pay claims of certain members of the tribe. It is apparent that when Congress intends to include individuals as distinct from tribes, it does not speak of them as Shawnee Indians, but as 'certain members' of the Shawnee tribe"). The Court also notes that the legislature is free to make changes to such language. *See id*.

[92] *See id.* (Noting reliance on treaty language in analysis).

in United States v. Perryman.[93] It is therefore still possible for an individual member of the Tohono O'odham Tribe to successfully sue under § 1160 to recover personal property damages from migrants.

One additional feature of § 1160 claims for damages resulted from Coosewoon v. Meridian Oil Co,[94] in which the plaintiff brought a claim against the Secretary and an oil company alleging negligence in the payment of oil and gas royalties on Indian land.[95] At issue in Coosewoon is the following § 1160 provision: "Whenever a non-Indian, in the commission of an offense within the Indian country takes, injures or destroys the property of any friendly Indian *the judgment of conviction shall include a sentence of...*" (Emphasis added).[96] The plaintiff argued that a violation of § 1160 creates an automatic claim of negligence per se.[97] However, the court held that § 1160 is merely a sentencing provision, stating that "[It] [d]oes not proscribe conduct but instead enhances the sentence of one who has engaged in conduct proscribed by other criminal statutes."[98] Although this may seem detrimental to a Tohono O'odham claim, it is simply a procedural formality. Based on this language, it can be inferred that a prior conviction under a distinct statute of the same criminal defendant is not necessarily a prerequisite. On the contrary, by only requiring that defendants engage in outlawed conduct, it is possible to assert a § 1160 claim along with many other charges against migrants in order to recover property damages. Such indictments could include any of the following, among others: larceny, burglary, bribery, drug smuggling, assault, intimidation, criminal mischief, public health violations, disturbing the peace, theft of items of cultural significance, and a wide range of environmental violations.[99]

It is also important to note that Coosewoon v. Meridian Oil Co. fails to incorporate the second part of § 1160, under which an Indian may recover damages from the federal government if the perpetrator cannot be appre-

---

[93] *See* 18 U.S.C.A. § 1160, *supra* note 87. Compare with United States v. Perryman, 100 U.S. 235 (1879) (laying out earlier version of 18 U.S.C.A. § 1160).

[94] *See generally* Coosewoon v. Meridian, 25 F.3d 920 (10 Cir. Ct. App. 1994) (noting third case that cites 18 USCA § 1160). This case analyzes § 1160 as to whether it establishes a claim of negligence per se. The court held that is does not, as the statute is merely a sentencing provision. However, the court does not discuss the merits of whether the plaintiffs have a claim for damages under § 1160 because the plaintiff must first demonstrate a violation of conduct prescribed by other statutes. *See id.* at 926.

[95] *See id.*

[96] *See* 18 U.S.C.A. § 1160 (West 2012) (emphasis added).

[97] *See* Coosewoon v. Meridian, 25 F.3d 920, 925(reporting that Plaintiffs contended the "district court erred in dismissing Count V of their complaint which alleged Meridian committed negligence per se through its alleged violation of 18 U.S.C. § 1160").

[98] *Id*. at 926 (concluding that§ 1160 "provided an improper basis for plaintiff's negligence per se claim").

[99] *See*, *e.g*., 10 U.S.C.A. § 921 (citing federal larceny statute). However, many of these claims are unique to state law. In Arizona, where the Tohono O'odham reside, one can sue for assault, for example, under A.R.S. § 13-1203.

hended.[100] This provision only reinforces the assertion that the holding in Coosewoon v. Meridian Oil Co. must mean that a prior conviction is unnecessary.[101] Otherwise, such a holding would make the second paragraph of § 1160 superfluous, as it is highly unlikely that a defendant would be convicted of property theft or damage without being accused of a § 1160 violation.

For the above reasons, the Tohono O'odham Nation cannot rely on strong case precedent to support a § 1160 claim, as only three cases in the statute's history specifically address claims for relief under this statute. As discussed below, however, the tribe can sue for monetary and equitable relief under other case precedent.

B. *Statutory Relief under the case Mitchell II*

The Tohono O'odham Nation could also sue for monetary relief under § 1160 and the statutory analysis established in Mitchell II. The seminal case for Mitchell II claims is United States v. Navajo Nation, which does not preclude a suit for property damage compensation under § 1160.[102] At issue was whether the United States breached its fiduciary duty, via the Indian Mineral Leasing Act ("IMLA"), to the Navajo Tribe by failing to re-negotiate its coal leases to secure a higher rate of return.[103] In its decision, the Court relied on Mitchell II, which held that a "network of other statutes and regulations did impose judicially enforceable fiduciary duties upon the United States in its management of forested allotted lands."[104] Mitchell II acknowledged this duty by contrasting the "bare trust created by the [General Allotment Act]" to comprehensive timber management statutes.[105] Navajo Nation, on the other hand, held that the fiduciary responsibility by the federal government under IMLA did not allow for private monetary damages, as it only required the Secretary's approval for Tribe's mining leases.[106] The Court further held that

---

[100] *See* 18 U.S.C.A. § 1160 (West 2012).

[101] *See id.* and accompanying text (arguing that § 1160 is merely a sentencing provision).

[102] *See* generally US v. Navajo, 537 U.S. 488 (2003).

[103] *See id*. at 488 (stating that the Tribe alleged the Secretary's approval of coal mining leases between the Tribe and Peabody Coal Company constituted a breach of trust). The Tribe sued the federal government for $600 million in damages. *See id*. at 500.

[104] US v. Mitchell, 463 U.S. 206, 224 (1983) (concluding that the "statutes and regulations now before us clearly give the federal government full responsibility to manage Indian resources and land for the benefit of the Indians").

[105] *Id*. at 226 (holding that because the statutes in Mitchell II establish a fiduciary duty, "they can fairly be interpreted as mandating compensation by the Government for damages sustained. Given the existence of a trust relationship, it follows that the Government should be liable in damages for the breach of its fiduciary duties").

[106] *See* US v. Navajo, 537 U.S. 488, 506 (noting that the IMLA "simply requires Secretarial approval before coal mining leases negotiated between Tribes and third parties become effective...").

the IMLA was more consistent with Mitchell I, which seeks to enhance tribal self-determination.[107] In Navajo Nation, the IMLA gave the tribes, not the federal government, the leading role in negotiating coal leases.[108] Imposing fiduciary duties would thus be contrary to the statute's main purpose.

Here, Navajo Nation does not preclude a § 1160 claim because this statutory provision is more similar to the fiduciary duty imposed on the United States in Mitchell II than the administrative requirements stipulated in Navajo Nation.[109] Although § 1160 does not does not implicate a complicated web of statues and regulations as is indicative of a Mitchell II analysis, it nevertheless imposes a similar affirmative duty by the federal government to compensate for property damage.[110] Moreover, § 1160 is inconsistent with *Mitchell I* and *Navajo Nation* as the purpose of this statute is to compensate for property damage suffered by Indians, not to increase tribal sovereignty.[111] In fact, § 1160 decreases tribal autonomy as it implicitly acknowledges that tribes are not themselves capable of either preventing trespassers from entering their land or absorbing the cost of damages caused by such individuals. A § 1160 claim brought by the Tohono O'odhams must therefore rely on *Mitchell II* as controlling precedent.

United States v. White Mountain Apache solidifies the concept that a potential claim for damages should be brought under a Mitchell II analysis.[112] Here, tribal land was held in trust by the federal government, which had allowed the buildings and property to deteriorate over many years.[113] The Court held that the federal government had a duty to maintain the property and could not let it "fall into ruin on [it's] watch."[114] In its holding, the court

---

[107] *See id.* at 507 (arguing that Mitchell I not only did not authorize, but did not even require government action in managing timber resources).

[108] *See id.* at 508 (noting that the "IMLA aims to enhance tribal self-determination by giving Tribes, not the Government, the lead role in negotiating mining leases with third parties"). *See id.* (Comparing with Mitchell I, where the General Allotment Act was designed so that the tribe, not the government, would manage the land).

[109] *See* US v. Navajo, 537 U.S and accompanying text (observing web of statutes and regulations giving rise to a fiduciary duty on part of federal government). Compare with supra note 109 and accompanying text (noting mere administrative requirements imposed by IMLA).

[110] *See* § 1160 (noting right of compensation for property damages).

[111] *See Id.* (concluding that Mitchell I and Navajo Nation aim to increase tribal autonomy). Section 1160, on the other hand, aims to compensate for damages by non-Indians through federal government payments.

[112] *See* generally United States v. White Mountain Apache, 537 U.S. 465 (2003) (holding that, "the United States' breach of fiduciary duty to maintain and preserve trust property gave rise to substantive claim for money damages under the Indian Tucker Act").

[113] *See id.* at 469 (reporting that, "Although the National Park Service listed the fort as a national historical site in 1976, the recognition was no augury of fortune, for just over 20 years later the World Monuments Watch placed the fort on its 1998 List of 100 Most Endangered Monuments").

[114] *Id.* at 475.

relied on a Mitchell II argument that the act granting trust of the property to the federal government was sufficient to impose a duty to compensate for damages caused to tribal land and property.[115]

Finally, the Tohono O'odhams could sue the federal government for breach of trust under 18 U.S.C.A. § 1165, which allows Indians to recover damages caused by trespassers who unlawfully take "game, fish, and peltries" from tribal land.[116] Although filing such a suit remains an option, it is unlikely given the lack of evidence that such crimes commonly occur on the Tohono O'odham reservation.

2. *The Guardian Ward Relationship: Common Law Trust and Protection Claim*

The Tohono O'odham could seek equitable relief under the common law of trusts. Such a claim is the modern manifestation of the evolution of the historic guardian-ward relationship between the federal government and the Indian tribes.

A. *History of the Guardian-Ward Relationship*

The Guardian-Ward relationship between the federal government and the Native American tribes has undergone significant change since it was established. The foundation of this relationship was first articulated in Cherokee Nation v. Georgia.[117] Here, the Cherokee Nation sought an injunction against Georgia to prevent it from taking Cherokee land and enforcing state law on the Cherokee reservation.[118] The Supreme Court declined to rule on the merits, instead stating that it lacked jurisdiction given that the Cherokee Nation is

---

[115] *See id*. at 475 (concluding that "The 1960 Act goes beyond a bare trust and permits a fair inference that the Government is subject to duties as a trustee and liable in damages for breach"). Furthermore, "as to the property subject to the Government's actual use, then, the United States has not merely exercised daily supervision but has enjoyed daily occupation, and so has obtained control at least as plenary as its authority over the timber in *Mitchell II*." *See id*. at 476.

[116] *See* 18 U.S.C.A. § 1165 ("Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined under this title or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited").

[117] *See generally* Cherokee Nation v. Georgia, 30 U.S. 1 (holding that tribes are subject to Guardian-Ward relationship with federal government).

[118] *See id.* at 3 (reporting that Cherokees sought to prevent Georgia from "executing and enforcing the laws of Georgia or any of these laws, or serving process, or doing anything towards

a type of "dependent nation."[119] Based on the Treaty of Hopewell, the Court held that the Tribe had given up partial autonomy and was a "domestic, dependent nation" dependent upon the federal government as a ward to its guardian.[120]

One year later in 1832, the Supreme Court further defined the scope of tribal autonomy in Worcester v. Georgia,[121] in which it held that a Georgia statute prohibiting non-Indians from entering Indian territory without a license was unconstitutional.[122] As a result of federalist claims, only the federal government, not state governments, can regulate Indian affairs.[123] In reaching this conclusion, however, the Court argued that tribes are a distinct, self-governing body with exclusive authority to promulgate laws within its borders.[124] Moreover, this authority comes from the tribe's natural rights.[125]

Finally, in the United States v. Kagama, the Supreme Court established the plenary power doctrine,[126] expanding the guardian-ward relationship by upholding the Constitutionality of the Major Crimes Act.[127] This case held that even though the Constitution failed to grant Congress plenary power,

---

the execution or enforcement of those laws, within the Cherokee territory, as designated by treaty between the United States and the Cherokee nation").

[119] *See id*. at 11 (declaring that "original jurisdiction of controversies between a state and a foreign state, without any restriction as to the nature of the controversy; that, by the constitution, treaties are the supreme law of the land. That as a foreign state, the complainants claim the exercise of the powers of the court of protect them in their rights, and that the laws of Georgia, which interfere with their rights and property, shall be declared void, and their execution be perpetually enjoined").

[120] *See id*. at 2 (describing domestic, dependent nations as "unquestionable, and heretofore an unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government… Their relations to the United States resemble that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the President as their great father").

[121] *See* generally Worcester v. Georgia, 31 U.S. 515 (1832)(holding Indians have exclusive discretion to govern within their territories).

[122] *See id*. at 558 (holding that "So long as treaties and laws remain in full force, and apply to Indian nations, exercising the right of self-government, within the limits of a state, the judicial power can exercise no discretion in refusing to give effect to those laws, when questions arise under them, unless they shall be deemed unconstitutional").

[123] *See id.* (Concluding that, due to the American victory over Great Britain, power to regulate Indian affairs passed to the federal government, not states).

[124] *See id*. at 519 (arguing that "nation" means a "people distinct from others").

[125] *See id*. (Concluding that "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial").

[126] *See* generally United States v. Kagama, 6 S.Ct. 1109 (1886).

[127] *See id*. at 379 (stating that the power to establish laws over Indians derives from "the ownership of the country in which the territories are, and the right of exclusive sovereignty which must exist in the national government, and can be found nowhere else").

this power also has never been denied as belonging to Congress.[128] This authority was implicit by the fact that the tribes were considered domestic, dependent nations.[129]

B. *The Modern Trust Doctrine: Specific Performance Relief under Common Law*

In addition to seeking statutory relief for property damages, the Tohono O'odhams can pursue equitable relief under a common law breach of trust claim. These trust claims are derived from the Guardian-Ward relationship.[130] Base on this relationship, as previously discussed, tribes were regarded as dependent nations with the ability to self-govern.[131] The basis for this relationship still remains unclear, as courts, intellectuals and the government have defined this association to be based on both trust and fiduciary duties.[132]

In any case, this relationship created an obligation of trust on the part of the federal government, which has resulted in several breach of common law trust suits in federal district courts.[133] In general, when a beneficiary of a trust

---

[128] *See id.* at 378 (reporting that the Constitution is "almost silent" concerning government relations with the Indians).

[129] *See id.* at 384 (arguing that this power is "necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else; because the theater of its exercise is within the geographical limits of the United States; because it has never been denied; and because it alone can enforce its laws on all the tribes").

[130] *See* Rodina Cave, *Simplifying the Indian Trust Responsibility*, 32 Ariz. St. L.J. 1399, 1400 (2000) (describing the guardian-ward relationship as a "justification for dispossessing tribes of their lands"). As a contemporary alternative, Indians should invoke the common law of trust to request relief from breaches of trust. *See id.*

[131] *See* Cherokee Nation v. Georgia, 30 U.S. 11 (describing tribes' relationship with federal government). *See* also Worcester v. Georgia, 31 U.S. 519 (describing tribes as a separate people).

[132] *See* Cave, *supra* note 130, at 1406-07 (citing, for example, the General Allotment Act as establishing a relationship based on trust, while fiduciary responsibility is more of a modern concept). *See also* Nell Jessup Newton, *Enforcing the Federal Indian Trust Relationship After* Mitchell, 31 Cath. U.L. Rev. 635, 637 (1982) ("The exact source of this special relationship remains uncertain. Ownership of Indian land, the helplessness of Indian tribes in the face of a superior culture, higher law, the entire course of dealings between the government and Indian tribes, treaties, and hundreds of cases and... a bulging volume of the U.S. Code have all been cited as the source").

[133] *See* Cave, *supra* note 130, at 1410 (stating that this type of litigation is advantageous because federal judges have more familiarity with breach of trust claims than Indian law claims). *See also* Richard Ansson, *The North American Agreement on Environmental Cooperation and Native American Tribes: How Can Tribal Interests Best Be Protected?*, 66 UMKC L. Rev. 837, 857 (1998)(noting that, prior to *Mitchell*, common law breach of trust cases were common). Although Mitchell encouraged suits to be brought under breach of fiduciary duty, some recent court decisions indicate that breach of trust causes of actions are still available. *See id.* (Concluding private

has a complaint against the trustee, such an action can be brought under the common law of trusts.[134] The common law of trusts provides the beneficiary with a right to relief.[135] Equitable relief is the most common form of remedy for breaches of trust.[136] Despite the discovery of widespread mismanagement of tribal fund, however, this form of equitable relief is not usually sought by Indians.[137]

Cobell v. Babbit further supports the possibility of equitable relief based upon a trust relationship.[138] The plaintiffs in this case were beneficiaries of a trust managed by the federal government, claimed breach of trust under the Indian Trust Fund Management Reform Act ("ITFMRA").[139] The court held that the government had violated its trust obligations and ordered equitable relief to the plaintiffs in the form of compliance with accounting and reporting requirements under the ITFMRA.[140] The court also paved the way for future equitable relief by waiving sovereign immunity for such claims.[141]

In Manchester Band of Pomo Indians, Inc. v. United States ("Manchester Band"), the plaintiffs also sued the federal government for equitable relief,

---

breach of trust claims may be invoked in the future). However, courts "have not yet resolved what standard will be applied to governmental conduct when the claim is based on the general trust relationship." *See id.*

[134] *See* Cave, *supra* note 130, at 1399 (noting that "centuries of common law trust doctrine have shaped the federal common law of trusts").

[135] *See* Richard Ansson, *The North American Agreement on Environmental Cooperation and Native American Tribes,* 66 UMKC L. Rev. 837, 858 (1998)(arguing that the trustee has a "duty to protect the trust property against damage or destruction. He is obligated to the beneficiary to do all acts necessary for the preservation of the trust res which would be performed by a reasonably prudent man employing his own like property for purposes similar to those of the trust") (citing Fort Mojave Indian Tribe v. United States, 23 Cl. Ct. 417, 426 (1991)). *See* Cave, *supra* note 130, at 1399 (stating that the word "trust" also "raises images of being able to rely on the integrity of someone or to have confidence in that person or in some event").

[136] *See* Cave, *supra* note 130, at 1400.

[137] *See id.* (Describing how the mismanagement of tribal resources is notorious and has been subject to public scrutiny).

[138] *See generally* Cobell v. Babbitt, 91 F. Supp.2d 1, 7 (D.D.C. 1999) (holding federal government liable for equitable relief under breach of trust claim).

[139] *See* Cobell v. Babbitt, 91 F. Supp.2d 1, 7 (D.D.C. 1999) (reporting that "The United States... cannot say how much money is or should be in the trust. As the trustee admitted on the eve of trial, it cannot render an accurate accounting to the beneficiaries, contrary to a specific statutory mandate and the century-old obligation to do so").

[140] *See id.* at 58 (holding that the ITFMRA required the United States to "provide plaintiffs an accurate accounting of all money... retrieve and retain all information concerning the trust... and establish written policies and procedures necessary").

[141] *Id.* at 24 (implicitly allowing future equitable relief claims to be brought). The court stated that, "An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States." *See id.*

alleging/government mismanagement of funds held in trust for dairy farms owned by the Tribe.[142] Specifically, the Tribe argued that the government failed to invest tribal funds and make interest payments.[143] The court analyzed the Tribe's claim under the common law of trusts, stating that the "conduct of the Government as a trustee is measured by the same standards applicable to private trustees," and, as a result, the Government must administer the trust "solely in the interest of the beneficiary."[144] The court applied the common law of trusts and granted the plaintiffs equitable relief in the form of investment of trust assets at prevailing rates.[145]

Cobell v. Babbit and Manchester Band both establish an avenue for equitable relief based on both tribes' status as a beneficiary of a trust managed by the federal government. Although a small portion of Tohono O'odham land is privately held as a result of the General Allotment Act, most of the land continues to be held in trust by the Federal Government.[146] The Tribe could therefore pursue equitable relief in the form of an injunction against migrant crossings for the majority of land held in trust by the government. Relying on *Cobell v. Babbit* as precedent, the tribe could similarly assert a breach of trust claim under the ITFMRA.[147] The most relevant provision of the ITFMRA states that the trustee has an explicit responsibility to "Appropriately manag[e] the natural resources located within the boundaries of Indian reservations and trust lands."[148] The Tribe could therefore make an argument that their natural resources, which include abiotic resources, are being compromised by migrants exploiting these resources on tribal reservations.[149]

---

[142] *See* Manchester Band of Pomo Indians, Inc. v. U.S., 363 F. Supp. 1238, 1242 (stating that the Manchester Band of Pomo Indians owned a dairy enterprise and revenues generated were placed in an account managed by the BIA).

[143] *See id.* (Reporting that "during the entire time the dairy enterprise was operative, a period of some eighteen years, only two payments of interest were made to the Band, totaling slightly more than $26... Some, but not all, of the interest generated from the Treasury deposits were deposited in commercial banks at prevailing rates of interest").

[144] *Id.* at 1245 (concluding that, "While it is true that under the terms of the trust, the trustee may be permitted to lend himself money held by him in trust, the trustee violated his duty to the beneficiary if he acts faith, no matter how broad the provisions of the trust may be").

[145] *See id.* (Holding that, "in the course of prudent management of the affairs of the Indians... the government is under a duty to pay to the plaintiffs the interest thereby lost by them").

[146] *See* Indian Land Tenure Foundation, Allotment Information for Western BIA Region, 2012, http://www.iltf.org/sites/all/themes/iltf/maps/western.pdf. Currently, only 41,003 acres or approximately 64 square miles of Tohono O'odham reservation have been allotted and therefore held privately. This is only about 1.4% of the reservation, as the total reservation comprises 4,453 square miles.

[147] *See* Cobell v. Babbitt, 91 F. Supp.2d, *supra* note 139 and accompanying text (discussing ITFMRA claim and equitable relief).

[148] 25 USCA § 162a (West 1994).

[149] *See Abiotic Resource*, Biology Online, http://www.biology-online.org/dictionary/Abiotic_resource (stating that abiotic resources include water, land, air and ores).

The Tohono O'odhams could also assert a claim under Manchester Band for a violation of the private law of trusts. According to this holding, the Government is obligated to act in the tribe's best interest and to administer the trust in the best interest of the beneficiary.[150] In addition to the case Manchester Band, one article articulates a novel manifestation of this concept, to which the Tohono O'odhams could adequately analogize in support of their relief. This article asserts that, under the federal trust doctrine, the federal government is obligated to assists Indians "in the protection of their property and their rights."[151] The article discusses the North American Agreement on Environmental Cooperation ("Agreement") and how tribal interests can best be protected through this treaty.[152] The author argues that the tribes have a clear interest in the Agreement, due to environmental problems involving water, waste and air pollution associated with lax Mexican environmental laws as well as spillage and illegal dumping of hazardous wastes by Mexico entities.[153] As a result, the federal government should be responsible for protecting reservation land by advocating tribal claims under the Agreement whenever a tribe's land or resources are threatened under its obligations as trustee.[154]

Since the Tohono O'odham Tribe faces a threat to its property and way of life due to Mexican policies,[155] the federal government as trustee must legally protect tribal property interests.[156] Here, the Tohono O'odhams could seek equitable relief in the form of an injunction prohibiting specific migrants

---

[150] *See* Manchester Band of Pomo Indians, Inc. v. U.S., 363 F. Supp. 1238, 1242 nd accompanying text (describing obligations of federal government as trustee of tribal trusts).

[151] Richard Ansson, *The North American Agreement on Environmental Cooperation and Native American Tribes: How Can Tribal Interests best Be Protected?*, 66 UMKC L. Rev. 837, 839 (1998) (arguing that, "in the context of NAFTA, these duties these duties required the United states government to either bring a tribe's claim or to actively support a claim brought by a tribe within the structures created by the [Agreement]").

[152] *See id*. at 861 (discussing that the Agreement was established between the governments of Canada, the United States and Mexico to "enhance compliance with existing environmental laws and to strengthen future environmental protection efforts").

[153] *See id*. at 845-46 (finding that "Tribes residing along the United States-Mexico border have already experienced problems associated with lax enforcement of Mexican environmental laws... Since the passage of NAFTA, tribal entities have experienced problems associated with the spillage or illegal dumping of hazardous wastes on their land. A 1996 report by the United States General Accounting Office noted that more than 1250 trucks cross daily from Mexico into the United States carrying cargo which exhibited 'significant safety concerns'").

[154] *See id*. (Concluding that, "in order to fulfill the goals of the [Agreement] and his duties as tribal trustee, the United States representative must advocate for a tribe or support a tribe's claim when its land or resources are being environmentally threatened by another party's failure to enforce its environmental laws").

[155] *See* supra notes 29-60 and accompanying text (describing destruction to Tohono O'odham tribe).

[156] *See* Richard Ansson, *The North American Agreement on Environmental Cooperation and Native American Tribes: How Can Tribal Interests best Be Protected?*, 66 UMKC L. Rev. 837, 861 (1998).

from crossing through tribal land and destroying tribal property. The federal government would be ultimately responsible for complying with such relief under its trust responsibility.

A breach of trust claim is essential to the Tohono O'odham's quest to restore peace to its reservation. Suing for breach of fiduciary duty under § 1160, as described above, will only allow the tribe to recover monetary damages for tangible objects.[157] However, if the Tribe sues for equitable relief in the form of an injunction, it could stop the root of its problems at the source. Such a suit may not be adequately enforced, as the federal government has been clearly unsuccessful in securing the United States-Mexican border for many years.[158] By pursuing equitable relief, however, the Tohono O'odhams would not only send a message to the federal government that border patrol efforts need to be improved, but also more adequately preserve the culture and integrity of the Tribe.[159]

III. Conclusion

Immigration is a significant problem for Americans living in the Southwest, but it is a matter of financial security and cultural integrity for the Tohono O'odham Tribe. Illegal migrants from Mexico have exploited the Tohono O'odham reservation due to its relatively weak border protection, which is the result of a federal government greater efforts to secure the nation's borders on either sides of the tribal reservation, creating a funnel effect.[160] As a result of the increase in migrant crossings on reservation land, the tribe now faces violence, drug-trafficking, and environmental destruction.[161] The Tohono O'odham are no longer able to enjoy their relatively serene and traditional lifestyles.[162]

---

[157] *See* 18 U.S.C.A. § 1160 (reporting that, where Indian property is taken by a non-Indian, the Indian is entitled to "a sum equal to twice the just value of the property so taken, injured, or destroyed").

[158] *See, e.g.*, Julia Preston, *Huge Amounts Spent on Immigration, Study Finds*, The New York Times, Jan. 7, 2013, http://www.nytimes.com/2013/01/08/us/huge-amounts-spent-on-immigration-study-finds.html?_r=0 (reporting on the severity of immigration issues facing the government).

[159] *See* Cave, *supra* note 130, at 1415-16 (arguing that monetary damages provide inadequate relief). In sum, "tribes have much more at stake than loss of funds. Money is not an adequate substitute... tribes rely on their land base to maintain their cultures and societies. Religious practices in Native religions often require ceremonies to take place in certain areas for the survival of the people and continuation of the world. This is important to the goal of maintaining distinct political society."

[160] *See* Hugh Holub, *Tohono O'odham reservation Deadly Place for Migrants*, Tuscan Citizen.com, Sept. 2, 2010, http://tucsoncitizen.com/view-from-baja-arizona/2010/09/01/tohono-oodham-deadly-place-for-migrants/.

[161] *See supra* notes 30-60 and accompanying text.

[162] *See* John Dougherty, *One Nation, Under Fire*, High Country News, Feb. 19 2007, http://

As a result of both the tangible and intangible destruction faced by the Tribe on account of undocumented migrants passing through tribal land, and the failure of Border Control to curb such abuse, the Tribe's interests would be best served by suing the federal government. Under § 1160, the Tribe could claim monetary relief to compensate for tangible damage caused by migrants; under the common law of trusts, the Tribe could sue the federal government for equitable relief to encourage the government to take action in preventing the influx of migrants. In either case, it is vital that the Tribe obtain some form of relief to counter the destruction it continues to face.

www.hcn.org/issues/340/16834. *See* John Dougherty, *One Nation, Under Fire*, High Country News, Feb. 19, 2007, http://www.hcn.org/issues/340/16834.

Recibido: 24 de abril de 2013.
Aceptado para su publicación: 19 de agosto de 2013.

NOTES

Mexican Law Review
New Series
VOLUME VI
Number 2

MEXICAN-AMERICAN STUDIES IN TUCSON, ARIZONA AND THE *ACOSTA V. HUPPENTHAL* DECISION

Molly Schiffer*
Stephen A. Nuño**

Abstract. *This note examines the political context surrounding the banning of the Mexican American Studies program in Tucson, Arizona and the Acosta v. Huppenthal decision, which leaves the ban largely intact. The convergence of economic crisis and partisan politics contributed to the rise in anxiety over the demographic shifts of the state of Arizona, for which Mexican American Studies became a symbolic target for Republicans. Mexican American Studies was declared in violation of a new law passed by the Republican dominated legislature, A.R.S. § 15-112, by Arizona Superintendent John Huppenthal, despite the conclusion by an independent audit he ordered which concluded otherwise. This left leaders within the Mexican American community and civil rights organizations with the conclusion that the ban on Mexican American Studies was politically motivated. This note explores the motivations by individual political actors, such as the current Attorney General of Arizona Tom Horne, and how he rose to power on a platform centered on the ban against Mexican American Studies.*

Key Words: *Mexican American Studies, ethnic politics, Republican Party, partisanship, Tucson, Arizona.*

Resumen. *Esta nota examina el contexto político alrededor del programa de Estudios México-Americanos en Tucson, Arizona y la decisión Acosta v. Huppenthal. La convergencia de la crisis económica y las políticas partidistas contribuyeron al aumento de la ansiedad sobre los cambios demográficos del estado de Arizona, por lo cual el Programa de Estudios México-Americanos se convirtió en un objetivo simbólico de los republicanos. El Programa de Estudios México-Americanos fue declarado violatorio de una nueva ley aprobada por una legislatura dominada por los republicanos, A.R.S. § 15-112, por el superintendente de Arizona John Huppenthal, a pesar de la conclusión de una auditoría independiente que él ordenó y quien concluyó lo contrario. Lo anterior llevó a los*

* M.A. Political Science, Northern Arizona University. J.D. Candidate, James E. Rogers School of Law, University of Arizona.

** Ph.D. Political Science, University of California, Irvine. Assistant Professor Department of Politics and International Relations Northern Arizona University.

líderes de la comunidad México-americana y organizaciones de derechos civiles a concluir que la prohibición del programa de Estudios México Americanos fue por motivos políticos. Esta nota explora las motivaciones de los actores políticos, como el actual fiscal general de Arizona, Tom Horne, y la forma en que llegó al poder en una plataforma centrada en la prohibición de estudios mexicanos.

Palabras clave: *Estudios México-Americanos, políticas étnicas, Partido Republicano, Tucson, Arizona*.

Table of contents

I. Introduction

The *Acosta v. Huppenthal*[1] decision illustrates the confluence of socio-economic forces and partisan politics in shaping public policy, providing historical context to the banning of the Mexican-American Studies program in Tucson, Arizona. Rooted in political opportunism and a historical proclivity to cultural domination by the majority population in Arizona, A.R.S. § 15-112[2] is part of a long string of political attempts to leverage cultural anxiety for political gain. As a state covered under Section 5 of the Voting Rights Act,[3] designed in large part to address injustices committed against African-Americans in the South, the historical evidence of Arizona's civil rights record is well established and will not be discussed here. It is important, however, that readers are made aware of this historical fact to help them understand the cultural setting that led to the ban on Mexican American Studies in Arizona, as well as why A.R.S. § 15-112 arose when it did. The focus of this paper will center on the contemporary political climate and how that contributed to A.R.S. § 15-112. We then discuss the *Acosta v. Huppenthal* decision, followed by a discussion of the decision's legal implications and its impact on the Mexican-American community.

[1] *See* Acosta v. Huppenthal, CV 10-623-TUC-AWT, 2013 WL 871892, (D. Ariz. Mar. 8, 2013), *judgment entered*, CV 10-623-TUC-AWT, 2013 WL 871948 (D. Ariz. Mar. 8, 2013).

[2] Ariz. Rev. Stat. Ann. § 15-112 (2011).

[3] 42 U.S.C.A. § 1973c (West 2006).

II. Context

1. *Economic Crisis and Partisan Opportunism*

The housing market crash and ensuing recession after 2008 significantly damaged the Arizona economy. Largely built on tourism, agriculture, mining, and housing development, Arizona has been a historical magnet for young low-skilled labor. Over sixty percent of Arizonans were not born in Arizona, making it the second lowest rate of native-born residents.[4] The demographic implication of this cannot be understated. The result is a state that has one of the highest cultural generation gaps in the country, where almost half the school population is minority and almost seventy-five percent of the older voting population is white.[5]

Most important, however, is how the state's demographic makeup, combined with its economic crisis, provoked strife among racial and ethnic minorities as a result of partisan politics —and how it spurred growth in the Republican Party. As Governor Jan Brewer's approval ratings sunk, and local politicians sought re-election, Arizona's voting population became anxious not only because of economic loss but also perceived threats to their cultural identity. The push for SB1070, the anti-immigrant law that requires state police to determine the immigration status of anyone arrested or detained based on "reasonable suspicion" that they are not in the country legally, became a popular rallying cry for politicians and Tea Party activists across the state. SB1070 was part of an assault on the Mexican-American community along with other bills designed to decimate programs and services that benefitted the Latino population.

Governor Brewer's rise to power came on the heels of an important Democratic victory by President Obama. As a result of Democratic Governor Janet Napolitano's appointment to head the Department of Homeland Security, Secretary of State Jan Brewer became next in line to replace her. Governor Napolitano's departure was a major loss for Latinos. While she was willing to make concessions to Republican calls to address unauthorized immigration, such as sending the National Guard to assist at the border, she also acted to curb harsher Republican initiatives. In 2008, for example she vetoed a bill, SB 2807, that would have allowed police to share, compile, and track information with other agencies regarding unauthorized immigrants. This bill resembled the now infamous SB1070 that Governor Brewer signed enthusiastically.

With the departure of Governor Napolitano, and worsened recession, the GOP was ripe for making important gains in the legislature and statewide

[4] U.S. Census Bureau, *Lifetime Mobility in the United States: 2010*, AM. CMTY. SURVEY BRIEFS (Nov. 2011), http://www.census.gov/prod/2011pubs/acsbr10-07.pdf.

[5] CNN Election Center, http://www.cnn.com/election/2012/results/state/AZ/president.

office. Prior to 2010, the Democratic deficit in the State Senate was six State Senators and ten State Legislators; after the 2010 election, the Republican Party gained three Senate seats and five in the State Legislature.

2. *Partisan Politics, Political Entrepreneurship and the Impact on Mexican-American Studies*

The rise against Mexican-American Studies in Tucson, Arizona cannot be solely explained by economic strife; likewise, we cannot simply say that it transpired as a result of white resentment or anxiety about the growth in the Latino population. Rather, it was the confluence of these events with a political party willing to exploit each of these issues to their advantage. And individual actors motivated to use these issues in order to rise to power within the party seeking political office. This political entrepreneurship interested in mobilizing institutional responses to the cultural anxiety, from the media, political organizations, such as the Tea Party, and the state party came overwhelmingly from the Republican Party in triggering the legislative response between 2009 and 2011. Ramakrishnan and Gulasekaram find that the greatest predictive value in explaining the rise in anti-immigrant legislation lies not on demographic shifts or even economic crisis, but on the strength of the Republican Party and those within the party willing to capitalize on harsh economic times.[6]

In Tucson, where the public school district is over sixty percent Latino,[7] the Mexican-American community has been subject to asymmetrical power structures dominated by Anglos, resulting in a disproportionate impact on issues ranging from justice[8] to housing.[9] As a result, segregation has long been a fixture of the political landscape in Tucson, where a desegregation plan has been in effect since 1978. However, federal oversight was terminated at the end of 2009, exposing Mexican American Studies to political attack. Mexican American Studies was originally designed to comply with the directives set forth in No Child Left Behind in order to close the Latino "achievement gap" in the schools to improve the graduation rate of Latinos, and increase their low matriculation rates at college.[10]

---

[6] Karthick Ramakrishna & Pratheepan Gulasekaram, *The Importance of the Political in Immigration Federalism*, 44 (1431) Arizona State Law Journal (2013); Santa Clara Univ. Legal Studies Research Paper No. 4-13. Available at SSRN: http://ssrn.com/abstract=2209311/.

[7] Tucson Unified Sch. Dist., http://tusdstats.tusd.k12.az.us/planning/demo_main.asp.

[8] Adalberto Aguirre Jr. & David Baker, *The Execution of Mexican American Prisoners in the Southwest,* 16(4) Social Justice (1989).

[9] James E. Officer, *Barriers to Mexican Integration in Tucson*, 17 (1-2) Kiva 7-16 (Nov.-Dec. 1951).

[10] Agustine F. Romero, *The Hypocrisy of Racism: Arizona's Movement towards State-Sanctioned Apartheid*, 6 (1) Journal of Educational Controversy (Fall 2011-Winter2012), available at http://www.wce.wwu.edu/Resources/CEP/eJournal/v006n001/a013.shtml.

Tom Horne, a Canadian immigrant who was the Superintendent of TUSD, ran for state Attorney General in 2010 on a platform that supported measures to crack down on immigrants and oppose the Patient Protection and Affordable Care Act[11] ("Obamacare"). The Mexican American Studies program provided a useful tool to appeal to the growing concern over immigration and the influence Mexican migration has had on the shifting demographics of the state. Horne's attack on Mexican-American Studies helped him win the seat as Attorney General.

Similarly, John Huppenthal ran to replace Tom Horne on the promise to continue the fight to "stop La Raza" by ending Mexican-American Studies program, as well as bilingual education.[12] By the end of 2010, SB1070 became the model legislation for anti-immigrant politicians across the country, and Mexican-American Studies was declared illegal because it violated state law for "promoting the overthrow of the U.S. government and resentment toward a race or class of people."[13] Despite an independent audit ordered by John Huppenthal which found that "no observable evidence was present to suggest that any classroom within Tucson Unified School District is in direct violation of the law", MAS was declared in violation of the law by Huppenthal.[14] The decision to ban Mexican-American Studies was an immediate source for legal and political recourse for the Latino community, resulting in the Acosta v. Huppenthal lawsuit. In response to the ban on Mexican American Studies, the Arizona American Civil Liberties Union Executive Director, Alessandra Soler Metze said, "Huppenthal is ignoring evidence showing how the program has made great strides in improving student achievement and in building students' confidence, and in doing so is making a mockery of his oath of office. This kind of censorship is even more offensive because it lets politics and bias dictate what should be discussed in the classroom."[15]

III. The *Acosta v. Huppenthal* Decision

In Acosta v. Huppenthal, the United States Circuit Judge Tashima issued a memorandum that overwhelmingly upheld A.R.S. § 15-112, the law prohibit-

[11] *See* 42 USCA § 18001 (2010).

[12] Gregory Rodriguez, *Why Arizona Banned Ethnic Studies: Put Bluntly, the State Acted to Protect the Reputation of the White Majority*, L.A. TIMES, Feb. 20, 2012, http://articles.latimes.com/2012/feb/20/opinion/la-oe-rodriguez-ethnic-studies-20120220.

[13] *See* Acosta v. Huppenthal, CV 10-623-TUC-AWT, 2013 WL 871892, 1 (D. Ariz. Mar. 8, 2013), *judgment entered*, CV 10-623-TUC-AWT, 2013 WL 871948, (D. Ariz. Mar. 8, 2013).

[14] Cambium Learning. National Academic Educational Partnership, Curriculum Audit of the Mexican American Studies Department: Tucson Unified School District (May 2, 2011).

[15] ACLU-AZ Press Release. ACLU Demands Audit Records, Says Efforts to Shut Down TUSD Mexican American Studies Program Amount to Censorship 8 (June 16, 2011).

ing certain race-related curricula in school districts and charter schools.[16] The court was explicitly deferential to Arizona, as federal courts must be when examining a state law regulating public school education.[17] In December 2010, then-Superintendent Tom Horne issued a finding that the Mexican American Studies program was in violation of § 15-112(A), which was later supplemented with a second finding from Superintendent Huppenthal, who found that MAS promoted resentment towards white people, advocated for Latino solidarity, and was primarily designed for Latino pupils. A.R.S. § 15-112(A) prohibits courses that: (1) promote the overthrow of the U.S. government; (2) promote resentment towards a particular race or people; (3) are designed primarily for students of a specific ethnic group; or (4) advocate ethnic solidarity rather than treatment of students as individuals.[18] While TUSD administratively appealed the Huppenthal finding, plaintiffs including teachers of the Mexican American Studies program at Tucson Unified School District, the Director of the MAS program, and two students who intend to take MAS classes in the future brought the original action, but because the teachers and director lacked standing, they were dismissed as plaintiffs.[19] A former MAS student and his mother were later added as plaintiffs, and the court assumed the current plaintiffs had standing without deciding the issue.[20] In December 2011, an Administrative law Judge (ALJ) concluded that the MAS program violated § 15-112(A).[21]

In order to determine whether § 15-112 is unconstitutional under the student's right to receive information, the court looked to whether sections of the statute are facially overbroad or vague.[22] A statute is overbroad if "a substantial number of its applications are unconstitutional" balanced with the legitimate applications of the statute.[23] Although the court held that § 15-112 is facially overbroad, § 15-112 (A)(1)-(2) was not found to be facially overbroad, because it would not produce a substantial number of unconstitutional applications.[24] Because the court found that a narrow reading was readily susceptible, it could not read it in a broad enough way to encompass all teaching of histories of oppression or political theories.[25]

Unlike the court's holding concerning § 15-112(A)(1)-(2), it held § 15-112(A)(3) to be unconstitutionally overbroad.[26] § 15-112(A)(3) states: "Are de-

---

[16] *Id.*

[17] *Id.*

[18] Acosta, 2013 WL at 1.

[19] *Id.*

[20] *Id.* at 11.

[21] *Id.* at 1.

[22] Acosta, 2013 WL at 7.

[23] *Id.*

[24] *Id.* at 9.

[25] *Id.*

[26] *Id.*

signed for pupils of a particular ethnic group."[27] The court found that there is no legitimate purpose being served in this section that is not already served by § 15-112(A)(2); anything that is not already covered is too attenuated from the legitimate purpose of reducing racism in schools in Arizona.[28] The court wrote, "It thus appears that (A)(3) forbids courses designed for a particular ethnic group, even if those courses do not promote resentment of another group, and even if they do not advocate ethnic solidarity, instead of individual treatment."[29] While the section is technically not a ban, it is overbroad for it could create a deterrent effect, effectively chilling the offering and teaching of all ethnic studies courses.[30] There was no evidence to support either an inference that the law could not be enforced without the section or that the law would not have passed but for this subsection, so the court severed the section from the statute as a whole.[31]

The court then found that § 15-112(A)(4) was facially valid because it reflected the stated purpose of the statute as a whole.[32] While "ethnic solidarity" language within this section seems problematic because ethnic solidarity does not itself create racism or divisiveness, it is sufficiently narrowed by the words "advocate" and then "instead of the treatment of pupils as individuals."[33] Those phrases narrow the scope of the section, according to the court, because advocate is a strong verb.[34]

After finding only one of four sections unconstitutionally overbroad, the court found that § 15-112 is not unconstitutionally vague.[35] For vagueness, the court used the *Williams* standard, which is a two-prong test.[36] A statute is vague if it does not give someone of reasonable intelligence fair notice of what is prohibited.[37] Because the statute implicates the First Amendment, it is void if it creates a real and substantial deterrent effect on legitimate expression.[38] There were three phrases which were in controversy here: 1) "to promote"; 2) "advocate ethnic solidarity"; and 3) "designed primarily for."[39] As in the overbroad analysis, the court read the phrases in context of the sentences

---

[27] *Id.* at 10; Ariz. Rev. Stat. § 15-112 (A)(3) .

[28] Acosta, 2013 WL at 10.

[29] *Id*.

[30] *Id*.

[31] *Id*.

[32] *Id.* at 11.

[33] *Id.*

[34] *Id*.

[35] *Id*. at 13.

[36] *Id*. at 10.

[37] Acosta, 2013 WL at 11, *citing* United States v. Kilbride, 584 F.3d 1240, 1257 (9th Cir. 2009).

[38] Acosta, 2013 WL at 11, *citing* Cal. Teachers Ass'n v. State Bd. Of Educ., 271 F.3d 1141, 1151 (9th Cir. 2001).

[39] Acosta, 2013 WL at 11.

from which they came.[40] In context, while considering the explicit purpose of the statute, the court determined that the phrases were not unconstitutionally vague because they provided fair notice to the parties of what is prohibited.[41]

After deciding on First Amendment issues, the court granted summary judgment *sua sponte* for defendant on the equal protection issue.[42] While not explicitly moving for summary judgment, the plaintiffs argued that the statute violates the equal protection clause because it is discriminatory on its face and was created with discriminatory intent.[43] In terms of the facial challenge, the plaintiffs used *Hunter v. Erickson* (1969) to argue that a statute need not openly target specific ethnic groups to be facially discriminatory.[44] According to plaintiffs, while the statute did not explicitly target Latino populations, it prohibits classes designed for Latino students.[45] The court decided, though, that Hunter did not apply because that statute obstructed minorities from remedying past discrimination and this did not.[46]

The second part of the equal protection claim involved discriminatory intent, which asks whether the law was motivated by a discriminatory purpose.[47] The court used the non-exhaustive list of factors from *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) to frame the holding,[48] which are: 1) whether the history reveals official actions taken for malicious purposes; 2) whether the events leading up to the decision reveals discriminatory intent; 3) whether there were departures from normal procedural sequence; 4) whether factors normally used by lawmakers would strongly favor a conclusion that contradicts the statute; 5) legislative history.[49] Even though many factors may have shown discriminatory intent, the court held that the record as a whole did not offer sufficient proof.[50] Although it acknowledged that some facts may show discriminatory intent, such as when then-Superintendent Horne attempted to eliminate the MAS program in 2007(before the law was passed) and supported the bill specifically because he wanted to eliminate the MAS program,[51] the bill itself was enacted in response to the MAS

---

[40] *Id*. at 12

[41] *Id*.

[42] *Id*. at 13.

[43] *Id*.

[44] *Id*. *citing* Hunter v. Erickson, 393 U.S. 385 (1969) (holding that even without express classifications, a statute can be held to violate the Equal Protections Clause if it creates obstructions to rectify patterns of discrimination).

[45] *Id*.

[46] *Id.*

[47] Acosta, 2013 WL at 14.

[48] *Id*. *citing* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-268 (1977).

[49] *Id.*

[50] Acosta, 2013 WL at 15.

[51] *Id.*

program.[52] Then-Superintendent Horne also found that two other programs in the state violated the statue, but chose only to target MAS with single-minded focus.[53] Though these facts were acknowledged, the court found that, as a whole, the record does not prove discriminatory intent.[54]

The court also decided issues of substantive due process from the 14th Amendment *sua sponte*.[55] The plaintiffs argued that substantive due process gives the parents the right to make decisions concerning their children, but the court rejected that,[56] because under *Fields v. Palmdale School District* (9th Cir. 2006), the right does not give parents the authority to interfere with decisions made by public schools regarding curriculum.[57] The suspension of the MAS program did not take away the parental rights of the plaintiffs.[58] Because the court found only one section of the law to be unconstitutional, it was unwilling to issue a permanent injunction sought by the plaintiffs, as the court is not required to grant an injunction for every violation of the law.[59]

IV. Implications for Mexican-American Studies

Acosta leaves the bulk of A.R.S. § 15-112 intact and the legal team of Acosta will now need to decide how to move forward, likely leading to an appeal. The impact of the decision will continue to have a ripple effect throughout Arizona's Latino community, as it struggles against periodic waves of statutory attacks on its culture during episodic moments of economic hardship that resonate through the majority population.

The confluence of economic strife, partisan politics, and motivated self-serving politicians willing to mobilize existing institutions against the demographic shifts in Arizona formed a "perfect storm" that put Mexican-American Studies of the crosshairs of the Republican Party. The historical context of Arizona and its relationship with the Mexican-American population, not simply the majority rule of whites, makes these events more likely to occur when economic times fall hard on the majority population.

While other states have similarly large Latino populations, such as Nevada and Colorado, the anti-immigrant movement has had a more difficult time gaining traction there. The electoral results of 2012 demonstrate just how difficult this is even in Arizona, where the Democrats were able to win a majority of the nine Congressional seats after the 2012 election, despite the GOP's

---

[52] *Id.*

[53] Acosta, 2013 WL at 15.

[54] *Id.*

[55] *Id.* at 16.

[56] *Id.*

[57] *Id. citing* Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1204 (9th Cir. 2006).

[58] Acosta, 2013 WL at 16.

[59] *Id.*

gains in 2010. This was largely a product of the Independent Redistricting Commission put in place by popular initiative in 2000 to redraw districting lines following the 2010 Census. After an up swell of concern came from the business community worried that the State was gaining a bad reputation for SB1070, causing a slower economic return to normalcy, the state senate voted down five bills proposed by Russell Pearce widely viewed as a further attack on the Latino population. One such bill, S.B. 1611, would make it unlawful to operate a vehicle without proof of legal status and would make it illegal to obtain public housing or any public benefit without proof of being legally present in the country. Another set of bills, S.B. 1308 and S.B. 1309, would amend the state constitution creating a new category of citizenship and would revoke birthright citizenship. The other bills voted down were S.B. 1405, which would have required hospitals to check an individual's legal status and notify law enforcement if they suspected an individual was in the country illegally, and S.B. 1407, which would have required school districts to collect data on the number of students who were illegal immigrants.

Current federal desegregation court orders call for TUSD to establish a curriculum that includes "culturally relevant" material, but the school board has been reluctant to comply for the 2013-2014 academic school year. As the case continues to make it way through the courts, the political momentum against Mexican-American Studies will depend on the socio-economic climate of the state, but A.R.S. § 15-112 is a fixture of Arizona's history that has created anxiety among Latinos of how hostile the state can be towards Mexican-Americans in times of recession.

The 2012 election illustrated that the confluence of factors mentioned above are central to explaining the attack on Mexican-American Studies, but also the difficulty in sustaining that energy. Despite this, President Obama lost in Arizona by a wide margin largely because the anti-immigrant movement has been so effective, unlike in other states, such as Colorado and Nevada. For example, the share of white voters in Arizona voting against President Obama was 12% greater in Arizona than in Colorado and 11% greater in Arizona than in Nevada.[60]

This illustrates that the simmering anxiety within Arizona still has great potential for future politicians willing to take that leap. This continues to be a concern for the Latino community until the Republican Party can find a way to reel back the opportunism of its political base. Although senators John McCain and Jeff Flake have done so in the past, they have also occasionally succumbed to party pressure. Without significant gains by Democrats and increased political participation by Latinos, however, attacks on programs designed to help Latinos will continue to be susceptible to political attack.

---

[60] Stephen Nuño, *Why Voting Against Immigration May Not Galvanize the White Vote*, NBCLatino, July 18, 2013, available at http://nbclatino.com/2013/07/18/analysis-why-voting-against-immigration-reform-may-not-galvanize-the-white-vote/.

Recibido: 24 de mayo de 2013.
Aceptado para su publicación: 22 de agosto de 2013.

Mexican Law Review
New Series
VOLUME VI
Number 2

RECIPROCITY IN MEXICAN RELATIONS WITH THE UNITED STATES: PAST INDICATORS OF FUTURE DILEMMAS

Max Paul Friedman*

Abstract. *This note assesses the lessons for future Mexican relations with the United States of past episodes of conflict over border issues and U.S. intervention in Latin America. The author argues that Mexican officials have and should continue to present Mexican views and assert Mexican national interests in disputes with the United States without concern for the historically frequent tendency of U.S. officials and commentators to ascribe such positions to Mexican "anti-Americanism."*

Key Words: *Mexican foreign policy, border, labor migration, anti-Americanism.*

Resumen. *Este trabajo analiza las consecuencias para las futuras relaciones entre México y los Estados Unidos de episodios de conflicto en el pasado sobre problemas de la frontera e intervenciones estadounidenses en América Latina. El autor propone que funcionarios y líderes mexicanos deben seguir presentando las perspectivas mexicanas y reivindicando los intereses nacionales mexicanos sin preocuparse por la tendencia de funcionarios y comentadores estadounidenses de culpar al "anti-americanismo" de tales posiciones.*

Palabras clave: *Política exterior mexicana, frontera, migración laboral, antiamericanismo.*

* Professor of History and Affiliate Professor of International Studies, American University, Washington, D.C. Doctor of Philosophy and Master of Arts in History from the University of California at Berkeley. His research interests include U.S. foreign policy and relations with Latin America. He thanks the editors and anonymous reviewers of MLR for their suggestions on this article. This note was originally presented as a talk at the conference "Mexico's Future: In Search of a New Democratic Equilibrium" held at American University in Washington, D.C., April 1-2, 2013.

Table of contents

I. Introduction

1. *"Anti-Americanism" as an Explanatory Category*

The prospects for improvement in relations between Mexico and the United States after the return to power of the PRI will be determined in part by how far this transition is accompanied by a return to old patterns of conflict and misperception. The issues are well known and have been fairly consistent over the decades: the security and the ecology of the border, labor migration, trade and U.S. military intervention in Latin America. One obstacle to more balance in U.S.-Mexican relations has been the tendency of U.S. officials, academics and the media to blame Mexican "anti-Americanism" whenever Mexicans stand up for their own interests.

The use of *anti-Americanism* as an explanatory category for the behavior of peoples and governments outside the United States has a long history.[1] It is a term that suggests Mexicans are not behaving like anyone else —presenting their own demands based on their own analyses— and are perversely opposed to rational U.S. policies. Barry Rubin and Judith Colp Rubin claim that anti-Americanism in Latin America stems from "hurt pride" and "ultrasensitivity to imagined slights," among other factors.[2] Michael Radu calls Mexican anti-Americanism "Pavlovian," invoking an animal's salivating instinct.[3] A leading history textbook still teaches U.S. students that Mexicans suffer from "virulent, almost pathological Yankeephobia."[4]

---

[1] See Max Paul Friedman, Rethinking Anti-Americanism: The History of an Exceptional Concept in American Foreign Relations (New York: Cambridge University Press, 2012).

[2] Barry Rubin & Judith Colp Rubin, Hating America: A History 121 (Oxford University Press, 2004).

[3] Michael Radu, *A Matter of Identity: The Anti-Americanism of Latin American Intellectuals*, *in* Understanding Anti-Americanism: Its Origins and Impact at Home and Abroad 144-164, quoted at 146 (Ivan R. Dee, ed., 2004).

[4] Michael C. Meyer & William L. Sherman, The Course of Mexican History 335 (7th ed., Paul Hollander, ed., Oxford University Press, 2003 [1979]).

This approach follows a venerable scholarly tradition of looking down upon Latin Americans as inherently inferior, emotionally unstable and irrational. Yale's Ellsworth Huntington, author of *Civilization and Climate* (1922) and president of the Association of American Geographers, was a climatic determinist and later a leading eugenicist who held that "the high temperature…in tropical America presumably weakens the power of man's mind. This, perhaps, accounts for the fact that almost no great ideas have ever been born and perfected within the tropics."[5] One finds innumerable references in U.S. publications since the late nineteenth century to the "Latin-American 'republics,' hot-blooded and impulsive,"[6] populated by "the hot-blooded man of Latin race,"[7] governed by "ambitious, hot-headed, and excitable leaders"[8] whose prospects are limited by "the natural incapacity of the hot-headed Latin for self-government,"[9] which comes from unfortunate racial mixing by the "hot-blooded Creole… altogether unfitted for Parliamentary institutions,"[10] who has regrettably failed to overcome "tropical… hot blooded… human nature with its untamed passion,"[11] and so on. The hallmark of what we might be tempted to call anti-Latin Americanism is attributing political convictions to uncontrollable Latin American emotionality whereas North Americans believe they reach their own views through sober reasoning.

Viewing world affairs through the prism of a racial hierarchy explains only part of the tendency to denigrate Latin American opinion. The clash of interests that arises when the United States seeks preferential access to markets or resources has contributed both to interventionism from the North and resentment from the South. Equally important is "American exceptionalism," the notion that the United States is superior to other societies and is a divinely-ordained force for good in the world. To the many U.S. officials who reach positions of power with articulated or latent beliefs along these lines, the only normatively rational position must be for Mexicans to support the U.S. policy of the day, regardless of what that policy may be. For this reason, Mexican articulations of its national interests, its critiques of U.S. intervention in the Caribbean, or Mexico's protests over the treatment of its nationals in the United States have all been historically lumped into the category of unreasonable Mexican "anti-Americanism."

---

[5] Ellsworth Huntington, *The Adaptability of the White Man to Tropical America*, *in* Latin America: Clark University Addresses 360-86, here 381-2 (George Hubbard Blakeslee, ed., Stechert and Co., 1914).

[6] Charles Fletcher Lummis, *In the Lion's Den*, 4 Land of Sunshine 236 (May 1896).

[7] Grover Flint, Marching with Gomez 195 (Lamson, Wolffe and Company, 1898).

[8] *Mexico in Disorder*, The Outlook, Apr. 13, 1912, at 796.

[9] Archibald Ross Colquhoun, Greater America 201 (Harper, 1904).

[10] William Alfred Hirst, Argentina 122 (C. Scribner's, 1910).

[11] Robert E. Speer, Missions in South America 157 (Board of Foreign Missions of the Presbyterian Church, 1909).

2. *A Mexican Rejoinder: History Matters*

From time to time, Mexicans have tried to explain why congenital or racially determined irrationality is not a useful way to explain their independent views. Young economist José Iturriaga tried to convey the more relevant factors in a satirical article in *El Popular* in 1951 entitled "Why I Am Anti-Soviet and Anti-Russian":

> For more than one hundred years we have been the victims of that country.... How can a good Mexican forget that in 1846 the Czar of all the Russias, James Polkov, sent Winfield Scottisky to make war on us in order to annex the province of Texas to its immense Ukrainian steppes, in which conflict we lost not only Texas but more than half our territory.... A Mexican patriot cannot forget, either, that when we were in the midst of a civil war to oust Victoriano Huerta, the troops of the Russian fleet under Admiral Fletcherev trampled on our Mexican shores and occupied Veracruz from April to November, 1914.… We cannot ignore the humiliations suffered by our wandering farmers, who, because they want to earn a few rubles on the other side of the Volga, are discriminated against and ill-treated because they are guilty of not being Slavs…[12]

Thus did a talented young Mexican try to call attention to historical and material basis of rational Mexican critiques. It was hard to get the message to penetrate. The U.S. Embassy had considered Iturriaga "one of the brightest of the young stars in the Mexican intellectual firmament" but when he published his satire, a U.S. diplomat complained about his unreasonable "anti-Americanism" —thereby rather exquisitely missing the point.[13]

Iturriaga did not accept this notion. He sought to explain that Mexico's wariness towards its powerful northern neighbor did not spring from passion or prejudice, but from historical roots. Mexican nationalists had gone from *yancofilia*, their early admiration for the U.S. political system and its Constitution, to resentment under the impact of certain events. In 1833, Lorenzo de Zavala had judged that the glittering wealth and republican virtues of the United States represented "the final grade of human perfection." Fray Servando Teresa y Mier assured his compatriots that the United States would lead Mexicans "to the gates of happiness… Lifting the banner of liberty, they planted it in our hearts."[14] What soured Mexican opinion was the series of subsequent interventions at their expense. Had Russia committed those acts, Iturriaga implied, Russians would be the object of Mexican anger and

[12] José Iturriaga, *Porque soy anti-soviético y anti-ruso*, El Popular, Apr. 27, 1951.

[13] Raine to DoS, 4 May 1951, 611.12/5-451, RG 59, National Archives, College Park, Maryland.

[14] José E. Iturriaga, La estructura social y cultural de México 217-218 (Fondo de Cultura Económica, 1951).

Russian analysts would be writing reports about the perplexing problem of Mexican anti-Russianism.

II. Lessons from the 1950s

Instead, U.S. officials were left with a distorted picture of Mexican thinking that affected the U.S. policy-making process on a range of issues. The two countries share a single ecological zone which should naturally allow for the free flow of people, animals and water, and where artificial breaks imposed by politics have caused all manner of dislocations. For decades, U.S. agribusiness drained off so much volume from the Colorado River that Mexicali farmers were left with cracked, dry earth and salinity too high for growing crops, and Mexican protests landed on deaf ears at the White House. During an outbreak of hoof and mouth disease in Mexican cattle in the 1950s, the Mexican government wanted to address the epidemic through vaccination, as it had done successfully during an earlier scare, while the United States pressed for the immediate slaughter of a million head of cattle.[15] President Dwight D. Eisenhower's longtime advisor, Undersecretary of State Walter Bedell Smith, blamed the problem on Mexicans' closeness to their animals. "The Peon loves his cow," Smith told the Cabinet. "If it were small enough it would sleep under the bed."[16] We do not read of Smith's "anti-Mexicanism" for espousing such an absurd view of why Mexican ranchers might not want to destroy their herds, yet we have grown accustomed to the claim that Mexican policies emerge from "anti-Americanism."

When the Eisenhower administration and the government of Adolfo Ruiz Cortines negotiated over how to regulate migration, the *New York Times* denounced the Mexican position —that the problem lay with U.S. employers who sought exploitable undocumented workers— as a sign of "anti-Yankeeism" in Mexico. In vain, Mexican officials tried to persuade the *Times* that pursuing the Mexican national interest "does not necessarily mean anti-Americanism."[17] Polls taken in the 1950s showed that 65% of Mexicans described their feelings toward the United States as "good" or "very good," whereas only 3% called their feelings "bad" or "very bad."[18] For all the heated reportage about "anti-gringo prejudice" and "hypersensitive pride" from the

---

[15] Josefina Zoraida Vázquez & Lorenzo Meyer, The United States and Mexico 166 (University of Chicago Press, 1985).

[16] L. Arthur Minnich, 3 Jul 1953, Box 2, Cabinet Series, White House Office, Office of the Staff Secretary, Dwight D. Eisenhower Presidential Library, Abilene, Kansas [hereinafter DDEL]; *U.S. Shuts Border to Mexican Cattle,* N. Y. Times, May 24, 1953, at 39.

[17] Sydney Gruson, *Anti-Yankeeism Is Seen in Mexico,* N. Y. Times, May 13, 1954, at 8.

[18] International Research Associates, SA de CV, *Barometer Study of Public Opinion – Mexico*, in folder MXUSIA56-LA** (Roper Center, Storrs, Connecticut, December 1956).

"violently anti-Yankee" Mexicans, there was little true hostility that could be measured.[19]

Meanwhile, Eisenhower decided on the expulsion of those who arrived without papers. Under the startling name "Operation Wetback," the Border Patrol apprehended and deported more than a million Mexicans, some of them living in the United States legally. More than a quarter of the deportees were repatriated via cargo vessels that a Congressional investigation likened to an "eighteenth century slave ship." Eighty-five Mexican workers died of sunstroke after thousands were unceremoniously "dumped" over the border in the desert by U.S. authorities.[20] "Anti-Americanism" in Mexico did not lead Mexicans to dump Americans in the desert; the allegedly urgent problem of "anti-Yankeeism" seems not to have produced any victims or costs of any kind.

Mexico and the United States also regularly clashed over foreign policy, especially U.S. interventionism to undermine governments that challenged economic arrangements favoring U.S. investors. The late Carlos Fuentes termed the June 1954 overthrow of Guatemala's democratically elected reformist president, Jacobo Arbenz Guzmán, who promoted land reform at the expense of the United Fruit Company, "a glorious victory against democracy in the name of democracy."[21] The Ruiz Cortines government has been criticized for not opposing the coup more strongly in public, but the record shows that Mexican officials tried to warn the United States against going forward with the CIA's plans. In March 1954, with the invasion of Guatemala looming, the U.S. called a Pan-American conference in Caracas to gain hemisphere-wide support. Secretary of State John Foster Dulles trumpeted that he had gotten nearly all the countries of the region to sign on for a campaign against "communist Guatemala." In fact, the archival record of the conference shows otherwise. The United States bought votes with millions of dollars in concessions on oil, coffee, military aid and debt forgiveness. But that was not enough to get Latin American countries to sign on for intervention. Mexico and Argentina led a diplomatic offensive that got Dulles's text changed. The meeting's final communique gutted any possible interventionist justification. At Mexico's prompting, it adopted this language: "This declaration… is designed to protect and not to impair the inalienable right of each American State freely

---

[19] Alexander Holmes, *Mexicans Welcome American Aid but Resent Patronizing Attitude*, L. A. Times, Feb. 24, 1959, at F5.

[20] Mae M. Ngai, Impossible Subjects: Illegal Aliens and the Making of Modern America 156 (Princeton University Press, 2004); Lester D. Langley, Mexico and the United States: The Fragile Relationship 46 (Twayne, 1991).

[21] Carlos Fuentes, *Farewell, Monroe Doctrine*, 263 (1575) Harper's 29-35, quoted at 29 (August 1981). On the 1954 coup and its significance, see Piero Gleijeses, Shattered Hope: The Guatemalan Revolution and the United States, 1944-1954 (Princeton, NJ: Princeton University Press, 1992); Greg Grandin, The Last Colonial Massacre: Latin America in the Cold War (University of Chicago Press, 2004).

to choose its own form of government and economic system and to live its own social and cultural life."[22]

That turned a resolution for action against Guatemala into a resolution prohibiting action against Guatemala. So much for Dulles's victory. When the coup went ahead nonetheless, Mexico gave asylum to Arbenz's followers in its embassy in Guatemala City. The State Department urged Mexico to hand them over to the tender mercies of the coup leaders; Mexico declined.[23]

Mexico continued testing the limits of how far it could deviate from U.S. policy priorities by maintaining diplomatic relations with Cuba, criticizing the invasion of the Dominican Republic in 1965 and serving as a diplomatic facilitator during the Central American wars of the 1980s. Even when this was partly rhetorical dissent to placate the domestic Left, it was a constructive role, and as Mario Ojeda demonstrated in a landmark study, although the power of the United States imposes limits on Mexican foreign policy, Mexico carved out substantial room for independent and often principled stands throughout the Cold War.[24] Indeed, as Paolo Riguzzi has shown, even from a position of relative weakness, since the late nineteenth century Mexico has been able to successfully pursue its interests in disputes with the United States across a range of bilateral economic and other issues, often by taking an unapologetically nationalist stance in negotiations.[25]

A new equilibrium would seek to move the United States closer to the official guidelines of Mexican foreign policy, enshrined in Article 89 of the constitution, including respect for international law and legal equality of States, non-intervention in the domestic affairs of other countries and the peaceful resolution of conflicts. Mexico retains its potential to serve as an independent voice in regional diplomacy, for example, as an intermediary between the U.S.-sponsored neoliberal free trade project (ALCA/FTAA) and ALBA, the Venezuelan-sponsored Bolivarian Alternative for the Americas. There is no reason Mexico could not replicate Brazil's rapid rise to the posture of an independent actor in global affairs.

---

[22] *Declaration of Solidarity for the Preservation of the Political Integrity of the American States Against International Communist Intervention*, Box 72, Latin America (4), OCB Central File Series, National Security Council Staff Papers, DDEL.

[23] For a full account of the March conference, see Max Paul Friedman, *Fracas in Caracas: Latin American Diplomatic Resistance to United States Intervention in Guatemala in 1954*, 21 (4) Diplomacy & Statecraft 669-689 (2010).

[24] Mario Ojeda, Alcances y límites de la política exterior de México (El Colegio de México, 1984).

[25] Paolo Riguzzi, ¿Reciprocidad imposible? La política del comercio entre México y Estados Unidos, 1857-1938, 298 (El Colegio Mexiquense - Instituto de Investigaciones Doctor José María Luis Mora, 2003). This contrasts with what scholars have observed about the NAFTA process, when cooperation on shared goals yielded an agreement many thought unlikely. See, for example, Jorge I. Domínguez & Rafael Fernández de Castro, The United States and Mexico: Between Partnership and Conflict (Routledge, 2001).

III. The Price of True Reciprocity

Of course, equilibrium is not the same as even balance, or fairness or complete reciprocity. If it were, that would mean an equilibrium of fairness in U.S.-Mexican relations would look something like this:

It is the year 2023 and the United States has just ceded half its territory to Mexico in exchange for a cash payment to help alleviate its enormous debt. Unemployed U.S. factory workers from Ohio and Michigan wade across the Rio Grande or join guest worker programs to take jobs at assembly plants in Sonora, where the *federales* demand to see their papers if they overhear them speaking English among themselves. The chain of resorts known as "Club Mex" has opened a series of luxurious properties in the most beautiful landscapes from Yosemite to Cape Cod, where U.S. workers are welcome to wash dishes and clean toilets, but are excluded by armed guards from trespassing onto the beaches, entering the flashy nightclubs or walking on the manicured golf courses reserved for Mexico's vacationing elite. Fresh-faced young volunteers from Mexican universities have arrived under a government-sponsored program to spend two years in the decaying inner cities and stagnant rural areas of the United States, teaching Spanish, basic health care, and food production techniques to impoverished U.S. citizens. When the U.S. government faces a catastrophic devaluation of its currency, an investor group chaired by Carlos Slim steps in to arrange a bailout. Finally, NAFTA is renegotiated to allow not only for the free flow of goods and capital, but of labor.

That may all seem unlikely. But here is what one would have thought should be unlikely: It is the 21st century and a senior Republican congressman speaks nostalgically of the 50 to 60 "wetbacks" his family employed on their farm.[26] A presidential candidate wins the nomination of his party after suggesting that 11 million undocumented workers, mostly Mexicans, should be put under so much legal harassment and economic deprivation that they "self-deport."[27] His opponent, President Barack Obama, boasts of having exceeded the George W. Bush administration's record of a thousand deportations a day by reaching a high of 1,122 deportations per day.[28] For five years, America's leading cable news channel turns over an hour of prime time every weeknight to a program whose anchor, Lou Dobbs, devotes himself to arguing that Mexicans pose a mortal threat to the United States, spreading disease, committing crimes and draining the national treasury.[29] The lead-

[26] Dana Milbank, *Rep. Don Young Faces Backlash for 'Wetback' Slur*, Washington Post, Apr. 1, 2013.

[27] David Boroff and Roque Planas, *Mitt Romney Says He Favors "Self-Deportation" When Asked about Immigration during GOP Debate,* N. Y. Daily News, Jan. 24, 2012.

[28] The number of people deported in the fiscal year ending September 30, 2012 was 409,849. Corey Dade, *Obama Administration Deported Record 1.5 Million People* [*i.e.* in first presidential term], NPR News, Dec. 24, 2012.

[29] The reference is to "Lou Dobbs Tonight" on CNN, a program that ended in 2009.

ing political scientist Samuel Huntington warns that Mexican immigration "threatens to divide the United States into two peoples, two cultures, and two languages… rejecting the Anglo-Protestant values that built the American dream. The United States ignores this challenge at its peril."[30] Turning such sentiment into action, three white teenagers in Pennsylvania attack Luis Ramirez, a 25-year-old Mexican immigrant, and beat him to death, yelling that Mexicans should get out of their town.[31]

Here is what else seems likely. Until the United States listens to decades of Latin American advice and starts treating drug use as a public health problem on the consumption side, rather than a military problem on the production and transportation side, Mexicans will continue to fight and die as victims of a proxy drug war that we have offshored to the other side of the border. Unless the United States brings some regulatory sense to its out-of-control firearms market, Mexican gangs are going to continue to be able to outgun the police. Unless the Obama Administration has genuinely traded in its strategy of placating the right with skyrocketing deportations for a more auspicious effort at immigration reform that does not fetishize the further militarization of the border, we will continue to have millions of people living in the United States without basic rights.

We know how these problems work and we know what can be done to address them more effectively. We know that undocumented immigration is not something people do for fun or to annoy U.S. authorities and cable television hosts. We know that the fluctuating rate of undocumented immigration correlates closely with the unmet demand for low-wage labor and the unmet demand for visas, and that it was boosted under neoliberal strategies like NAFTA whose advantages for U.S. agribusiness devastated smallholder agriculture in the Mexican countryside. It would not be hard to figure out how to bring supply and demand more into line; these two factors are not susceptible to border control but are eminently manageable through sensible legislation.

Since the U.S. political system presently gives few signs of heading in the direction of sensible legislating, a new equilibrium is going to depend greatly on Mexican initiatives and whether a new Mexican polity, perhaps less dysfunctional than its worst predecessors, can communicate its views of shared interests and play a larger role in international affairs without being constrained by the spurious charges of Mexican anti-Americanism that will inevitably accompany such an approach.

[30] Samuel P. Huntington, *The Hispanic Challenge*, Foreign Policy, Mar. 1, 2004; *see also* Samuel P. Huntington, Who Are We? The Challenges to America's National Identity (Simon & Schuster, 2004).

[31] *3 Coal-Region Teens Held in Hate-Crime Killing*, Philadelphia Inquirer, July 26, 2008.

Recibido: 24 de abril de 2013.
Aceptado para su publicación: 19 de agosto de 2013.

Mexican Law Review, nueva serie, vol. VI, núm. 2, enero-junio de 2014, es una publicación semestral editada por el Instituto de Investigaciones Jurídicas de la UNAM. Circuito Maestro Mario de la Cueva s/n, Ciudad de la Investigación en Humanidades, Ciudad Universitaria, 04510 México, D. F., tel. 5622 7474. Editor responsable: John Mill Ackerman Rose. Reservas de Derechos al Uso Exclusivo: 04-2010-102014301100-102. Licitud de Título: en trámite. ISSN: en trámite. Impresa por Desarrollo Gráfico Editorial, S. A. de C. V., Municipio Libre 175-A, colonia Portales, delegación Benito Juárez, 03300 México, D. F., tel. 5605 8175. Este número se terminó de imprimir el 6 de enero de 2014. En su edición se empleó tipo *Baskerville* en 9, 10 y 11 puntos. Se utilizó papel cultural 57 x 87 de 37 kilos para los interiores y cartulina para los forros. Consta de 500 ejemplares (impresión *offset*).