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# REFORMING MEXICO'S ANTI-TRAFFICKING IN PERSONS LEGISLATION

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Abstract: *In the past few years, Mexico has taken a number of measures to further prevention, protection, and prosecution of trafficking in persons. The country's government has signed international anti-trafficking conventions and has taken some aspects of widely accepted international definitions of this crime as a reference when drafting its anti-trafficking legislation. However, Mexican lawmakers have interpreted human trafficking in their own terms. Mexico's current anti-trafficking legislation is based on a quite broad definition of trafficking in persons and shows serious limitations that have led to the misidentification of victims and traffickers, as well as to re-victimization. This adds to Mexico's weak rule of law, corruption, and the involvement of interest groups with particular agendas/ideologies that have obstructed reform. The present analysis demonstrates the imperative necessity to modify the current anti-trafficking legislation in Mexico and provides some basic suggestions for this much-needed reform.*

Keywords: *Mexico, Palermo Protocol, human trafficking, anti-trafficking legislation, reform, Tapachula*

Resumen: *En los últimos años, México ha tomado una serie de medidas para prevenir, proteger y procesar judicialmente la trata de personas. Asimismo, el gobierno de este país ha suscrito convenciones internacionales anti-trata y ha*

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*adoptado aspectos clave de las definiciones de este delito ampliamente aceptadas en el ámbito internacional como referencia al diseñar su propia legislación. Sin embargo, algunos juristas mexicanos han interpretado el fenómeno de la trata de personas en sus propios términos. La legislación actual anti-trata se basa en una definición del fenómeno bastante amplia, que presenta serias limitaciones, las cuales han contribuido a una identificación errónea de víctimas y tratantes de personas, así como a la revictimización. Lo anterior se añade a la debilidad del estado de derecho en México, a la corrupción y al involucramiento de grupos de interés con agendas e ideologías específicas que han contribuido a obstruir una modificación de este marco legislativo. El presente análisis demuestra la imperativa necesitad de modificar la actual legislación anti-trata en México y provee algunas sugerencias básicas para realizar esta reforma tan necesaria.*

Keywords: *México, Protocolo de Palermo, trata de personas, legislación anti-trata, reforma, Tapachula*

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## I. Preamble: A Field Trip to Tapachula, Chiapas

On Sunday, October 5th, 2015, a team of researchers and human rights advocates visited the women's prison located in Tapachula, Chiapas, a city that is considered as one of the main sex trafficking hubs in Mexico.[1] This visit was part of a field trip to study the role of transnational organized crime in human trafficking in Central America and along Mexico's eastern migration routes.[2] The main goal of this visit was to interview women convicted of human trafficking crimes in order to understand their *modus operandi*, as well as their connection with other actors, including transnational criminal groups. We visited Tapachula since it is a well-known hub for human trafficking and particularly because it is located in Chiapas, a state that has in recent years received a number of domestic and international accolades and awards for the apparent progress it has made in terms of prevention, protection, and prosecution of trafficking in persons. For instance, *Comisión Unidos vs. Trata* (Commission United Against Human Trafficking), a non-governmental organization headed by former Congresswoman Rosa María Orozco, has recognized multiple times the current governor of Chiapas, Manuel Velasco Coello for his alleged significant contributions to preventing and prosecuting trafficking.

Most governmental and civil institutions lauding the state of Chiapas's anti-human trafficking efforts measure the state's success based on the increasing numbers of victims state authorities report having identified and rescued, as well as of perpetrators arrested and prosecuted. Since Chiapas created its Special Prosecutor's Office against Human Trafficking Crimes (*Fiscalía Especializada en Atención a los Delitos en Materia de Trata de Personas*), state authorities "have facilitated the rescue of 666 victims and brought 327 suspects to trial, achieving 85 convictions for human trafficking and 62 other sentences."[3] One of the purposes of our field trip to Chiapas was to assess to what extent reality matched the promising statistics reported by the government.

In fact, what we witnessed on the ground differed starkly from the positive figures present in official speeches and reports. Of particular notice was the concerning situation faced by the inmates of the women's prison we visited in Tapachula. In the course of our interviews with eleven female prisoners charged and convicted of human trafficking, we became increasingly skepti-

[1] The authors thank María Fernanda Machuca, who contributed to the present analysis and travelled to Tapachula to assist in the fieldwork.

[2] This field trip was made possible by the generous support of the American people through the United States Department of State. The contents are the responsibility of the researchers and do not necessarily reflect the views of the Department of State nor the ones of the United States government.

[3] General Prosecutor's Office of the State of Chiapas (PGJE), *Participa Procuraduría de Chiapas en Encuentro Nacional en Materia de Trata de Personas,* PGJE, (April 3, 2017, 11:45 AM), *http://www.icosochiapas.gob.mx/2017/04/04/participa-procuraduria-de-chiapas-en-encuentro-nacional-en-materia-de-trata-de-personas/.*

cal about the validity and consistency of the charges pressed against them. All the inmates we interviewed showed very high levels of vulnerability. Eight of them were migrants from Central America who did not know Mexico's territory and who were residing in the country for the first time. It is hard to envision any circumstances under which these women would be able to misguide, mislead or transport victims, and thus commit human trafficking. Their testimonies suggested that they were not leading any human trafficking ring in Mexico's southern border region. It was also clear that they were not the main beneficiaries of the very significant revenues that this industry generates in Tapachula. Some might have even been victims of this crime or might have been "in the wrong place at the wrong time."

Academic, governmental, civil society and media sources have often reported on the recurring abuses undocumented migrants endure in Mexico, including those experienced while in the custody of the Mexican government. Abusive employers, exploitative criminals, and corrupt state agents are known to threaten irregular migrants with deportation if they report abuses suffered at their hands. Due to their lack of familiarity with the local language and perceived fragility, foreign women, particularly indigenous girls and young women from Central America, are especially vulnerable to abuse by corrupt officials. The inmates we interviewed in Tapachula were young, female, impoverished, foreign, indigenous, and had low levels of formal education (some were illiterate). All these traits are vulnerability factors that increase a person's chances of falling victim to trafficking in the hands of criminal networks as well as victim of abuse by corrupt authorities.[4] And in Mexico, where the federal government has been pressuring state governments to ramp up and improve their anti-trafficking records, this demographic group is particularly susceptible to falling victim to state authorities looking to illegitimately inflate their crime-fighting statistics.

Mexico's current anti-trafficking legislation is the main factor enabling Mexican states to arrest and jail individuals who are not actually traffickers. The legislation defines the crime in broader and vaguer terms than similar definitions adopted elsewhere, such as the ones adopted by the United Nations and the United States. This broader understanding of what constitutes trafficking allows Mexican law enforcement to characterize and prosecute a wide array of crimes as human trafficking, such as certain forms of prostitution, illegal adoption, and possession of child pornography. One example is the arrest in February 2014 and prosecution for human trafficking of Maria Alejandra Gil Cuervo, president of a Mexico City-based NGO whose mission was to promote HIV awareness among the city's sex workers. She was

[4] On the conditions of vulnerability that facilitate human trafficking see Comisión Nacional de los Derechos Humanos (CNDH), and Centro de Estudios e Investigación en Desarrollo y Asistencia Social (CEIDAS), *Diagnóstico de las condiciones de vulnerabilidad que propician la trata de personas en México*, CNDH AND CEIDAS (2009).

accused of leading a massive prostitution ring in Mexico City for over 30 years (Vela 2015).[5,6]

Such flexibility and subjectivity in framing what constitutes trafficking in persons, combined with a weak rule of law and high levels of corruption, often spread, rather than prevent, injustice. Frequently, the individuals most affected by cases of miscarriage of justice engendered by the legislation's broad definition are society's most marginalized and vulnerable members, including trafficking victims themselves. The key leaders of human trafficking rings and main beneficiaries of related activities are often rich and powerful entrepreneurs and politicians who frequently escape arrest and other types of sanctions. Reforming Mexico's current anti-trafficking legislation and equipping the country's courts and law enforcement agencies with a definition that is in tune with international conventions is the first step towards enabling the country to prosecute criminals and protect victims efficiently while ensuring accountability. This study will present an overview of the process that led Mexico to its current anti-trafficking legislation, the law's shortcomings, and suggestions on how to amend them.

## II. Introduction

Adopted by resolution A/RES/55/25 of November 15, 2000, the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (also known as the Trafficking Protocol, the Palermo Protocol, or U.N. TIP Protocol)[7] is a landmark international anti-human trafficking accord.[8] It arose from the necessity to craft a comprehensive document that would define human trafficking and prescribe the actions its signatories should adopt. As a party to the protocol, Mexico adopted its first anti-trafficking law in November 2007.

Years later, in 2012, Mexico approved a revamped and broader anti-trafficking law that replaced its precursor. Mexican lawmakers also used the Pal-

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[5] Gil is currently serving a 15-year sentence in jail.

[6] Vela, David Saúl, *Sentencian a 15 años de cárcel a la 'Madame de Sullivan'*, El Financiero, (Dec. 3, 2015, 2:35 PM), *http://www.elfinanciero.com.mx/nacional/sentencian-a-15-anos-de-carcel-a-la-madame-de-sullivan.html.*

[7] It entered into force on December 25, 2003. See United Nations, *United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, United Nations, (Jul. 20, 2017, 10:30 PM), *https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf.*

[8] The Palermo Protocol was initially intended to deal only with trafficking in women and children. However, it was subsequently expanded in scope to include all persons. Most states agree that particular attention should be given to the protection of women and children. See Anne Gallagher, *Human rights and the new UN protocols on trafficking and migrant smuggling: A preliminary analysis*, 4 Human Rights Quarterly 23, 975-1004 (2001).

ermo Protocol as a reference while drafting the new legislation. However, Mexico defined human trafficking on its own terms. This divergence enables Mexican authorities to characterize a wider range of crimes and infractions as human trafficking. In some cases, individuals that did not commit a human trafficking crime according to the internationally accepted definition are prosecuted as traffickers in Mexico. The current broad definition of human trafficking considered in the Mexican legislation inhibits authorities from accurately identifying the source of this crime under different circumstances and from efficiently fighting this complex phenomenon.

The purpose of this article is to identify the drawbacks of the current anti-trafficking legislation and to propose changes to the current framework that would allow: 1) the improvement of government authorities' interdiction of traffickers; 2) better identification of victims of trafficking, and 3) more effective international and intra-national efforts to combat human trafficking in Mexico. Overall, we believe that an improved legislative framework will further prevention, protection, and prosecution of human trafficking in the country.

This article provides a legal interpretation of the Palermo Protocol as a way to understand the international and widely accepted, even if imperfect, definition of trafficking in persons. The first part of this analysis explains the changes in Mexico's anti-human trafficking legislation and examines its current contents in contrast with the U.S. legislation and the Palermo Protocol. Overall, the present article assesses the divergence between the definition of trafficking in international and Mexican provisions and laws. It also explains which groups supported Mexico's definition of trafficking in persons and for what reasons, and it describes the impacts that current legislation has had on anti-trafficking efforts in Mexico. This article highlights the limitations of Mexico's legislation and the serious obstacles it poses today to further prevention, protection, and prosecution of trafficking in persons in the country. These problems are illustrated by analyzing in depth the case of Tapachula, Chiapas. Finally, the present article provides suggestions for reform and highlights policy directions that might have a favorable impact on investigations, prosecutions, and convictions related to this high-level crime.

## III. Mexico's Anti-Trafficking Legislative Framework

> *The recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.*
>
> - U.N. definition of trafficking in persons

### 1. *Defining Human Trafficking: Article 3 of the Palermo Protocol and the U.S. TVPA*

The U.N. TIP Protocol or Palermo Protocol defines human trafficking in subparagraph (a) of its Article 3. According to the text, for a crime to be labeled as human trafficking, it should include three basic elements: acts, means, and purpose. Hence, an observer trying to determine if a crime constitutes human trafficking has to identify three main components:

1. The acts, or in other words, what happened. Subparagraph (a) lists the following acts: "recruitment, transportation, transfer, harboring *or* receipt of persons." However, those acts alone are insufficient to classify the crime as trafficking in persons.
2. The means, or how the acts listed above were carried out, are just as important. The Protocol specifies the following set of means: "threat *or* use of force *or* other forms of coercion, of abduction, of fraud, of deception, of the abuse of power *or* of a position of vulnerability *or* of the giving *or* receiving of payments *or* benefits to achieve the consent of a person having control over another person."
3. Finally, human trafficking crimes must not only consist of the acts listed above *and* be performed by using the described means. Exploitation should be the purpose of those acts. In other words, why the crime happened is just as important as what happened and how it happened.

A legal interpretation of the Palermo Protocol would state that for a crime to be considered human trafficking, these three elements must be present. Thus, if an individual (or group of individuals) commit(s) one or more of the listed acts for the purpose of exploiting someone, but do(es) not do so by using at least one of the means described, he/she is certainly infringing on the rights of his/her victim, and committing a crime. However, that crime, as heinous as it may be, is not human trafficking. "If one of these elements is absent, we are not facing trafficking in persons, we are facing a different crime, or just an administrative fault, or the violation of labor rights."[9] The Trafficking Protocol provides only one exception when one of the elements, namely the means, does not need to be present for a crime to be classified as human trafficking. Subparagraphs (c) and (d) note that when the victim is under eighteen years of age, the acts described, when performed for the purpose of exploitation, constitute human trafficking, "even if this does not involve any of the means set forth in subparagraph (a)."

Also in 2000, the United States enacted the Victims of Trafficking and Violence Protection Act (TVPA), which states that "severe forms of trafficking in persons means: (a) sex trafficking in which a commercial sex act is induced by

[9] Hispanics in Philanthropy (HIP), *Una mirada desde las organizaciones de la sociedad civil a la trata de personas en México*, HISPANICS IN PHILANTHROPY, 10 (2017).

force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (b) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery." There are differences between the TVPA and the Palermo Protocol, but they similarly recognize the three key elements of human trafficking: acts, means, and purpose.

It is worth noting that even these widely accepted definitions of human trafficking have been contested at several levels and by several actors. According to Sienna Baskin, Director of the Anti-Trafficking Fund, "the question of defining trafficking is actually quite complex." She explains that the "U.N. TIP protocol is the result of much struggle and compromise, producing vague concepts like 'the exploitation of prostitution of a person'."[10] In her view, "the U.S. definition is different but similarly contested. For example, it does not include organ trafficking. It changed recently to define a person who offers to pay a minor for sex as a trafficker." It is thus important to acknowledge that these are contested definitions, "different from jurisdiction to jurisdiction, that draw a circle around certain acts and leave other acts, which some might see as equally abusive, out."[11] Notwithstanding the different interpretations of what constitutes human trafficking, the United Nations Office on Drugs and Crime (UNODC) provides a model law as a template for countries to draft their own regulations.[12]

### 2. *Mexico's 2007 Anti-Human Trafficking Law*

Mexico signed the Palermo Protocol in late 2000. This was the first step the Mexican government took in recognizing trafficking in persons as a domestic and international issue. Concurrently with the Congress's deliberations on anti-trafficking legislation, the Office of the United Nations High Commissioner for Human Rights (OHCHR) pressured Mexico to improve its treatment of foreign-born trafficking victims. As noted in the final report of Mexico's *TIP Shelter Project*,[13] before 2006 the Mexican government did not provide protection or social assistance to foreign victims who were in Mexico irregularly.[14] Additionally, the government often deported these victims. This

[10] On such a compromise, see Appendix 1.

[11] Sienna Baskin, e-mail message to author and others (Mar. 21, 2017).

[12] See United Nations Office on Drugs and Crime (UNODC), *Model Law against Trafficking in Persons*, UNODC, (Jul. 20, 2009, 3:50 PM), *https://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf.*

[13] This project was known as PROTEJA Shelter Project. PROTEJA stands for *Proyecto de Apoyo a Refugios para Victimas de Trata de Personas en México* (in English: PROTECT - Project to Support Shelters for Victims of Human Trafficking in Mexico).

[14] PROTEJA was a program focused on improving shelters for migrants and human trafficking victims in Mexico. It received funding from USAID under the President's Initiative

ran contrary to the directives set forth by the U.N. TIP Protocol that requires its parties to protect the basic human rights of all trafficking victims. And, in pragmatic terms, the deportation of foreign victims deprived Mexican courts of important witnesses, without whom prosecuting traffickers becomes a significantly harder task. Since then, Mexico's National Migration Institute (INM) shifted its policy towards foreign victims of trafficking. The INM now grants foreign trafficking victims temporary resident visas and working permits for the duration of the judicial process against their alleged traffickers.

Mexico ratified the Palermo Protocol in March 2003, and in 2004 the Mexican Congress discussed drafting national anti-trafficking laws. On December 9, 2004, senators Enrique Jackson Ramírez, Ramón Mota Sánchez, and Miguel Sadot Sánchez Carreño (all affiliated with the Institutional Revolutionary Party, PRI) formally presented a proposed anti-human trafficking law. On November 27, 2007, Mexico published its first anti-trafficking law in the Official Gazette (*Diario Oficial de la Federación*, DOF): the "Law to Prevent and Punish Trafficking in Persons" (*Ley para Prevenir y Sancionar la Trata de Personas*).

Ten pages long, the text of the first Mexican anti-trafficking law was relatively short. It provided a definition of human trafficking that followed the language present in the Palermo Protocol. The first paragraph of its Article 5 presented and described all three elements discussed in the Protocol: acts, means, and purpose of trafficking; it also defined organ trafficking as human trafficking. The paragraph read: "commits human trafficking those who promote, procure, provide, facilitate, obtain, transfer, deliver, *or* receive a person, either for himself *or* others, by means of physical *or* moral violence, deceit *or* abuse of power, for the purpose of sexual exploitation, forced labor *or* services, slavery *or* practices analogous to slavery, servitude, *or* the removal of an organ, tissue, *or* one of his components."[15]

The second and last paragraph of Article 5 mirrors subparagraphs (c) and (d) of the Protocol's Article 3 when stating that: "when this crime is committed against people under the age of eighteen years old, or against those who are not capable of comprehending the significance of the act committed, or those who are not capable of resisting it, the verification of the means of trafficking will not be required." Thus, only if the victim is a minor, or someone incapable of giving consent, a crime that has the acts and purpose, but not the means, described by the law will be classified as trafficking.

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to Combat Trafficking in Persons. It was comprised of 127 civil society organizations and 95 government agencies. See Capable Partners Program-Mexico, *Mexico's TIP Shelter Project*, Final Report, May 2006-Mar. 2009, USAID (2010).

[15] See Chamber of Deputies, *Ley para Prevenir y Sancionar la Trata de Personas, Última Reforma DOF 01-06-2011*, Government of Mexico (Feb. 20, 2016, 4:40 PM). *http://www.inegi.org.mx/est/contenidos/proyectos/aspectosmetodologicos/clasificadoresycatalogos/ced2012/doc/federal/LPPYSLTDP.pdf.*

It is also worth noting that Article 10 of Mexico's 2007 anti-trafficking law postulated that the federal government would establish a permanent interagency commission to study the phenomenon of trafficking in persons. The Commission would be responsible for formulating a national program to prevent and combat human trafficking. It would also be responsible for fostering cooperation between the federal and state governments, as well as for coordinating anti-trafficking efforts.

3. *The Path Towards the 2012 General Law*

On February 27, 2009, the executive branch issued the enabling legislation (*reglamento*) of the 2007 law that directed and informed states how to interpret and apply the new anti-trafficking legislation in Mexico. It also delineated with further detail how the newly created interagency commission would function. In December 2009, a federal judge used the 2007 law to sentence human traffickers for the first time.[16] In August 2010, the Permanent Commission of the Mexican Congress (*Comisión Permanente del Congreso de la Unión*) proposed that state anti-trafficking laws should be updated to be consistent with international and federal laws.[17] On January 6, 2011, the Inter-secretarial Commission to Prevent and Sanction Human Trafficking published its national program in the Official Gazette (DOF).[18] The program had as its four core objectives: to know the current context, causes, and consequences of human trafficking in Mexico; to prevent the crime of human trafficking; to assist in the improvement of law enforcement in regards to human trafficking; and to provide comprehensive and high quality care to people in situations of trafficking, as well as to relatives and witnesses.

The document operationalized the four objectives with variables such as the number of anti-trafficking campaigns, the number of federal-state anti-trafficking cooperation agreements, and the number of victims treated. It presented what the situation was in Mexico in 2010 and where the government should be in 2012. In 2011, out of Mexico's 32 states (including the capital city), 28 states and the Federal District (now Mexico City) had defined human trafficking as a crime in their jurisdictions. Among these states, only 13 had laws on how to provide support to trafficking victims.[19]

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[16] U.S. Department of State, *Trafficking in Persons Report,* U.S. Department of State (2010).

[17] Animal Político (staff), *Propone Congreso reformar leyes contra trata de personas*, Animal político, (Aug. 26, 2010, 3:15 PM), *http://www.animalpolitico.com/2010/08/el-congreso-propone-reformas-contra-la-trata-de-personas/*.

[18] See Secretaría de Gobernación (SEGOB), *Programa Nacional para Prevenir y Sancionar la Trata de Personas 2010-2012*, Comisión Intersecretarial para Prevenir y Sancionar la Trata de Personas, Diario Oficial de la Federación, SEGOB (2011).

[19] Patricia Guillén, *Trata de personas, segundo ilícito más redituable en México*, Animal Político, (Abril 13, 2011, 7:24 AM), *http://www.animalpolitico.com/2011/04/trata-de-personas-segundo-ilicito-mas-redituable-en-mexico/*.

On March 15, 2011, the Federal Chamber of Deputies agreed, with 401 votes in favor, to reform the 2007 federal law.[20] One of the main reasons for such a reform is that it was extremely difficult to prove that trafficking took place. Particularly difficult to prove was the subjugation of a person by means of coercion, abduction, fraud, deception, or any other element that was then stipulated in the law. "This was the main argument used to establish that the 2007 law did not work to detain the person who was actually benefiting from trafficking in persons. To prove the subjugation was a big challenge."[21] At the same time, it was contended that the existing law did not provide enough provisions to assure the victim's safety. The new law would classify human trafficking as a serious felony, thus allowing judges to issue preventive arrest warrants against suspected traffickers. In August 2011, lawmakers presented the text of the updated legislation to Congress.

Some anti-prostitution NGOs, known as "abolitionists" due to their opposition to prostitution and their advocacy to outlaw this activity, saw a significant opportunity in the reform. These groups tend to equate prostitution with human trafficking. The legality of prostitution in Mexico makes it difficult to determine whether the alleged trafficked victim is engaged in commercial sex activities willingly or if a third person is forcing and/or exploiting him/her.[22] Abolitionists believe that every person participating in the sex trade does so involuntarily, and in their view, "it is not necessary to prove how she/he is retained. By eliminating the need to prove the subjugation, it would be much easier to demonstrate the existence of human trafficking." These arguments were crucial in the push to eliminate "the means" from the definition of trafficking in persons in the new law of 2012.[23],[24]

### 4. *The 2012 General Law*

On June 14, 2012, the General Law to Prevent, Sanction and Eradicate Crimes Related to Trafficking in Persons was published in the Official Gazette (DOF). [25] Its stated goal was to better articulate and delineate how fed-

[20] See voting in: *http://gaceta.diputados.gob.mx/Gaceta/Votaciones/61/tabla2or2-44.php3* (Parliamentary Gazette, LXI Legislature, Chamber of Deputies, Mexico City).

[21] Hispanics in Philanthropy (HIP), *Una mirada desde las organizaciones de la sociedad civil a la trata de personas en México*, Hispanics in Philanthropy, 10 (2017).

[22] *Ibid*, 11.

[23] *Ibid*, 11.

[24] See Appendix 1 for a discussion on the divide between abolitionist and non-abolitionist views of prostitution and the impact of these views on the concept of human trafficking.

[25] It is officially called General Law to Prevent, Sanction and Eradicate Crimes Related to Trafficking in Persons and for the Protection and Assistance of Victims of these Crimes *(Ley General para Prevenir, Sancionar y Erradicar los Delitos en Materia de Trata de Personas y para la Protección y Asistencia a las Víctimas de estos Delitos*).

eral, state, and municipal authorities should act and cooperate in their anti-trafficking efforts. In contrast to its 10-page predecessor, lawmakers intended that the General Law's 129 articles, spreading 48 pages, would clearly define human trafficking and provide assurances to its victims.[26] The legislation's most visible proponents declared that the new law would allow the government to fight trafficking more efficiently.[27]

The new anti-trafficking legislation was accompanied by constitutional reforms. For example, changes were made to Article 20 of the Mexican Constitution so that human trafficking victims could have their identities and personal information kept secret. Article 73 of Mexico's *Carta Magna* was also modified in order to accommodate a more detailed anti-trafficking law.[28] While the 2007 legislation prescribed six to 18 years of imprisonment to traffickers, the new legislation increased the penalties to a maximum of 40 years behind bars, depending on the form of trafficking committed.[29]

While the 2007 law focused on human trafficking as an international crime, allowing states to use discretion on how they would prosecute traffickers, the new law framed human trafficking as a domestic crime.[30] In other words, the 2012 legislation shifted the focus from international to domestic trafficking. The 2007 law understood trafficking as essentially happening when a victim was brought from a foreign country.[31] The current law understands it at the domestic level as well, meaning that if someone was misled or abducted and brought from one Mexican state to another, that constitutes trafficking. It is worth noting that when the focus shifted to the domestic level, the number of people the government identified astraffickers increased significantly.

The 2012 General Law was a more complex and comprehensive law than the one approved in 2007. It also significantly changed Mexico's definition of human trafficking. The first law clearly stated that for a crime to be hu-

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[26] See Chamber of Deputies, *Ley General para Prevenir, Sancionar y Erradicar los Delitos en Materia de Trata de Personas y para la Protección y Asistencia a las Víctimas de estos Delitos, Última Reforma DOF 19-03-2014*, Government of Mexico (Feb. 20, 2014, 6:30 PM). *http://www.diputados.gob.mx/LeyesBiblio/pdf/LGPSEDMTP.pdf.*

[27] *Aprueban diputados ley contra trata de personas*, animal político**,** (May 14, 2017, 4:07 PM), *http://www.animalpolitico.com/2012/03/aprueban-diputados-ley-contra-trata-de-personas/.*

[28] *Promulga Calderón reforma contra trata de personas*, animal político, (May 21, 2017, 3:58 PM), *http://www.animalpolitico.com/2011/07/promulga-calderon-reforma-contra-trata-de-personas/.*

[29] *Diputados aprueban sanción de hasta 40 años a quien cometa trata de personas*, Animal Político, (May 22**,** 2017, 7:25 PM), *http://www.animalpolitico.com/2012/04/diputados-aprueban-sancion-de-hasta-40-anos-a-quien-cometa-trata-de-personas/.*

[30] Francisco Sandoval Alarcón, *Diputados congelan ley para castigar la trata de personas*, Animal Político, (Diciembre 28, 2011, 8:29 AM), *http://www.animalpolitico.com/2011/12/diputados-congelan-ley-para-castigar-la-trata-de-personas/.*

[31] For example, under the 2007 law, if someone was a foreigner and worked in the sex industry, the government tended to consider her/him to be a victim of trafficking and those in charge of her to be traffickers. The government disregarded that foreign migrants might choose to work in the sex industry in order to finance their travel towards the United States.

man trafficking, it had to include all three elements of trafficking, that is, acts, means, and purpose. The second law understands that for a crime to be classified as human trafficking, it suffices to prove that a set of acts was performed for the purpose of benefiting from exploiting people, regardless of how these acts were performed. Article 10 of the General Law considers the means (i.e. force, threat, coercion, and fraud) as aggravating factors, but not basic elements of human trafficking. This small but important change made the Mexican definition of human trafficking pointedly broader than the definitions set forth in the Palermo Protocol and the U.S. anti-trafficking legislation.[32] It is worth noting that eliminating the means from the definition of human trafficking is not a widespread phenomenon in other regions of the world. Of the 188 countries with human trafficking laws and a specific anti-trafficking institutional framework, less than a dozen have eliminated the means as a key provision for the occurrence of trafficking in persons.

## IV. A Need to Reform Mexico's Anti-Trafficking Legislation

### 1. *Limitations of the 2012 Law*

#### A. *A New Definition of Trafficking*

In sum, whereas under the U.N. TIP Protocol, acts, means, and purpose are the three elements of human trafficking, Mexico's 2012 trafficking law eliminates the means and only considers acts and purpose as the key elements of trafficking in persons. By removing the means, trafficking becomes one of many forms of exploitation. The first paragraph of Article 10 is the one that resembles the most basic contents of the Palermo Protocol, but the article's subsections then start to define and regulate what entails exploitation instead of focusing on trafficking. Specifically, Article 10 of the 2012 law defines trafficking to include: slavery, serfdom, prostitution and other forms of sexual exploitation (such as table dancing), labor exploitation,[33] forced labor, the use of children for organized crime, forced begging, illegal adoption, forced or servile marriage, the trafficking of organs and unlawful biomedical research on humans.[34] Article 14 of the current law also defines the production, distribution, and possession of pornography as a form of trafficking.[35]

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[32] U.S. Department of State, *Trafficking in Persons Report*, U.S. Department of State (2015).

[33] It is worth noting that the concept of labor exploitation is quite broad and unless we are talking about forced labor, this phenomenon cannot be considered strictly human trafficking.

[34] Chamber of Deputies, *Ley General para Prevenir, Sancionar y Erradicar los Delitos en Materia de Trata de Personas y para la Protección y Asistencia a las Víctimas de estos Delitos, Última Reforma DOF 19-03-2014*, Government of Mexico, Article 10, 7 (Feb. 20, 2014, 6:30 PM). *http://www.diputados.gob.mx/LeyesBiblio/pdf/LGPSEDMTP.pdf.*

[35] *Ibid*. Article 14, 8.

### B. *Increasing Numbers: Investigations, Convictions, and Victims*

Overall, this new broad definition of trafficking allows for an expansion beyond the Protocol's categories of "sexual exploitation, forced labor, slavery and its practices, servitude, and the removal of organs" (U.N. TIP Protocol 2000, Article 3). The definition of trafficking under the 2012 law also extends beyond the U.S. TVPA. This change has had a direct impact on how human trafficking has been prosecuted in Mexico since 2012. The broader definition of human trafficking increased the number of human trafficking cases that the Mexican government has investigated, as well as the number of convictions for this crime (see Tables 1 and 2).

Table 1
Federal and state investigations, human trafficking cases
(2008-2016)

| *Year* | *Federal Investigations* | *State Investigations* |
|---|---|---|
| 2008 | 24 (FEVIMTRA) | N/A |
| 2009 | 48 | N/A |
| 2010 | 76 (FEVIMTRA) + N/A SIEDO | N/A |
| 2011 | 67 (FEVIMTRA) | N/A |
| 2012 | 72 (FEVIMTRA) + 21 (UEITMPO) | N/A |
| 2013 | 91 (FEVIMTRA) + 48 (SEIDO) | N/A |
| 2014 | 253 | 196 |
| 2015 | 250 | 415 |
| 2016 | 188 | 288 |

Source: U.S. Department of State, *Trafficking in Persons Report*, U.S. Department of State (2009-2017). The information for each year is reported in the DOS TIP report of the following year.

Notes: Prior to 2015, the DOS TIP reports did not register the number of state investigations opened per year. Starting in 2015, the DOS TIP reports stopped distinguishing between FEVIMTRA and federal investigations by other agencies (SEIDO; UEITMPO, and SIEDO). SEIDO stands for *Subprocuraduría Especializada en Investigación de Delincuencia Organizada* (Deputy Attorney-General's Office Specialized on Investigations on Organized Crime); UEITMPO is *Unidad Especializada en Investigación de Tráfico de Menores, Personas y Órganos* (Special Prosecution Unit on Investigations of Trafficking in Minors, Persons and Organs); and SIEDO stands for *Subprocuraduría de Investigación Especializada en Delincuencia Organizada* (Deputy Attorney-General's Office for Special Investigation on Organized Crime).

Table 2
Convictions, human trafficking cases (2009-2016)

| *Year* | *Federal* | *State* |
|---|---|---|
| 2009 | 0 | 22 |
| 2010 | 1 | 49 |
| 2011 | 4 | 65 |
| 2012 | 0 | 68 |
| 2013 | 2 | 154 |
| 2014 | 8 | 137 |
| 2015 | 4 | 123 |
| Total | 19 | 618 |

Source: Secretaría de Gobernación (SEGOB), *Informe Anual de la Comisión Intersecretarial para Prevenir, Sancionar y Erradicar los Delitos en Materia de Trata de Personas 2015*, SEGOB (2016). For the years 2009-2015. "Local" convictions were decided at the High Court of Justice of the states (*Tribunal Superior de Justicia*) and "federal" convictions at the Judicial Power of the Federation (*Poder Judicial de la Federación*). This table shows the number of convictions for the years 2009-2013. The present document does not show the number of investigations conducted during those years since they were not included in the DOS TIP reports and because some inconsistencies were found in the available sources.

The number of identified victims also increased significantly (see Table 3). Mexican authorities identified 35 victims of human trafficking in the country in 2010 —considering both federal and local cases. In 2015, that number rose to 439.[36] In July 2015, news website Animal Politico reported that the number of human trafficking complaints increased 600% between 2008 and 2014.[37] In 2015, the number of federal investigations of human trafficking cases did not shift significantly from the previous year, decreasing from 253 to 250. On the other hand, state investigations more than doubled during the same year —from 196 to 415 new state investigations.[38] In 2016, both federal and state investigations decreased. During this year, Mexico's government "decreased overall funding for investigations and prosecutions," impeding its ability to investigate and prosecute human trafficking crimes.[39]

[36] Secretaría de Gobernación (SEGOB), *Informe Anual de la Comisión Intersecretarial para Prevenir, Sancionar y Erradicar los Delitos en Materia de Trata de Personas 2015*, segob (2016).

[37] Arturo Ángel, *Las denuncias por trata de personas se disparan 600% en México en 6 años*, animal político, (May 21, 2017, 7:23 AM), *http://www.animalpolitico.com/2015/07/las-denuncias-por-trata-de-personas-se-disparan-600-en-mexico-en-6-anos/*.

[38] See: Table 1, U.S. Department of State, *Trafficking in Persons Report*, U.S. Department of State (2016).

[39] U.S. Department of State, *Trafficking in Persons Report*, U.S. Department of State (2017).

Table 3
Number of victims of human trafficking (2009-2016)

| *Year* | *Federal* | *State* |
|---|---|---|
| 2009 | 0 | 25 |
| 2010 | 8 | 27 |
| 2011 | 9 | 107 |
| 2012 | 0 | 127 |
| 2013 | 5 | 211 |
| 2014 | 8 | 271 |
| 2015 | 19 | 420 |
| Total | 49 | 1,218 |

Source: Secretaría de Gobernación (SEGOB), *Informe Anual de la Comisión Intersecretarial para Prevenir, Sancionar y Erradicar los Delitos en Materia de Trata de Personas 2015*, SEGOB (2016).

The broader definition of human trafficking present in the 2012 General Law is not the only element that explains the increase of human trafficking investigations, identified victims, and complaints in the past few years in Mexico. Since 2004 Mexico has undertaken significant efforts to improve its laws, educate law enforcement agencies and judges on the nature of human trafficking, and raise awareness. Nevertheless, the adverse effects of Mexico's current definition of trafficking in persons must be acknowledged. For example, this broader definition seems to have led to a number of people, who would not be considered as traffickers under the international definition, to be prosecuted as traffickers in Mexico.

What is more, under Mexico's current legislative framework, "many other offenses that are not trafficking, but are related to it, are now punishable alongside trafficking. These include: purchasing sex while being aware that the person is trafficked, renting a building knowing it will be utilized for trafficking, and posting advertisements with trafficking ends".[40] In fact, under the current Mexican anti-trafficking law, if you benefit from the exploitation or are aware of the exploitation of a person, you can be considered a trafficker (for example, a person driving the vehicle that transports the victims or the woman who cleans the room, house or apartment where the victims are

[40] Guadalupe Correa-Cabrera & Jennifer Bryson Clark, *Re-victimizing Trafficked Migrant Women: The Southern Border Plan and Mexico's Anti-trafficking Legislation,* 1 Eurasia Border Review 7, 61 (2016).

kept could be defined as human traffickers).[41] However, these two conditions constitute a different phenomenon and should not be equated to trafficking in persons as they currently are.

### C. *Trafficking vs. Sexual Exploitation*

Critics of Mexico's General Law claim that the new law lacks precision in the language and is too complex to be consistently applied by authorities. Some also report that not focusing on force, fraud, or coercion has led public officials to target sex workers instead of concentrating on actual trafficking, with public officials conflating trafficking with prostitution. In fact, the 2012 law focuses primarily on sexual exploitation, and does not identify as trafficking victims those engaged in forced labor, forced begging, and compelled labor for criminal activities by organized crime. The anti-prostitution lobby heavily influenced the passage of the 2012 law, and while there is a growing awareness that trafficking in persons is not restricted to sex trafficking (including, for instance, labor trafficking), the majority of the law still remains focused on sexual exploitation.

Several human rights activists, practitioners and lawyers have recognized the adverse effects of the 2012 legislation on sex workers since it criminalizes prostitution to some extent. Such effects are the result of efforts by certain interest groups with particular agendas, including the aforementioned abolitionist groups.[42]

### D. *Trafficking and Irregular Migration*

Mexico's current anti-trafficking legislation and its definition of trafficking in persons have also had negative effects on the irregular migrant population transiting through or settling in the country. According to Mónica Salazar, a leading legal expert on Mexico's anti-trafficking legislation and former director of the anti-trafficking NGO *Colectivo contra la Trata de Personas*

[41] Prosecutors also classify as traffickers anyone who is aware, even if indirectly, that someone is a victim of trafficking and does not take action to stop the exploitation.

[42] A good example of such group is the one headed by former Congresswoman Rosa María Orozco, who had key influence in the drafting of the law, which pushes for the criminalization of prostitution in the country. Orozco, who propelled herself into the political arena by promoting herself as an anti-trafficking activist and defender of Christian values, advocates that prostitution is a form of trafficking. Other anti-trafficking activists who also oppose prostitution —including Teresa Ulloa Ziaurriz, Regional Director of the Coalition Against Trafficking in Women and Girls in Latin America and the Caribbean (CATW-LAC)— helped push for this broader definition of human trafficking and assisted Orozco's anti-prostitution efforts.

(Collective against Trafficking in Persons), the significant rise in the number of arrests after the passage of the 2012 law that considers an overly broad definition of trafficking, along with the lack of conceptual understanding of this phenomenon by a number of law enforcement agents and judges, has hampered the correct identification of migrants who have been trafficked.[43] This has resulted in re-victimization as unidentified migrant trafficking victims are frequently deported, or released and placed back in the hands of traffickers.

### 2. *The Transition Towards an Oral Adversarial System*

The country's legal system is an additional factor that has allowed ostensibly innocent individuals to be sentenced under human trafficking charges. Until very recently, Mexico applied the written inquisitorial legal system. Under this system, a judge made his/her decision based on written reports and the defendant was not allowed to address the judge nor confront his accusers. As a matter of fact, international observers often criticize Mexico for its courts' lack of transparency.[44] The written inquisitorial system led defendants to be seen as presumptively guilty rather than individuals whose innocence must be presumed. In regard to trafficking cases, the government presumed that suspects were guilty until proven innocent. When prosecutors identified victims, they automatically started identifying people as traffickers, even if they lacked evidence. According to Salazar, "the government arrested over 1,000 individuals for trafficking under the previous approach of presumed guilt." She also noted that "in Mexico City, the government arrested more than 800 people," but clarified that "it has released more than half of them for lack of evidence." [45]

The inquisitorial system sharply differs from the oral adversarial system used in the United States in which the prosecutor makes his case against the defendant to a jury, and which has now been adopted in Mexico. In 2008, Mexico approved constitutional reforms that included moving from the inquisitorial system to the oral adversarial system by 2016. Mexican states adopted the new system gradually, and the government expects that it will pro-

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[43] Guadalupe Correa-Cabrera & Jennifer Bryson Clark, *Re-victimizing Trafficked Migrant Women: The Southern Border Plan and Mexico's Anti-trafficking Legislation,* 1 Eurasia Border Review 7, 62 (2016).

[44] Paul J. Zwier & Alexander Barney, *Moving to an Oral Adversarial System in Mexico: Jurisprudential, Criminal Procedure, Evidence Law, and Trial Advocacy Implications*, 1 Emory International Law Review 26, 189 (2012).

[45] Skype interview with Mónica Salazar, lawyer and former director of the anti-trafficking NGO *Colectivo contra la Trata de Personas* (Collective against Trafficking in Persons), (Mar. 10, 2017). She mentioned that this numbers vary according to different sources. Therefore, there is no way to provide definite statistics on these cases.

vide for fairer trials. Mexico's justice reforms present a positive opportunity for more just and transparent trials. By allowing defendants a fair chance to refute accusations, Mexico can better protect innocent individuals from being wrongly convicted. Nevertheless, as US-based experts have pointed out, the new system's implementation comes with its own set of shortcomings, including unsatisfactory police oversight and deficient respect to defendants' rights.[46]

Not only does Mexico's anti-trafficking legislation raise significant concerns, but how the country enforces it has also been problematic. One example is the Mexican state of Quintana Roo. According to official state government statistics, between 2010 and 2013, the Quintana Roo government started eight processes to investigate human trafficking. The government identified 32 people as trafficking victims but was unable to convict any perpetrators. "Those are extraordinarily low numbers, considering that Quintana Roo's largest city, Cancún, is an internationally-known hub for sex trafficking."[47]

A further problem is that state authorities have enforced anti-human trafficking laws unevenly. Congress drafted and adopted the 2012 General Law to ensure that states would investigate and prosecute human trafficking following federal norms and definitions. In fact, the current legislation requires Mexican states to adjust their anti-trafficking laws in accordance with the federal law. However, each state is allowed to legislate and prosecute trafficking as they see fit. According to Arun Kumar Acharya, a professor at Universidad Autónoma de Nuevo León, while most Mexican states have specific anti-trafficking laws based on the federal law, "many states' laws do not criminalize all forms of trafficking and these inconsistencies complicate interstate investigations, prosecutions, and convictions".[48] Quintana Roo, again, illustrates this issue. Here the state legislature passed its own TIP law, but the Attorney General's Office (PGR) and the National Human Rights Commission (CNDH) are currently contesting eleven of its articles. They claim the contested articles are inconsistent with the existing federal legislation and overlap the federal government's jurisdiction.[49]

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[46] Bill Kisliuk, *UCLA-led Study Highlights Shortcomings of Mexican Criminal Justice Reforms*, UCLA Newsroom, (May 22, 2017, 5:43 PM), *http://newsroom.ucla.edu/releases/ucla-led-study-highlights-shortcomings-of-mexican-criminal-justice-reforms*.

[47] Guadalupe Correa-Cabrera & Jennifer Bryson Clark, *Re-victimizing Trafficked Migrant Women: The Southern Border Plan and Mexico's Anti-trafficking Legislation,* 1 eurasia border review 7, 62-63 (2016).

[48] *Ibid*, 61.

[49] The current imbroglio between federal and state authorities over TIP legislation in Quintana Roo has led some to believe that the state is not covered by any anti-trafficking law. This is an incorrect assumption. Even in the absence of a state legislation, the federal law still applies.

## V. Tapachula and the Effects of the 2012 General Law

As mentioned at the beginning of the present article, an illustrative case of the pitfalls of Mexico's definition of trafficking in persons and current anti-trafficking legislation is the city of Tapachula, located in Mexico's southernmost state of Chiapas. Situated just eleven miles from the border with Guatemala, the city has long been a hub for Central American migrants entering Mexico. Since 2006, when President Vincente Fox inaugurated a triage center for undocumented migrants known as *Estación Migratoria Siglo XXI* (21st Century Migration Station) in the city, Tapachula has also become a convergence point for migrants in the process of being deported from Mexico.[50]

As an arrival and departure location for migrants, Tapachula is a focal point of exploitation of vulnerable Central Americans along Mexico's southern border. Unaccompanied Central American children selling crafts dot the city's downtown area, while girls from Guatemala, El Salvador, and Honduras work as waiters and prostitutes in shabby bars and brothels in Tapachula's marginalized quarters. The dire living conditions Central Americans face in Tapachula are not exclusive to the city, but a reflection of what migrants experience across the state of Chiapas. According to a 2014 report by the National Citizen Observatory of Justice and Legality (*Observatorio Nacional Ciudadano de Seguridad, Justicia y Legalidad*), Chiapas registered the second highest number of human trafficking cases in Mexico between 2010 and 2013. In 2013, the National Human Rights Commission (*Comisión Nacional de los Derechos Humanos*) listed Tapachula as one of Chiapas's high incidence zones of human trafficking.[51]

Tapachula-based human rights activists concur that human trafficking and exploitation take place in the city and that undocumented migrants are often victims of these crimes. For example, in 2012 Miriam González, a researcher at the Institute for Women in Migration (*Instituto para las Mujeres en la Migración*, IMUMI), reported that 58% of the women involved in the sex industry (or sex commerce) in Tapachula are of Guatemalan origin. According to González, 95% of these women are between the ages of 15 and 19 years old.[52] Gerardo Espinoza, an activist working at the Center of Human Rights Fray Matías de Córdova, informed us that trafficking for both labor and sexual exploitation

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[50] In 2015, Mexico deported 173,000 Central American migrants. Deborah Bonello, *Mexico's Deportations of Central American Migrants are Rising*, Los Angeles Times, (May 21, 2017, 6:51 PM), *http://www.latimes.com/world/mexico-americas/la-fg-mexico-migrants-20150905-story.html.*

[51] Comisión Nacional de los Derechos Humanos-México (CNDH), *Diagnóstico sobre la Situación de la Trata de Personas en México*, CNDH (2013).

[52] It is not clear how she arrived at this figure. See La Hora (staff), *Guatemaltecas en Tapachula son Obligadas a Prostituirse*, La Hora, (May 21, 2017, 9:55 AM), *http://lahora.gt/hemeroteca-lh/guatemaltecas-en-tapachula-son-obligadas-a-prostituirse/.*

is a serious problem in Tapachula. Despite these crimes being recurrent in the city, Espinoza asserted that it is hard for the police to investigate cases of labor trafficking, as gathering substantive evidence is challenging.

Although it shares similar aspects with sex trafficking, including factors such as the commercialization of sex and a high incidence of Central American women, prostitution is not illegal in Mexico and migrant women often engage in it in order to afford their journey to the North. The complicated task of distinguishing between trafficking and prostitution or sex work is left to law enforcement and judicial authorities. Unfortunately, according to several human rights advocates interviewed for this research, these authorities are often unprepared and poorly versed in what distinguishes the two activities. The broad definition of human trafficking contained in the current legislation seems to further blur the line between them. Interviewed activists reported that exploited women and sex workers alike were arrested for human trafficking in Tapachula.

Tapachula authorities have recurrently conducted raids in bars long believed to serve as fronts for brothels where Central American women, including minors, are exploited. However, the law's broad definition of human trafficking has allowed the government to prosecute and sentence for trafficking individuals with tangential connections to human trafficking networks, including bar waiters, drivers, and even the victims themselves. The police seem to arbitrarily decide who are the trafficking victims and traffickers without conducting proper investigations. Those that the police accuses of trafficking are detained and allegedly forced through threats and coercion to admit that they were in charge of the raided bar. Fabricating confessions is not the only type of irregularity that local activists accuse officers of conducting in the city. Gerardo Espinoza claimed that police officers also extort migrant women who work in bars and brothels;[53] those who cannot pay the officers are arrested and even raped. His account included the story of an activist who denounced officers for such actions. The police accused the man of being a human trafficker, and he fled the city. Espinoza believes the man is innocent and told us thatit was a common practice among local corrupt officials to file bogus charges against their opponents.

It does not seem plausible that the migrant women jailed for human trafficking that we interviewed in Tapachula were the owners, partners or top-level administrators of major sex trafficking rings. It was not evident either that they greatly benefited from this highly profitable illegal industry. [54] Most of the testimonies we gathered at the prison depicted rather poor women,

[53] Interview with Gerardo Espinoza, the Center of Human Rights Fray Matías de Córdova (Oct. 5, 2015), Tapachula, Chiapas.

[54] Many of the women we met at the local prison were illiterate, and some of them alleged that they were promised to be freed as long as they signed some paperwork; they signed, but their release never happened. One woman said, for example, that she was forced into confessing a crime she did not commit after she witnessed her husband being beaten by the

who started a journey to the United States with the sole aim of providing a better life for their families. Some of them reported their concerns over their children, whom they left with relatives in their countries of origin. Their incarceration and alienation from the workforce placed a heavy financial burden on their families . Two of the inmates we interviewed did not even have enough money to make long distance phone calls to talk to their children on a frequent basis. Their extreme levels of vulnerability, as well as their lack of social networks and knowledge of Mexico's territory, would have made it extremely difficult for them to operate a human trafficking ring, or to even participate in the regular activities of such complex organizations.

Some of the human rights violations we witnessed in Tapachula were to some extent a consequence of lawmakers' desire to protect human trafficking victims, which ultimately blurred the legal line between victims and perpetrators. The 2012 legislation was drafted as an attempt to further prevention, protection, and prosecution of trafficking in persons in the country; however, the new law contributed to generating unexpected collateral problems, such as the ones we observed in Tapachula.

## VI. Recommendations for Reform

There are reasons for mild optimism regarding Mexican anti-trafficking efforts. In October 2016, Mexico's Senate approved amendments to the 2012 anti-trafficking law that would have aligned it more closely with international law, but such reforms remained under consideration in the Chamber of Deputies.[55] In December of the same year, the Mexican Congress approved a Crime Victim's Law, "which includes but is not limited to trafficking victims; and mandates the creation of a federal fund for crime victim assistance and mandates the states also create such funds".[56] On February 8, 2017, the lower house of the Mexican Congress hosted a "Preventing Human Trafficking" forum, where members of the Congress's Special Commission on Trafficking in Persons, National Commission on Human Rights (CNDH), and Inter-Secretarial Commission on Trafficking in Persons discussed avenuesto improve the country's anti-trafficking legislation.[57]

At this last event, Congresswoman Julieta Fernández Márquez (PRI), president of the Special Commission on Trafficking in Persons, declared that "it is urgent [for Mexico] to adopt a law that truly pinpoints the origins of the

police. More than half of the women in prison accused of human trafficking were migrants from Central America.

[55] U.S. Department of State, *Trafficking in Persons Report*, U.S. Department of State (2017).

[56] *Ibid*. 279.

[57] Veracruzanos.info (staff), *Crece delito de trata: uno de cada 7 adolescentes ha recibido ofertas sexuales por internet*, Veracruzanos.info (Feb. 9, 2017, 3:47 AM), *http://veracruzanos.info/crece-delito-de-trata-uno-de-cada-7-adolescentes-ha-recibido-ofertas-sexuales-por-internet/*.

problem and takes into consideration the living situation of [human trafficking] victims."[58] According to Congressman César Camacho Quiroz (PRI), lawmakers have a duty to "craft an anti-trafficking legislation that is adequate, judicially solid, and efficient."[59] In February 2017, the President of the Chamber of Deputies, Congressman Javier Bolaños Aguilar (of the National Action Party, PAN), stated that reforming the country's anti-trafficking legislation should be a priority to all political parties in Mexico.[60] Despite lawmakers' willingness to reform and amend the 2012 legislation, their aims are sometimes at odds with what some experts believe would be an adequate legal framework.

Believing that the 2007 stricter definition of human trafficking inhibited the government's ability to identify and prosecute traffickers, Mexican lawmakers downgraded the means of human trafficking, i.e. coercion, abduction, fraud, deception, and abuse of power, from an essential component of the crime to an aggravating factor. However, as Mexico's authorities still lack a clear and proper procedure to identify traffickers, they are unable to assert that all individuals they have apprehended for trafficking have indeed committed the crime, or have been victims of trafficking. Notwithstanding this fact, Mexican lawmakers do not seem inclined to reclassify means of trafficking as an essential component of the crime. Instead, they are focusing on expanding the list of acts that fall under the human trafficking conceptual umbrella. Critics claim that merely expanding the list of crimes that can be prosecuted as trafficking would not only be insufficient to combat trafficking, but it would also contribute to prosecuting as human traffickers people who did not commit trafficking.

Mónica Salazar believes that a more efficient approach would be to craft concise legislation that explicitly and accurately defines the fundamental components of human trafficking. In her words, lawmakers should focus on defining human trafficking as the crime of "exploiting a person, by any means, in order to benefit from said exploitation." From a conceptual standpoint, according to Salazar, the sort of exploitation a person is submitted to, including forced labor and sexual servitude, is irrelevant to determine if a crime constitutes human trafficking. Currently, Article 10 of the 2012 legislation specifically lists eleven forms of exploitation that Mexico understands as constituents of trafficking.[61]

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[58] Chamber of Deputies, *Traslado de seres humanos de un lugar a otro con fines de explotación sexual o laboral, Delito de Lesa Humanidad,* Bulletin 3024, Government of Mexico (Aug. 3, 2017, 10:24 AM). *http://www5.diputados.gob.mx/index.php/camara/Comunicacion/Boletines/2017/Febrero/08/3024-Traslado-de-seres-humanos-de-un-lugar-a-otro-con-fines-de-explotacion-sexual-o-laboral-delito-de-lesa-humanidad*.

[59] *Id*.

[60] *Diputados llaman a dar celeridad a reformas contra trata de personas*, Noticias Terra, (May 22, 2017, 4:16 PM), *http://www.20minutos.com.mx/noticia/190581/0/diputados-llaman-a-dar-celeridad-a-reformas-contra-trata-de-personas/*

[61] Skype interview with Mónica Salazar (Mar. 10, 2017).

Salazar also pointed to Articles 23 and 40 of the current law as problematic. Article 23 lists the conditions under which compelled labor will not be considered forced labor nor labor exploitation. Its section 4 lists "labor done by members of local, national, or international organizations for the benefit of civil society groups or associations and private or public benefit institutions." This definition encompasses work done by religious organizations as well as NGOs. Given that some church shelters and NGOs have been suspected of exploiting migrants and other vulnerable groups, this exemption is particularly concerning. Article 40 does not distinguish between underage and adult individuals, stating that regardless of a victim's age or how he/she was exploited, a victim's consent will not preclude the perpetrator from penal responsibility. By ignoring consent given by adults, the current legislation denies individuals' judicial rights and agency.

According to Salazar, a more efficient law would be based on four main guidelines. First, rather than listing specific forms of exploitation, it should provide a concise definition of human trafficking in accordance with the one presented in the Palermo Protocol, including defining means as an essential component of trafficking. Second, Mexican authorities must have a complete understanding of what constitutes human trafficking in order to effectively define and combat it. Third, the new legislation should clearly recognize the agency of adults regarding consent. Fourth, lawmakers should draft the law pragmatically, without including clauses sanctioning other crimes and activities, such as labor exploitation and prostitution.[62]

## VII. Conclusion

In conclusion, from a conceptual standpoint, Mexico's 2012 anti-trafficking law provides a broad definition of trafficking in persons that does not include force, fraud, and coercion as essential elements of trafficking, but merely as aggravating factors to it. Such a definition allows Mexican authorities to investigate and condemn individuals for human trafficking even if, following internationally-adopted definitions, they have not committed this crime. The current anti-trafficking legislation in Mexico has in fact led to the misidentification of victims and perpetrators. It has also led to the re-victimization of the former, as we were able to ascertain in our visit to Tapachula's women prison. What is more, with the current approach to prosecution of human trafficking crimes in Mexico, more people are identified as traffickers. The higher the number of identified traffickers, the greater the funding anti-trafficking agencies and organizations receive. Anomalies in Mexico's justice system are thus strengthened by these perverse incentives.

Although Mexico's anti-trafficking efforts, including crafting anti-trafficking laws and creating a special prosecutor's office to investigate and fight hu-

[62] Skype interview with Mónica Salazar (Mar. 10, 2017).

man trafficking across the country must be acknowledged and praised, the many existing shortcomings in Mexico's legislative framework and justice system, in general, must be equally recognized and criticized. In many instances, the Mexican government has acted against the interests and security of the trafficking victims it is required to protect. Abuse and negligence were recurring themes in the field research we conducted. Under the current legislative framework, Mexican authorities have essentially prosecuted those who are in direct contact with victims of exploitation, rather than those who are "in charge" or who benefit from exploitation.

As Mónica Salazar stated: "The government should conduct proactive investigations. It should investigate who is in charge of the trafficking rings; who is the second in charge; who is responsible to watch over the victims; who assaults them; who threatens them; who forces them into debt, etc. Responsibilities and crimes must be differentiated. The government does not often proceed in this way because it would increase the complexity of investigations."[63] In fact, under the current legislative scheme, we do not know who is really benefitting from trafficking. It is fair to assume that some of those benefitting the most from human trafficking networks likely have links with government authorities or influential members of the business community. However, most of the time these high-level connections are not correctly identified and the real beneficiaries of the big businesses of human trafficking are never investigated, arrested, or tried. The most vulnerable are those who very frequently end up in jail, paying the consequences of a limited justice system and deficient legal framework.

By removing the means from the definition of trafficking in persons, "prostitution, and other forms of sexual exploitation are synonymous with forced prostitution (trafficking)," thus making it difficult to identify the real victims and actual traffickers.[64] Groups that support this idea —mostly abolitionists or anti-prostitution advocates— believe that by eliminating prostitution, sex trafficking is eliminated (see Appendix 1). However, in reality, this does not seem to be the case. Prostitution might involve the consent of all implicated parties, while sex trafficking necessarily involves a victim. Hence, it is important to make a clear distinction between prostitution and trafficking. In this way, sex workers will be allowed to work within legal parameters and will become less vulnerable. These actions might not end violence and exploitation, but will plausibly decrease them.

The implementation of the 2012 General Law, which inaccurately conceptualizes trafficking in persons, has also created stark divisions among government actors and civil society groups, thus generating further problems and

[63] Skype interview with Mónica Salazar (Mar. 10, 2017).

[64] Guadalupe Correa-Cabrera & Jennifer Bryson Clark, *Re-victimizing Trafficked Migrant Women: The Southern Border Plan and Mexico's Anti-trafficking Legislation,* 1 Eurasia Border Review 7, 55-70 (2016).

hampering collaboration among the different actors interested in fighting this high-level crime.[65] There have been some important recent efforts to reform the current anti-trafficking legislation. In 2013 the Mexican Senate initiated a process of legislative reform with the aim of minimizing the risk of detaining and punishing innocent people. This proposal attempts to recover the key elements of internationally-adopted definitions of trafficking in persons by reincorporating the "means" and thus requiring evidence of subjugation. The proposed reform also aims to harmonize the standards for victims' protection with the contents of Mexico's General Law for Victims (*Ley General de Víctimas*).[66] Unfortunately, this reform has been stuck in the Chamber of Deputies for four years. Specific interest groups have influenced such actions, with abolitionist or anti-prostitution NGOs taking the lead to stop this reform.[67]

The broader definition of human trafficking present in the 2012 legislation has negative implications for Mexico's anti-trafficking efforts. It diverges from internationally-adopted definitions and covers a wide array of non-trafficking crimes and activities under its umbrella. Although Mexican law enforcement agencies criticized the 2007 anti-trafficking legislation for being too focused on the details of what constitutes human trafficking and for consequently resulting harder to apply, the far-reaching scope of the current definition misdirects and misapplies anti-trafficking efforts and funds. Mexico must adopt a definition that better describes the phenomenon of trafficking in persons. It must also develop and follow a program to ensure that government officials clearly understand what constitutes human trafficking.

## VIII. Appendix: Prostitution and Human Trafficking: A Historical Debate

The definition of human trafficking formulated in the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children of 2000 is the most influential conceptualization of trafficking in contemporary times. Its characterization of human trafficking as an activity consisting of means, purpose, and actions has influenced the draft of subsequent anti-trafficking legislation by national legislatures. However, despite the Palermo Protocol's near-universal adoption with its 172 party states, the process of drafting its definition of human trafficking was not the product of consensus, but the result of a compromise between clashing views

[65] Hispanics in Philanthropy (HIP), *Una mirada desde las organizaciones de la sociedad civil a la trata de personas en México*, Hispanics in Philanthropy, 9 (2017).

[66] See: Chamber of Deputies, *Ley General de Víctimas, Última Reforma DOF 03-01-2017*, Government of Mexico (May 22, 2017; 7:25 PM). *http://www.conocer.gob.mx/templates/conocer/modulos_conocer/pdf/LEY%20GENERAL%20DE%20ViCTIMAS.pdf.*

[67] Hispanics in Philanthropy (HIP), *Una mirada desde las organizaciones de la sociedad civil a la trata de personas en México*, Hispanics in Philanthropy, 11 (2017).

on what constitutes trafficking. The ongoing debate in Mexico on whether human trafficking is an illicit activity that covers primarily sexual exploitation of women and children, including prostitution, or a crime that includes other forms of exploitation such as forced labor and services is a centuries-old discussion that was at the center of the protocol's drafting process.

Following resolution 53/111 of December 9, 1998, the United Nations General Assembly established an Ad Hoc Committee, open to all states, in order to begin drafting what would become the Convention against Transnational Organized Crime. The committee met in Vienna eleven times between January of 1999 and the General Assembly adoption of the convention in November 2000. By analyzing the *travaux préparatoires* of the convention and its three protocols, it is possible to observe the evolution of the protocol against human trafficking going from one that focused primarily on the sexual exploitation of women and children to the definition currently in place, which does not discriminate victims based on sex, age, or type of exploitation suffered.

Produced in the first session of the Ad Hoc Committee, which took place from January 19 to 29, 1999, the first draft of the protocol against human trafficking was titled "Draft Protocol to Combat International *Trafficking in Women and Children* supplementary to the United Nations Convention on Transnational Organized Crime" (emphasis added). Its purpose was "to prevent, investigate and prosecute trafficking in persons for the purpose of forced labor, prostitution or other sexual exploitation, giving particular attention to the protection of women and children, who are so often the victims of organized crime." During its second session, from March 8 to 12, 1999, the Committee incorporated changes to the draft based on proposals made by Argentina and the United States. The Argentine delegation wanted to restrict the definition of trafficking to women and children while the American delegation desired to expand the definition to encompass other victims as well.[68] By the third session, "almost all countries expressed their preference that the Protocol address all persons rather than only women and children, although particular attention should be given to the protection of women and children."[69]

The debates in Vienna over what activities should be considered trafficking, if sexual exploitation should be the primary concern, and whether prostitution should count as a form of trafficking were not restricted to states. In her 2005 article titled "Now You See Her, Now You Don't: Sex Workers at the UN Trafficking Protocol Negotiation," Dr. Jo Doezema, a sex worker

[68] As recorded in footnote 1 of "Revised Draft Protocol to Prevent, Suppress, and Punish Trafficking in Women and Children, Supplementing the Convention against Transnational Organized Crime, Combined Proposed Drafts of Argentina and the United States of America." United Nations Document Symbol A/AC.254/4/Add.3/Rev.1.

[69] Footnote 2 of "Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime." United Nations Document Symbol A/AC.254/4/Add.3/Rev.2.

rights activist and scholar, described lobby from both pro-prostitution and anti-prostitution feminist organizations during the two years of negotiations in Vienna that resulted in the trafficking protocol. In her words, "The lobby efforts were split into two 'camps', deeply divided in their attitudes towards prostitution. One lobby group, the Human Rights Caucus, saw prostitution as legitimate labor. The other, led by the Coalition Against Trafficking in Women (CATW), saw all prostitution as a violation of women's human rights".[70] This divide between states as well as between feminist activists on how, if in any way, prostitution is connected to human trafficking, dates back to the inception of the concept of human trafficking in international law.

Drafted in 1902 and signed in 1904 by sixteen states, the "International Agreement for the Suppression of the White Slave Traffic" was the first international accord on human trafficking. Advocacy by anti-prostitution movements, known as abolitionists, in England, Western Europe, and the United States propelled the treaty.[71] Josephine Butler, one of the main women's rights activist of Victorian Britain, actively campaigned for the criminalization of prostitution. She collaborated with journalist W.T. Stead, the author of multiple reports of British girls and women being sold into prostitution abroad, in helping to disseminate the "white slavery" panic of the late 19th century.[72] Abolitionist activists did not believe that any woman would voluntarily choose to be a sex worker, and thus would only be in such a position if she had been forced or coerced.

In its first article, the 1904 treaty states that "Each of the Contracting Governments undertakes to establish or name some authority charged with the coordination of all information relative to the procuring of women or girls for immoral purposes abroad." The role of consent is not mentioned. In 1921, the League of Nations included the traffic of boys into the agreement and in 1949 the "United Nations Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others" declared that "prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of a human person and endanger the welfare of the individual, the family, and the community of a person".[73]

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[70] Jo Doezema, *Now You See Her, Now You Don't: Sex Workers at the UN Trafficking Protocol Negotiation*, 1 Social & Legal Studies 14, 62 (2005).

[71] Elzbieta M. Gozdziak & Elizabeth Collett, *Research on Human Trafficking in North America: A Review of Literature,* 1-2 International Migration 43, 100 (2005).

[72] University of Toronto Libraries, *Legislating the 'White Slave Panic,' 1885-1914,* University of Toronto, (Nov. 26, 2017, 6:36 PM), *https://exhibits.library.utoronto.ca/exhibits/show/bawdy/white-slave-trade.*

[73] Elzbieta M. Gozdziak & Elizabeth Collett, *Research on Human Trafficking in North America: A Review of Literature,* (1-2) International Migration 34, 100-101 (2005).

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# THE MERIDA INITIATIVE AND THE TORT CLAIMS ACT: HUMAN RIGHTS VIOLATIONS AND FOREIGN NON-CONTRACTUAL CIVIL LIABILITY IN THE UNITED STATES

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Abstract: *This article discusses the possibility that Mexican victims of human rights violations may take advantage of the contents of the Alien Tort Claims Act to sue Mexican officials for extra-contractual civil liability in the event that they suffer damages derived from the use of firearms, technology, or otherwise, linked to the Merida Initiative. We analyze the Merida Initiative to Combat Illicit Narcotics and Reduce Organized Crime Authorization Act of 2008, and the Alien Tort Claims Act, also known as the Alien Tort Statute. We also refer to related Acts such as the Foreign Sovereign Immunities Act and the Torture Victim Protection Act, as well as to cases that help to understand the scope and limitations of the Alien Tort Claims Act. We conclude that the Merida Initiative and the resources allocated under it have deepened human rights violations in Mexico, and that the Alien Tort Claims Act could be invoked by Mexicans victims of such violations and of the "war" against drug trafficking under the framework of the Merida Initiative.*

Keywords: *Humans rights, Alien Tort Claims Act, Merida Initiative to Combat Illicit Narcotics and Reduce Organized Crime Authorization Act.*

Resumen: *El artículo discute la posibilidad de que víctimas mexicanas de violaciones a derechos humanos aprovechen el contenido de la Ley de Demandas por Agravios a Extranjeros para demandar a los funcionarios mexicanos por responsabilidad civil extracontractual en caso de que sufran daños derivados del uso de armas de fuego, u otros, vinculados a la Iniciativa Mérida. Por lo anterior, analizamos la Ley de Mérida para Combatir los Estupefacientes Ilícitos y Reducir la Delincuencia Organizada de 2008, y la Ley de Reclamaciones*

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*contra Agentes Extranjeros, también conocida como la Ley de Demandas por Agravios a Extranjeros. También nos referimos a Actas relacionadas, tal como la Ley de Inmunidades Soberanas Extranjeras y la Ley de Protección a Víctimas de la Tortura, así como diversos casos que ayudan a entender el alcance y limitaciones de la Ley de Demandas por Agravios a Extranjeros. Concluimos que la Iniciativa Mérida y los recursos asignados por ella han profundizado las violaciones de derechos humanos en Mexico y que la Ley de Demandas por Agravios a Extranjeros puede ser invocada por mexicanos víctimas de tales violaciones y de la "guerra" contra el narcotráfico en el marco de la Iniciativa Mérida.*

Palabras clave: *Derechos Humanos, Ley de Reclamaciones de Agentes Extranjeros, Ley de Mérida para Combatir los Estupefacientes Ilícitos y Reducir la Delincuencia Organizada.*

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## I. Introduction

In 2002 John E. Howard, the former Vice-President of International Policy and programs at the US Chamber of Commerce, wrote an article in which he asked readers:

> Did you know that, under current U.S. law, foreigners can sue your company in U.S. courts — if you simply did business, paid taxes and complied with the laws of a foreign country in which those foreigners allege that an atrocity occurred?
>
> Did you know that foreign nationals can sue your company if your products or resources were used in a U.S. military campaign against terrorists in those foreign nations?

> Did you know that your company can be sued if it was present in a country where that country's government had engaged in actions to put an end to riots, rebellion, or other disorders, whether or not you played any role in the disorders or the government's response?[1]

John E. Howard then responded to his own questions, saying that all of the above is indeed possible under the Alien Tort Claims Act (ACTA) of 1789.[2] Howard's questions demonstrate a fear of this specialized law on liability, which was ignored for years.

> The ATCA was forgotten for two hundred years, but in 1979 a Paraguayan sued an Asuncion police officer for the torture and death of his son during the dictatorship of General Stroessner using that law. The case, -*Filártiga v. Peña Irala*-[3] ushered in a series of suits through which the courts of the United States have expanded the application of the ATCA, including claims for atrocities committed outside the US by state representatives and other foreign nationals, including large multinational corporations.[4]

ATCA gained notoriety because it allows US courts to consider human rights cases filed by foreign nationals for acts committed outside the United States, granting jurisdiction to US Federal Courts over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[5]

Here we must ask ourselves, are the fears expressed by John E. Howard real? The importance of the answer lies in that our country –Mexico— has been fighting a "war" against drug traffickers, and in this war the participa-

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[1] John E. Howard, *The Alien Tort Claims Act: Is Our Litigation*, U.S. Chamber of Commerce (March 5, 2017, 10:30 AM), *https://www.uschamber.com/op-ed/alien-tort-claims-act-our-litigation*.

[2] John E. Howard, *The Alien Tort Claims Act: Is Our Litigation*, U.S. Chamber of Commerce (March 5, 2017, 10:30 AM), *https://www.uschamber.com/op-ed/alien-tort-claims-act-our-litigation*. Howard argued: "For nearly 200 years, this law remained on the books without being used. However, in 1980, a U.S. Court awarded over $10 million to the family of a Paraguayan human rights activist that had been tortured by a Paraguayan police inspector who had subsequently moved to the United States. (The $10 million was never collected.) And in 1995, a 2nd Circuit ruling in a suit against Bosnian Serb alleged war criminal Radovan Karadzic by his victims held that Mr. Karadzic need not be a government official to be sued under ATCA—a ruling that set the stage for the various lawsuits against companies that are pending today."

[3] 630 F.2d 876, United States Court of Appeals, Second Circuit. Dolly M. E. Filartiga and Joel Filártiga, Plaintiffs-Appellants, v. Americo Norberto Pena-Irala, Defendant-Appellee. No. 191, Docket 79-6090. Argued Oct. 16, 1979. Decided June 30, 1980

[4] Nicolás, Zambrana, *La Alien Tort Claims Act, una norma eficaz para luchar por los derechos humanos*, Legaltoday, (March 11, 2017, 10:00 PM), h*ttp://www.legaltoday.com/practica-juridica/supranacional/international_dispute_resolutions/la-alien-tort-claims-act-una-norma-eficaz-para-luchar-por-los-derechos-humanos.*

[5] Global Policy Forum, *Alien Tort Claims Act*, Global Policy Forum, (March 10, 2017, 12:00 PM), *https://www.globalpolicy.org/international-justice/alien-tort-claims-act-6-30.html.*

tion of the United States is clear. American funds, firearms and technology are all used in Mexico within the framework of the Merida Initiative. Here, we must clarify that the fears expressed by John E. Howard refer to US corporations; our interest is not primarily regarding violations of human rights by corporations but by Mexican officials. So, given the necessary adjustments, could the words of John E. Howard mean that, in terms of ATCA, Mexicans could be in a position to sue Mexican presidents and officials for extra-contractual civil liability resulting from possible damages stemming from the deployment of firearms or technology derived from the aid given to Mexico under the framework of the Merida Initiative?

In order to consider the above, it is necessary to examine the following: ATCA and its impact on non-contractual civil liability, particularly in cases of human rights violations; the evolution of the jurisprudence regarding ATCA and the possibility of effective compensation for damages; and the Merida Initiative and its relationship with ATCA.

In this article, we seek to determine if Mexican citizens who have been victims of human rights violations can use ATCA to sue Mexican heads of state and officials for extra-contractual civil liability in the event that they suffer damages derived from the use of firearms or technology from the Merida Initiative.

## II. Regional Security Initiative or Merida Initiative

The H.R. 6028 (110th): *Merida Initiative to Combat Illicit Narcotics and Reduce Organized Crime Authorization Act of 2008* (Merida Initiative)[6], is an enacted written statute or primary legislation, and thus, a federal law of Congress.

In Mexico the Merida Initiative is considered a *Letter of Agreement* between the United States and Mexico,[7] signed in 2007, which authorizes law enforcement and security cooperation and assistance to enhance the rule of law and strengthen civilian institutions in Mexico and the countries of Central America, and for other purposes.

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[6] Merida Initiative to Combat Illicit Narcotics and Reduce Organized Crime Authorization Act of 2008, H.R. 6028 (110th), (April 2, 2017, 5 PM) *https://www.govtrack.us/congress/bills/110/hr6028/text.*

[7] *Primera Reunión del Grupo de Alto Nivel. Declaración Conjunta del Grupo de Alto Nivel* (Joint Declaration of the High-level group), celebrated the December 19, 2000, in Washington, D.C., *https://mex-eua.sre.gob.mx/images/stories/PDF/GANI.pdf* which states: "Mexico and The United States signed a Letter of Agreement (LOA by its acronym in English) which makes available the first 197 million dollars of this program".

For the United States-Mexico Chamber of Commerce, the Merida Initiative is a cooperation agreement for security matters between United States and Mexico primarily, but also includes Central America. *Documento temático 1 - EE.UU. - Mexico Cooperación en Seguridad* (2011,1) (December 12, 2017, 11 AM), *http://www.usmcoc.org/papers-current/1-EE%20UU-Mexico-Cooperacion-en-Seguridad.pdf.*

As stated in the Merida Initiative, Section 2(3), the term "Merida Initiative" refers to the program announced by the United States and Mexico on October 22, 2007, to fight illicit narcotics trafficking and criminal organizations throughout the Western Hemisphere.

According to the US Congress, Mexico can and has served as a critical ally and partner in stemming the flow of illegal narcotics into the United States. Under the leadership of Mexican President Felipe Calderón, the United States and Mexico initiated an approach of joint responsibility to confront the threat of illicit narcotics trafficking and organized crime in the Western Hemisphere;[8] in addition, the Merida Initiative is an instrument of anti-crime policy in the United States and Mexico. The Merida Initiative began during Felipe Calderón's presidency, and has continued through the government of President Enrique Peña Nieto.

The Merida Initiative is a program to fight illicit narcotics trafficking and criminal organizations throughout the Western Hemisphere, this is made clear in the joint statements of the Act, which establish:

> (A) Mexico pledged to 'strengthen its operational capabilities to more effectively fight drug-traffickers and organized crime'; (B) the United States pledged 'to intensify its efforts to address all aspects of drug trafficking (including demand-related portions) and continue to combat trafficking of weapons and bulk currency to Mexico'; and (C) both nations pledged to 'augment cooperation, coordination, and the exchange of information to fight criminal organizations on both sides of the border'.[9]

As we can see, the Merida Initiative includes a cooperation agenda between the United States and Mexico related to organized crime. Besides being a long-term strategy to adequately contain the north/south flows of illicit narcotics along the United States-Mexico border, the Merida Initiative is also a means to protect a vast and free flow of trade. Section 102 (2) of the Act states: "The United States needs to ensure the free flow of trade between the United States and its critical neighbor, Mexico, while ensuring that the United States border is protected from illegal smuggling into the United States."

This demonstrates that the Merida Initiative is closely related to the North American Free Trade Agreement (NAFTA). Paul Ashby went so far as to argue that while there is no doubt that a security agenda has emerged in North America, "the reasons for this are absolutely and fundamentally connected to the region´s integration."[10]

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[8] The Merida Initiative Act, Title I. "Assistance for Mexico", Sec. 101. "Findings", states that: "*In March 2007, President George W. Bush and Mexican President Calderon held a summit in the Mexican City of Merida and agreed that the United States and Mexico must expand bilateral and regional cooperation to fight violence stemming from narcotrafficking and regional criminal organizations".*

[9] Merida Initiative Act, Section 101 (10).

[10] Paul Ashby, *Land Security: The Merida Initiative, Transnational Threats, and U.S. Security Projection in Mexico*, (2015, 112) (Doctor of Philosophy thesis, University of Kent), (March

Within the framework of this security agenda, the US Congress declared its intention to provide its expertise to meet the immediate security needs along the United States-Mexico border, to fight the production and flow of illicit narcotics, and to support Mexico in its efforts to do the same. Also, Congress declared that the United States should support the Government of Mexico's work to expand its own law enforcement, so as to independently conduct successful counternarcotics and organized crime related operations; stating that the Merida Initiative reflects the belief that Mexican military involvement is required in the short-term to stabilize the security situation, while recognizing that most aspects of this problem fall under the jurisdiction of law enforcement.[11]

Regarding law enforcement and security aid, the Merida Initiative highlights the "purposes of assistance" which are:

1. Enhance the ability of the Government of Mexico, in cooperation with the United States, to control illicit narcotics production, trafficking, drug trafficking organizations, and organized crime;
2. Help build the capacity of law enforcement forces of Mexico to control illicit narcotics production, trafficking, drug trafficking organizations, and organized crime;
3. Aid the support role that the armed forces of Mexico is providing to law enforcement agencies of Mexico as the security situation in Mexico is initially stabilized;
4. Protect and secure the United States-Mexico border, and control illegal activity going south as well as north;
5. Strengthen the bilateral and regional ties of the United States with Mexico and the countries of Central America;
6. Strengthen respect for internationally recognized human rights and the rule of law in efforts to stabilize the security environment relating to illicit narcotics production and trafficking and organized crime;
7. Support the judicial branches of the Government of Mexico and the countries of Central America, as well as support anti-corruption efforts in those countries; and
8. Respond to the direct requests of the Government of Mexico that the United States reduce the demand for illicit narcotics in the United States, stem the flow of illegal arms into Mexico from the United States, stem the flow of illegal bulk-cash transfers into Mexico from the United States, and stem the flow of illegal precursor chemicals into Mexico from the United States.[12]

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15, 2017: 10AM), *https://kar.kent.ac.uk/48367/1/142NAFTA-land%20Security%20The%20M%C3%A9rida%20Initiative,%20Transnational%20Threats,%20and%20U.S.%20S.pdf.*

[11] Merida Initiative Act, Section 102 "Declarations of policy", subsections (4), (5) and (6).

[12] Merida Initiative Act, Subtitle A--Law Enforcement and Security Assistance Sec. 111. Purposes of Assistance.

To carry out the stated purposes, the Merida initiative authorizes the President of the United States to provide assistance to Mexico for counternarcotics and counter-trafficking; port, airport and related security; operational technology, and public security and law enforcement:

> *Counternarcotics and counter-trafficking*. Includes assistance to build the capacity of law enforcement and security forces of Mexico to eradicate illicit narcotics trafficking and reduce trafficking-fueled violence, including along the United States-Mexico border, such as: (A) radar and aerial surveillance equipment; (B) land and maritime interdiction equipment and training, including: (i) transport helicopters and night-operating capabilities; (ii) surveillance platform planes; and (iii) maintenance and training relating to maintenance of aircraft; and (C) training of security and law enforcement units to plan and execute counternarcotics operations.
>
> *Port airport and related security*. Includes assistance in monitoring and controlling the United States-Mexico border and the border between Mexico and Central America to combat illicit narcotics trafficking, such as: (A) computer infrastructure and equipment; (B) secure communications networks; and (C) nonintrusive monitoring technology.
>
> *Operational technology.* Includes assistance in investigation and collection of intelligence against illicit drug trafficking organizations, such as: (i) expansion of intelligence databases; and (ii) hardware, operating systems, and training for updating the communications networks of security agencies. The Merida Initiative Act specifies that operational technology transferred to the Government of Mexico for intelligence or law enforcement purposes should be used solely for the purposes for which the operational technology was intended; and that the United States should take all necessary steps to ensure that use of operational technology is consistent with United States law, including protections of freedom of expression, freedom of movement, and freedom of association.
>
> *Public Security and Law Enforcement.* Includes assistance in the modernization of law enforcement entities and prevention of crime. This assistance include activities such as: (A) law enforcement training and equipment, including: (i) transport helicopters; (ii) surveillance aircraft, including Cessna Caravan light utility aircraft; (iii) nonintrusive inspection equipment; and (iv) human rights training for law enforcement units; (B) enhancement of the Government of Mexico's financial intelligence unit; (C) safety-related equipment for law enforcement officers and prosecutors, including protective vests and helmet sets; (D) reduction of drug demand in Mexico, including activities such as: (i) assistance to the National Council Against Addictions (CONADIC) to establish an Internet web-based support network; (ii) establishment of a national data center to support the CONADIC; and (iii) training of CONADIC and other agency staff in best practices and outreach and treatment programs, and design of a methodology to implement best practices in conjunction with the National Network for Technological Transfers in Addiction.[13]

[13] Merida Initiative Act, Subtitle A-Law Enforcement and Security Assistance Sec. 113. Activities Supported.

Regarding assistance by the way of funds to provide helicopters to the Government of Mexico, the Merida Initiative requires that funds be used, to the extent possible, to procure or provide helicopters that are of a similar build to those helicopters already in the possession of the Government of Mexico in order to facilitate integration of said assets into Mexico's existing air fleet. It also declares that the United States shall ensure, to the extent possible, that assistance is made available and cross-utilized by the armed forces of Mexico and relevant law enforcement agencies of the Government of Mexico, including the Mexican Office of the Attorney General.[14]

Finally, the Merida Initiative specifies that no assistance may be provided to any unit of the armed forces of Mexico or any unit of the law enforcement agencies of Mexico if the US Secretary of State determines there is credible evidence that said unit has committed gross violations of human rights. Nonetheless, it specifies that this limitation shall not apply if the Secretary of State determines and reports to the appropriate congressional committees that the Government of Mexico is taking effective measures to bring the responsible members of such unit to justice.[15]

Regarding assistance to enhance the rule of law and strengthen civilian institutions, the Merida Initiative specifies the activities that may be supported by assistance, which are: institution building and rule of law; anti-corruption, transparency and human rights; prevention; and development.

Institution building and rule of law refers to assistance in efforts to expand the rule of law and built the capacity, transparency, and trust in government institutions. This includes: A) rule of law and systemic improvements in judicial and criminal justice sector institutions, including (i) courts management and prosecutorial capacity building;(ii) prison reform activities, including those relating to anti-gang and anti-organized crime efforts; (iii) anti-money laundering programs; (iv) victim and witness protection and restitution; and (v) promotion of transparent oral trials via training for the judicial sector; (B) police professionalization, including (i) training regarding use of force; (ii) human rights education and training; iii) training regarding evidence preservation and chain of custody; and (iv) enhanced capacity to vet candidates; (C) support for the Mexican Office of the Attorney General, including (i) judicial processes improvement and coordination; (ii) enhancement of forensics capabilities; (iii) data collection and analyses; (iv) case tracking and management; (v) financial intelligence functions; and (vi) maintenance of data systems.[16]

Anti-corruption, transparency, and human rights refers to assistance to law enforcement and court institutions in Mexico to develop mechanisms to ensure due process and proper oversight and to respond to citizen complaints, including assistance such as (A) enhancement of polygraph capability in the

[14] Merida Initiative Act, Section 113. Activities supported. (a) In General.

[15] Merida Initiative Act, Section 114. Limitation on Assistance.

[16] Merida Initiative Act, Section 122. Limitation on Activities Supported (1).

Mexican Police agency; (B) support for greater transparency and accountability in the Mexican legal system, including (i) establishment of a center in the Mexican Office of the Attorney General for receipt of citizen complaints; (ii) establishment of clerk of the court system to track cases and pretrial detentions; (iii) reorganization of human and financial resources systems; and (iv) equipping and training of criminal investigators; and (C) promotion of human rights, including (i) support for human rights organizations, bar associations, and law schools; and (ii) training for police, prosecutors, and corrections officers.[17]

Prevention refers to assistance in preventing individuals from participating in illicit narcotics-related violent activities, such as (A) establishment of programs that address domestic violence and increase school attendance rates; and (B) expansion of intervention programs, including after-school programs and programs for at-risk and criminal involved youth.[18]

Development refers to assistance in the development of areas where lack of jobs breeds illicit narcotics-related violence, including (A) expansion of alternative livelihood programs, including job creation programs and rural development programs and the provision of microenterprise development assistance under title VI of chapter 2 of part I of the Foreign Assistance Act of 1961 (22 U.S.C. 2211 et seq.); and (B) establishment of gang reeducation and training programs.[19]

To support efforts related to the Merida Initiative, the United States Congress has allocated more than US$2.6 billion from Fiscal Year 2008 to Fiscal Year 2016. By November 2016, some US$1.6 billion worth of training, equipment, and technical assistance had been provided to Mexico.[20]

## III. Legal Protection of Human Rights in the United States through the Alien Tort Claims Act: Non-Contractual Civil Liability

The historical evolution of the Alien Tort Claims Act (or Alien Tort Statute) was part of the *Judiciary Act* of September 24, 1789, 1 Stat. 73, *An Act to Establish the Judicial Courts of the United States*, Section 9, which reads: "The district courts shall have (…) And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States." In Section 9 we find the original competence

[17] Merida Initiative Act, Section 122. Limitation on Activities Supported (2).

[18] Merida Initiative Act, Section 122. Limitation on Activities Supported (3).

[19] Merida Initiative Act, Section 122. Limitation on Activities Supported (4).

[20] Clare Ribando Seelke, et.al., *U.S.-Mexican Security Cooperation: The Merida Initiative and Beyond*, Congressional Research Service, (January 18, 2017, 1), (March 16, 2017, 11 AM), *https://fas.org/sgp/crs/row/R41349.pdf.*

of District Courts to apply responsibility in case of violations to law of the nations.

On February 1, 2010, Congress approved modifications to the *The Code of Laws of The United States of America.*[21] Presently, ATCA is a section of this code. This code is a consolidation and codification by subject matter of the general and permanent laws of the United States, prepared by the Office of the Law Revision Counsel of the United States House of Representatives.

U.S. Code Title 28 *Judiciary and Judicial Procedure*, part IV *Jurisdiction and Venue*", Chapter 85 *District Courts; Jurisdiction*, Section 1350 *Alien's action for tort*, states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[22]

ATCA thus allows foreigners to seek remedies in US courts for violation of human rights committed outside of the United States. The UNOCAL case (*Doe v. UNOCAL*) is considered to be one of the first victories of the ATCA, in 1996 the inhabitants of a region of Burma sued the UNOCAL Company for forced labor, rape, torture and murder committed by the military junta of that nation during the construction of an oil pipeline. Those affected stated that the company had cooperated and consented to such acts, eventually, the parties reached an agreement.

The ATCA is complemented by the *Torture Victim Protection Act* (TVPA) of 1991.[23] Section 2, *Establishment of Civil Action*, (a), of this Act prescribes that:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation: (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing, shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.[24]

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[21] Also known as *Code of Laws of the United States*, *United States Code*, *U.S. Code* o *U.S.C.*

[22] US Code, Title 28, part IV, chapter 85, § 1350.

[23] Hereinafter TVPA. Public Law 102–256, Mar. 12, 1992, 106 Stat. 73, provided that "Section 1. Short Title. 'This Act may be cited as the 'Torture Victim Protection Act of 1991.'"

[24] In Section 3, *Definitions*, The Torture Victim Protection Act of 1991, establishes: "(a) Extrajudicial Killing.-For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation. (b) Torture. For the purposes of this Act (1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and (2) mental pain

As can be noted, unlike ATCA, the TVPA requires state action and provides express causes of action for torture and for extrajudicial killing. However, the TVPA, limits access to jurisdiction when the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred and limits commencement of action to 10 years after the cause of action arose.[25] These two requirements are also applied to suits filed under ATCA. For our analysis of ATCA, we will rely on the work of professor Antoni Pigrau Solé,[26] with the necessary modifications to suit our purposes. As noted, the competence of ATCA refers to violations of human rights, in order to understand the scope and limitations of ATCA, we must refer to several cases and related Acts.

1. *Subject Matter Jurisdiction*

To sue using ATCA, the petitioner must be an *alien*,[27] that is, a foreigner; the claimant must claim to have been the victim of a prejudice or tort,[28] which constitutes a violation to the "law of nations,"[29] or a treaty[30] which is binding in the United States. These requirements are contained in cases such

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or suffering refers to prolonged mental harm caused by or resulting from (A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

[25] TVPA, Section 2(b)(c).

[26] Antoni Pigrau Solé, *La responsabilidad civil de las empresas transnacionales a través de la Alien Tort Claims Act por su participación en violaciones de derechos humanos*, 25 Revista Española de Desarrollo y Cooperación, 113, 130 (2010).

[27] According to *Webster's Dictionary* the word *alien* means: "relating, belonging, or owing allegiance to another country or government: foreign." The *Nationality Act* of 1940, HR 9980, 76th Congress, Public Law 853, October 14, 1940, lacks a definition of *alien*, nevertheless, by exclusion we can understand, from the contents of Title I, Chapter I Definitions, Section 101, subsections a), b) y c), that a foreigner is not a "national", a "national of the United States" or a person that has been conferred "naturalization".

[28] T*ort*, according to *Webster's Dictionary* is: "a wrongful act other than a breach of contract for which relief may be obtained in the form of damages or an injunction."

[29] "The Law of Nations is the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights." Emmerich de Vattel, *The law of the nations or principles of the law of nature applied to the conduct and affairs of nations and sovereigns* (1883) (April 11, 2017, 10AM), *http://www.constitution.org/vattel/vattel_pre.htm#003*.

[30] The ATCA uses the term "treaty" in accordance with Webster's Dictionary, as *a contract in writing between two or more political authorities (as states or sovereigns) formally signed by representatives duly authorized and usually ratified by the lawmaking authority of the state*. Article VI, second paragraph of the US Constitution of 1787 prescribes: *This Constitution, and the Laws of the United States which*

as *Tachiona v. Mugabe*, 2001, which established that: "The ATCA confers upon federal district courts 'original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law, of nations or a treaty of the United States.' [219] Thus, to satisfy subject matter jurisdiction under the ATCA, three conditions must be satisfied: the action must be (1) brought by an alien; (2) alleging a tort; (3) committed in violation of international law."[31]

With respect to what must be understood as torts in violation of laws of nations, in *Filartiga V. Pena-Irala*, the court stated: "the word 'tort' historically meant simply 'wrong' or 'the opposite of right,' so-called, according to Lord Coke, because it is 'wrested' or 'crooked,' being contrary to that which is 'right' and 'straight.'"[32] With regards to the term "law of nations," the court argued:

> In order to take the international condemnation of torture seriously this court must adopt a remedy appropriate to the ends and reflective of the nature of the condemnation. Torture is viewed with universal abhorrence; the prohibition of torture by international consensus and express international accords is clear and unambiguous; and "for purposes of civil liability, the torturer has become like the pirate and the slave trader before him *hostis humani generis*, an enemy of all mankind.[33]

With that, the idea of the law of nations as rights universally recognized by all nations was demarcated. On the other hand, in the case *Forti v. Suarez Mason,*[34] the District Court upheld that:

> These international torts, violations of current customary international law, are characterized by universal consensus in the international community as to their binding status and their content. That is, they are universal, definable, and obligatory international norms. [Besides, it claimed:] Because this right lacks readily ascertainable parameters, it is unclear what behavior falls within the proscription beyond such obvious torts as are already encompassed by the proscriptions of torture, summary execution and prolonged arbitrary detention. Lacking the requisite elements of universality and definability, this proposed tort cannot qualify as a violation of the law of nations.[35]

As can be noted, the law of nations are not only rights recognized by all nations but the violation of these rights must be clear, definable and without ambiguity, only then can a tort under the ATCA prosper.

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*shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.*

[31] *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001).

[32] *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984).

[33] *Id.*

[34] *Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987).*

[35] *Id.* The case of *Forti vs. Suarez Mason (Forti I)* reads: "The proscription of summary execution or murder by the state appears to be universal, is readily definable, and is of course obligatory."

In another case, *Doe I V. UNOCAL*, there is yet another delimitation of the law of nations. In the said case, the Court argued: "One threshold question in any ATCA case is whether the alleged tort is a violation of the law of nations. We have recognized that torture, murder, and slavery are jus cogens violations and, thus, violations of the law of nations. Moreover, forced labor is so widely condemned that it has achieved the status of a *jus cogens* violation."[36] Here, a violation of the law of nations means a violation of *jus cogens*. That is, the scope of claims recognizable under ATCA is reduced to *jus cogens* or violations of norms of international law, of which no nation can claim inapplicability, and which are binding on nations even if they do not agree to them, such as in cases of torture, extrajudicial killings and forced labor.[37]

As we can see, even though the scope of ATCA appears rather extensive from the wording of *US Code, Title 28, part IV, chapter 85, § 1350*, some case law seems to have reduced its scope. We must consider, however, that certain behaviors that are considered at a given time to be outside of the scope of ATCA, are later included. Nor is there always complete coherence in decisions: cruel, inhuman or degrading treatment or punishment, rejected in 1987 in the case of Argentina was accepted in 1993 for Haiti (as well as for Guatemala and Bosnia).

Even if the remedy provided for by ATCA is only obtainable for violations of *jus cogens* norms, Mexicans may be able to use it, since the war against crime has resulted in serious abuses, including unlawful or extrajudicial killings, torture and disappearances, cruel, inhumane and degrading treatment, and prolonged arbitrary detention, among other acts, which can reasonably fit within the concept of *jus cogens*.

### 2. *Time Limitation*

The TVPA enacted in 1991 specifies that no action shall be maintained unless it is commenced within 10 years after the cause of action arose.

In cases *Cabello v. Fernández-Larios*, 2002,[38] *Doe v. Saravia*, 2004,[39] and *In re "Agent Orange" product liability litigation*, 2005[40] the Courts begin to admit that time limitation of 10 years may not always apply for certain crimes (genocide,

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[36] *John Doe I c./ Unocal Corporation*, 403 F.3d 708 (9 Cir. 2005).

[37] *John Doe 1 v. Unocal Corporation*, 395 F.3d 932 (9 Cir. 2002).

[38] *Cabello v. Fernandez-Larios*, 2002, 402 F.3d 1148. Winston Cabello, a Chilean economist, was executed by Chilean military officers following a coup d'état, on October 17, 1973. On February 19, 1999, almost twenty-six years later, his survivors filed an action in district court against Armando Fernandez-Larios (Fernandez), a Chilean military officer who was alleged to have participated in his execution.

[39] *Doe v. Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004).

[40] Nos. 05-1509-cv, 05-1693-cv, 05-1694-cv, 05-1695-cv, 05-1696-cv, 05-1698-cv, 05-1700-cv, 05-1737-cv, 05-1760-cv, 05-1771-cv, 05-1810-cv, 05-1813-cv, 05-1817-cv, 05-1820-cv, 05-

crimes of war and crimes against humanity). For example, in case Cabello v. Fernández-Larios the Court determined:

> As we stated in Justice, the plaintiff should act with due diligence and file his or her action in a timely fashion in order for equitable tolling to apply. 6 F.3d at 1479. The information regarding the circumstances and manner of Cabello's death was not discoverable or knowable until 1990; therefore, the 1999 filing of this claim was timely. Our Circuit's precedent indicates that the statutory clock is stopped while tolling is in effect. Besides the Court argued: When a statute is equitably tolled, the statutory period does not begin to run until the impediment to filing a cause of action is removed. Thus, in this case, the clock was stopped until 1990 when the information surrounding Cabello's death became available. Since the statutory period began to run in 1990, the Cabello survivors' claim filed in 1999 is timely. Accordingly, we affirm the ruling of the district court and hold that the Cabello survivors' claims were not time-barred because they were entitled to equitable tolling of the ten-year statute of limitations.[41]

As can be noted, the time count is interrupted when there are extraordinary circumstances such as the existence of an impediment to file a suit or if there is no reasonable way of discovering the wrong perpetrated. Similarly, in *Jean v. Dorelien, 2005*[42], the Circuit Court highlighted:

> Under the TVPA and the ATCA, Plaintiffs have ten years from the date the cause of action arose to bring suit for torture, extrajudicial killing and other torts committed in violation of the law of nations or a treaty of the United States […] First, pursuant to the TVPA, the statute of limitations must be tolled at least until Dorélien entered the United States and personal jurisdiction could be obtained over him […] The statute of limitations should be tolled during the time the defendant was absent from the United States or from any jurisdiction in which the same or a similar action arising from the same facts may be maintained by the plaintiff, provided that the remedy in that jurisdiction is adequate and available.[43]

Thus, time limitation can also be tolled if the defendant is not in a jurisdiction where adequate remedy is available. This shows, that although there is a time limitation to sue under ATCA or TVPA, special circumstances can be argued after the 10-year period that can justify that a suit is not time barred.

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2450-cv, 05-2451-cv. *The cases concerning the United States military's acquisition and use of Agent Orange during the Vietnam War*.

41 *Cabello v. Fernandez-Larios*, No. 04-10030 (llth Cir. 2005).

42 *Marie Jean v. Dorelian*, 431 F.3d 776 (11th Cir. 2005).

43 *Id.*

The question of the retroactive application of the TVPA has also been discussed. In *Cabiri v. Assasie-Gyimah*, 1996,[44] the court stressed:

> The alleged acts of Assasie-Gyimah, if presumed to be true, violated a fundamental principle of the law of nations: the human right to be free from torture. The defendant cannot complain that he had no notice that torture was not a lawful act. Moreover, any expectation he might have had that he would not be held accountable for the brutal acts alleged is rightly disrupted. Accordingly, the Court holds that the Torture Act, which provides a ten year statute of limitations, applies retroactively to plaintiff's claims. Defendant's motion to dismiss the claims as time-barred, therefore, is denied.[45]

Thus, the TVPA provides a cause of action for violations which accrued prior to its enactment.

As was previously mentioned, Merida Initiative was funded beginning in 2008 and is still in effect, that is, it was born some nine years ago. This would mean that Mexicans seeking remedies for violations of human rights as a result of firearms of technology that comes from the Merida Initiative are not time barred.

3. *Exhaustion*

TVPA states there is access to jurisdiction in the United States when the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred, this is also applicable to ATCA. The principle of exhaustiveness of the TVPA and ATCA is discussed in case *Hilao v. Estate of Marcos*, 1996,[46] where the Court stated:

> A. Exhaustion. The Estate argues that the jury was not properly instructed because it was not required to find that each plaintiff had met the exhaustion requirement of the TVPA. The Act provides that "[a] court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred" 28 U.S.C. § 1350, note, § 2(b). The language of this provision, referring as it does to the court's authority to hear a claim, demonstrates that, contrary to the Estate's suggestion, the issue of exhaustion is one for the court, not for the jury. The Estate was therefore not entitled to the instruction it seeks.[47]

It is clear that it is the Court, and not the jury, that is entitled to decide if the requirement of exhaustion has been met. For the Court to make that

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[44] *Cabiri v. Assasie-gyimah*, 921 F. Supp. 1189 (S.D.N.Y. 1996).

[45] *Id*.

[46] *Hilao v. Estate of Marcos*, 1996, No.95-15779. Argued and Submitted June 18, 1996.

[47] *Id*.

decision, it must take into consideration not only the formal existence of remedies in a foreign forum, but also, if those existing remedies are effective and adequate. In *Xuncax v. Gramajo,* 1995, the Court sustained:

> The legislative history to the TVPA indicates that the exhaustion requirement of § 2(b) was not intended to create a prohibitively stringent condition precedent to recovery under the statute. Rather, the requirement must be read against the background of existing judicial doctrines under which exhaustion of remedies in a foreign forum is generally not required "when foreign remedies are unobtainable, ineffective, inadequate, or obviously futile."[48]

Even though there is a requirement of exhaustion for the applicability of ATCA and TVPA, this requirement can be excused if the plaintiffs' efforts to obtain remedies would be unobtainable, ineffective, inadequate or futile in forum state, that is, in the state where the conduct giving rise to the claim occurred. Therefore, Mexicans seeking to use ATCA to claim civil non-contractual liability may need to show that access to remedies in cases of human rights violations by Mexican officials is only a theoretical possibility in Mexico, and that there is not a genuine source of potential liability.

4. *Jurisdiction over a Foreign State, Heads of State and State Officials*

In the case *Argentine Republic V. Amerada Hess Shipping Corp*,[49] the Court determined that it was Congress' intention that the Foreign Sovereign Immunities Act (FSIA)[50] be the sole basis for obtaining jurisdiction over a foreign state in a court of the United States.

FSIA was enacted by the United States Congress in 1976, it seeked to codify sovereign immunity according to international law, adopting a restrictive theory of immunity which distinguished between public and private acts. Thus, FSIA confers subject matter jurisdiction over foreign sovereigns. To determine if the Courts of the United States should hear of a suit, consideration should be given to the immunity of the State by political question,

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[48] *Xuncax v. Gramajo*, 886 F.Supp. 162, 178 (D.Mass.1995).

[49] *Argentine Republic vs. Amerada Hess Shipping Corp*, (1989) 488 US 428, 109 S Ct 683. The court determined: "We think that the text and structure of the FSIA demonstrates Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts. Sections 1604 and 1330(a) work in tandem: 1604 bars federal and state courts from exercising jurisdiction when a foreign state is entitled to immunity, and 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and by aliens when a foreign state is not entitled to immunity."

[50] Hereinafter FSIA. Argentine Republic v. Amerada Hess Shipping, (1989), No. 87-1372, Argued: December 6, 1988, Decided: January 23, 1989 28 USC 1330: Actions against foreign states.

by act of State or by the principle *forum non conveniens*,[51] these three principles assume that the judge assesses whether it is appropriate to exercise judicial activity in a particular case.

A) Immunity of the State. According to the FSIA, 2000, foreign States have immunity in public acts or government acts, as determined in the cases: *Argentine Republic v. Amerada Hess Shipping Corp*, 1989;[52] *Chuidian v. Philippine National Bank*, 1990;[53] *In Re: Terrorist Attacks on September 11, 2001*, 2005.[54] This immunity extends to heads of state. Individual officials of a foreign government, when they act in official capacity, can also claim immunity.[55] But, officials who act beyond the scope of their authority are not shielded by FSIA. In the case of natural persons in practice, the Government can take a position in each case and it may be accepted by the Judge.

B) The Political Question. Based on the concept of separation of powers, it seeks to respect the positions taken by the power that is better equipped to deal with issues of a political nature. This criterion emerged from the cases *Baker v. Carr*, 1962, *Doe I v. State of Israel*, 2005;[56] *Sanchez-Espinoza v Reagan*, 1985,[57] *In re "Agent Orange" product liability litigation*, 2005; and *Sarei v. Rio Tinto, PLC*, 2007 (exception dismissed).[58]

The criteria to resolve the political question are: 1) demonstrable constitutional order of the matter to a specific branch of government; 2) inability to find judicially manageable criteria to resolve it; 3) impossibility to decide

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[51] According to Gilberto I. Boutin, *forum non conveniens* is "the limitation of discretionary nature exercised by the Anglo-Saxon or common law judge, on unspoken criteria where the claim filed has no link with the forum judge. In other words, it is the restraint exercised by the judge to reject a claim seeking a selection of a forum without any link in any double characterization in the particular interest of the business as the public interest that could have the administration of justice." Gilberto I. Boutin, Forum Non Conveniens, La limitación de la jurisdicción y la denegación de justicia 27 (Cultural Portobelo) (2003).

[52] *Argentine Rep. v. Amerada Hess*, 488 U.S. 428 (1989).

[53] *Chuidian v. Philippine National Bank*, 1990, 912 F.2d 1095.

[54] *In Re Terrorist Attacks on September* 11, 2001, 538 F.3d 71 (2d Cir. 2008).

[55] Extension of defendants' typology: a) State agents; b) individuals: *Kadic v Karadzic*, 1995; c) Armed or political groups: Islamic Front of Salvation in Algeria, *Doe V. Islamic Salvation Front*, 2003; Zimbabwe African National Union-Patriotic Front, *Tachiona v. Mugabe*, 2001; d) companies: numerous cases (Shell, Texaco, Chevron, Coca-Cola, Unocal, Rio Tinto, Del Monte, Drummond, Dyncorp, Freeport-McMoRan Copper & Gold, Pfizer, Talisman Energy, Bridgestone, Exxon, Titan, Caterpillar, Dow Chemical, Monsanto); e) authorship; f) incitement: *Doe et al. v. Lumintang*, 2001; g) complicity: *Mehinovic v. Vuckovic*, 2002; *Cabello v. Fernández Larios*, 2002; h) responsibility of superiors (Argentine General Suárez Masón, Guatemalan General Gramajo, Indonesian Generals Lumintang and Panjaitan, Nigerian General Abdulsalami Abubakar, former Heads of State of Haiti, Prosper Avril and the Philippines, Ferdinand Marcos, or assimilated to them Case of *Radovan Karadzic*, etc.).

[56] *Doe I v. State of Israel*, 400 F. Supp. 2d 86, 111-12 (D.D.C. 2005).

[57] *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (1985).

[58] *Sarei v. Rio Tinto PLC*, Nos.02-56256, 02-56390.

without an initial political determination sufficiently clear to avoid judicial discretion; 4) impossibility for the Court to adopt an independent resolution without expressly failing to respect the other branches of government; 5) an extraordinary need not to call into question a political decision already taken; and 6) potential negative consequences of different pronouncements of the various branches of government.

C) Act of State. According to the principle of sovereignty, the courts cannot judge the acts of government of another State made in its own territory, this is shown in the case *Underhill v. Hernandez*, 1897.[59] In the case of acts of State agents, it is a matter of analyzing whether they can be attributed to the Government to such an extent that they constitute State acts.[60] The applicability criteria are: i) the degree of international consensus regarding the rules applicable in the specific case; ii) the importance of the implications of the case for external relations; and iii) if the Government that committed the acts remains in power.[61]

This test has been used in numerous cases. Application was denied in: *Wiwa v. Royal Dutch Petroleum Co.*, 2002,[62] *Abiola v. Abubakar*, 2005[63] and *Sarei v. Rio Tinto*, 2007; application was affirmed in *Doe v. Liu Qi*, 2004[64] and *Doe v. State of Israel*, 2005.

D) *Forum non conveniens.* This consists of the discretionary possibility that allows the court to reject a claim even if the court is competent. The court has international jurisdiction to hear and decide the case, but declines jurisdiction because it considers it inconvenient and inappropriate to hear the case.

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[59] *Underhill v. Hernandez*, 168 U.S. 250 (1897).

[60] Accusation made during the exercise of a public function, was solved in the cases: *Lafontant v. Aristide*, 1994 [*Lafontant vs. Aristide*, 844 F. Supp. 128 (1994) Gladys M. Lafontant, plaintiff a resident of Queens, New York, seeks compensation in money damages for the killing of her husband, Dr. Roger Lafontant, by Haitian soldiers acting on the specific order of the then President of Haiti, Jean-Bertrand Aristide] and *Tachiona v. Mugabe*, 2001 [216 F.Supp.2d 262 (2002)]. In the latter case, it was established: "The district court held that Mugabe and Mudenge were entitled to diplomatic and head-of-state immunity, but that their immunity did not protect them from service of process as agents for ZANU-PF-a non-immune, private entity. Accordingly, in the district court's view, ZANU-PF was properly served with process and thus subject to a default judgment upon failure to appear in this litigation. Nevertheless sustains: In light of this court's own admonition that the inviolability principle be construed broadly, see 767 Third Ave. Assocs., 988 F.2d at 298-99, we hold that Article 29 of the Vienna Convention, as applied to Mugabe and Mudenge through Article IV, section 11(g) of the U.N. Convention on Privileges and Immunities, protected Mugabe and Mudenge from service of process as agents for ZANU-PF. Therefore, ZANU-PF was not properly served, and the claims against it should have been dismissed."

[61] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407(1964).

[62] *Wiwa et al. v. Royal Dutch Petroleum et al.*, (S.D.N.Y. ) (No. 96 Civ. 8386).

[63] *Abiola v. Abubakar*, 267 F. Supp. 2d 907, 912 (N.D. III 2003), aff'd, 408 F.3d 877 (7th Cir. 2005).

[64] *Doe v. Liu Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004).

The defendant must demonstrate: 1. That there is an appropriate alternative forum, and 2. That the presumption in favor of the jurisdiction of the forum chosen by the complainant is compensated because the weighting of the relevant factors relating to the public and private interests is clearly demarcated in favor of the alternative forum, as in the case *Gulf Oil Corp. v. Gilbert*, 1947. In *Wiwa v. Royal Dutch Petroleum Co.*, 2002 the *forum non conveniens* was dismissed; but in *Aguinda v. Texaco, Inc.*, 1996[65] and *Abdullahi v. Pfizer, Inc.*, 2005,[66] the *forum non conveniens* was accepted.

As noted, the general rule set out in FSIA is that foreign states and heads of state are entitled to immunity except otherwise provided. This means that there are exceptions to immunity. In *Tachiona v. Mugabe*:

> Sovereign immunity is not available in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.
>
> […]
>
> The FSIA also created an exception applicable to certain torts encompassing actions in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office of employment.[67]

Lastly, FSIA also includes as an exception to immunity, a waiver provided by the foreign state. Section 1605(a)(1) of FSIA provides: "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver."[68]

Should Mexican officials be sued for violations of human rights, they may claim immunity. It may then be necessary for plaintiffs to show that officials acted beyond the scope of their authority. Alternatively, the Mexican government could issue a waiver of immunity so as to hold the officials liable.

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[65] *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996).

[66] *Abdullahi v. Pfizer, Inc.*, No. 01 Civ.8118(WHP), 2005 WL 1870811, at 1 (S.D.N.Y. Aug. 9, 2005).

[67] *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001). See also: *Lafontant v. Aristide*, No. CV 93-4268, 844 F. Supp. 128 (1994), United States District Court, E.D. New York, January 27, 1994.

[68] 28 U.S. Code § 1605 (a) (1).

5. *Extraterritoriality*

On April 17, 2013, in *Kiobel v. Royal Dutch Petroleum*,[69] the US Supreme Court decided that the ATCA is subject to the "presumption against extraterritoriality" and thus usually will not apply to claims involving alleged human rights abuses or other violations of international law alleged to have occurred in foreign countries. In a concurrence, Justice Samuel Alito indicated that a cause of action falls outside the scope of the presumption only if the event or relationship that was the focus of congressional concern under the relevant statute takes place within the United States.

The Court held that when the Alien Tort Statute was enacted in 1789, there was no indication that Congress intended the United States to become a uniquely hospitable forum for the enforcement of international norms. Accordingly, the Court stated that the ATCA appeared to have been motivated by concerns about two distinct scenarios, namely, injuries to diplomats on U.S. soil, or piracy on the high seas; and that nothing about the historical context suggests that Congress also intended federal common law under the ATCA to provide a cause of action for conduct occurring in the territory of another sovereign. The Court further stated that even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.

Thus, the ATCA holds presumption against extraterritoriality, however such presumption can be displaced if the claims touch and concern the territory of the United States with sufficient force.

In the case of violations of human rights as a result the use of firearms or technology derived from the Merida Initiative, since we refer to a law of the United States Congress and of US funds, it is evident that "extraterritoriality" could not be claimed, and that such violations touch and concern the territory of the United States with sufficient force. In addition, in *Kiobel v. Royal Dutch Petroleum*, a case in which the presumption of extraterritoriality was determined by the US Supreme Court, the alleged perpetrator of violations of human rights was a corporation. In the case of human rights violations as a result of, for example, firearms and technology from the Merida Initiative, the defendants involved would not be corporations but individuals, and although in some cases they may invoke immunity or exception in the application of the ATCA for motives or political act, for example, in other cases, their behaviors could evidently fall under the TVPA.

As noted through these brief examples, to use the ATCA as a tool to claim non-contractual liability, it would be prudent to understand that ACTA is used in human rights cases for damages of a civil non-contractual nature; moreover, in view of the simplicity of the ATCA text, the plaintiffs must constantly refer to the criteria emanating from the cases adjudicated in the fed-

[69] *Kiobel v. Royal Dutch Petroleum*, No. 10–1491 (US Apr. 17, 2013).

eral courts of the United States, which complicates legal action. Regardless, ATCA can be invoked by the victims of the "war" against drug trafficking in the framework of the Merida Initiative.

## IV. Evaluation of the Merida Initiative and Violations of Human Rights

In his article of October 8, 2002, John E Howard, evaluates ATCA application, and sustains:

> At present, there are over 20 suits pending under ATCA alleging that U.S. firms doing business in such countries as Colombia, Ecuador, Egypt, Guatemala, India, Indonesia, Myanmar (Burma), Nigeria, Peru, Saudi Arabia, South Africa, and Sudan are liable for actions in those countries — action whether or not they had any direct connection other than being present in those countries.
>
> For years, U.S. business has sought to halt the proliferation of litigation-run-amok in the courts by restoring fairness, balance, efficiency and consistency to the U.S. civil justice system. But as serious as this problem is, it has generally been viewed as a "domestic" problem — with a small number of avaricious class-action lawyers using U.S. plaintiffs to pursue gargantuan remedies for domestic torts.
>
> Expansion of this problem into the international arena via ATCA promises nothing but trouble for U.S. economic and foreign policy interests worldwide. This is why ATCA's misuse must be checked — and efforts to obtain its repeal must begin — now! U.S. national interests require that we not allow the continuing misapplication of this 18th century statute to 21st century problems by the latter day pirates of the plaintiffs' bar.[70]

The case *Kiobel v. Royal Dutch Petroleum* putm an end to the litigation of the U.S. Chamber of Commerce, the ATCA does not apply to human rights violations by companies outside the United States.[71] Nevertheless, the Merida Initiative could put Mexico in the list of countries where their nationals make use of ATCA. In the near future "avaricious class-action lawyers," in the words of John E. Howard, this time from Mexico, may use ATCA to sue Mexican officials involved in the drug war under the Merida Initiative.

According to the testimony of Lisa Haugaard of the Latin America Working Group to the House Committee on Appropriations Subcommittee on State, Foreign Operations, and Related Programs, since 2009, "The growing

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[70] John E. Howard, *The Alien Tort Claims Act: Is Our Litigation*, U.S. CHAMBER OF COMMERCE (March 5, 2017, 10:30 AM), https://www.uschamber.com/op-ed/alien-tort-claims-act-our-litigation.

[71] *Extraterritoriality. The Shell game ends. Some good news for multinationals*, THE ECONOMIST, April 20, 2013, (April, 13, 2017, 11 AM), *http://www.economist.com/news/united-states/21576393-some-good-news-multinationals-shell-game-ends.*

role of the Mexican military in public security is resulting in increased human rights violations against the civilian population."[72] She also stated, "Abuses by members of the military are not effectively investigated and prosecuted, resulting in impunity in such cases." Haugaard maintained: "The Merida Initiative of course will have to take into account and seek to encourage reforms to address the very serious human rights abuses committed by police. Three persistent problems are the use of torture to elicit confessions, despite existing prohibitions; the use of lengthy pretrial detention; and the excessive use of force and grave human rights abuses in confronting social protests."[73]

In a document prepared for members and Committees of the US Congress entitled "U.S.-Mexican Security Cooperation: The Merida Initiative and Beyond" authors Clare Ribando Seelke and Kristin Finklea wrote:

> Ten years after the Mexican government launched an aggressive, military-led campaign against drug trafficking and organized crime, violent crime continues to threaten citizen security and governance in parts of Mexico, including in cities along the U.S. Southwest border. Organized crime-related violence in Mexico declined from 2011 to 2014 but rose in 2015 and again in 2016. Analysts estimate that the violence may have claimed more than 100,000 lives since December 2006. Social protests in Mexico against education reform and gas price increases have also resulted in deadly violence. High-profile cases—particularly the enforced disappearance and murder of 43 students in Guerrero, Mexico, in September 2014—have drawn attention to the problem of human rights abuses involving security forces. Cases of corruption by former governors, some of whom have fled Mexico, also have increased concerns about impunity.[74]

In a critical evaluation, the authors affirmed:

> By 2014, violence had begun to increase, high-profile cases of human rights abuses committed by security forces had captured international attention, and President Peña Nieto and his top adviser had become embroiled in conflict-of-

[72] Lisa Haugaard, *The Merida Initiative. U.S. Responsibilities & Human Rights*, Testimony presented by Lisa Haugaard, Director, Latin America Working Group to the House Committee on Appropriations Subcommittee on State, Foreign Operations, and Related Programs, (Abril 13, 2017, 12 PM) *http://www.lawg.org/storage/documents/merida_testimony_lh.pdf.*

[73] Lisa Haugaard, *The Merida Initiative. U.S. Responsibilities & Human Rights*, Testimony presented by Lisa Haugaard, Director, Latin America Working Group to the House Committee on Appropriations Subcommittee on State, Foreign Operations, and Related Programs, (Abril 13, 2017, 12 PM) *http://www.lawg.org/storage/documents/merida_testimony_lh.pdf.* Her testimony affirms: "with extreme examples such as the police response to the 2006 Oaxaca protests, and the flower growers' 2006 protest in San Salvador Atenco, in which two flower growers were killed, some 47 women detained and many detainees were allegedly raped and tortured."

[74] Clare Ribando Seelke, et.al., *U.S.-Mexican Security Cooperation: The Merida Initiative and Beyond* (Summary), Congressional Research Service, (January 18, 2017), (March 16, 2017, 11AM), *https://fas.org/sgp/crs/row/R41349.pdf.*

> interest scandals. Rising insecurity, social protests that have led to deadly clashes with security forces, and the government's apparent lack of new strategies to address either type of violence has raised significant concerns. President Peña Nieto has maintained former President Calderón's reactive approach of deploying federal forces—including the military—to areas in which crime surges rather than focusing on police reform and deterring violence and human rights abuses through criminal justice reform.[75]

Also, the authors of the document, under the section "Human Rights Concerns and Conditions on Merida Initiative Funding", affirmed:

> There have been ongoing concerns about the human rights records of Mexico's military and police, particularly given the aforementioned cases (Tlatlaya, Iguala) involving allegations of their involvement in torture, enforced disappearances, and extrajudicial killings. The State Department's annual human rights reports covering Mexico have cited credible reports of police involvement in extrajudicial killings, kidnappings for ransom, and torture. There has also been concern that the Mexican military has committed more human rights abuses since being tasked with carrying out public security functions.
>
> In addition to expressing concerns about current abuses, Mexican and international human rights groups have criticized the Mexican government for failing to hold military and police officials accountable for past abuses.[76]

On July 9, 2015, Amnesty International, and seven other human rights groups, called on the U.S. government to withhold aid to the Mexican armed forces. They submitted a joint memorandum to the State Department and U.S. Congress concerning the Mexican government's failure to meet human rights requirements set out in the Merida Initiative.[77]

In its "Country Report on Human Rights Practice for 2015: México," the U.S. Department of State established:

> The most significant human rights-related problems included involvement by police and military in serious abuses, such as unlawful killings, torture, and disappearances. Impunity and corruption in the law enforcement and justice system remained serious problems. Organized criminal groups killed, kidnapped, extorted, and intimidated citizens, migrants, journalists, and human rights defenders.
>
> The following additional problems persisted: poor prison conditions; arbitrary arrests and detentions; intimidation and violence against human rights defenders and journalists; violence against migrants; violence against wom-

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[75] *Ibid*, "The Peña Nieto Administration's Security Strategy", at p. 21 (the document has several pages with the number 21).

[76] *Id*. at p. 16.

[77] Amnesty International, *Amnesty International Urges U.S. to Withhold Aid to Mexican Armed Forces*, Amnesty International, (April 4, 2017, 2 PM) *http://www.amnestyusa.org/news/press-releases/amnesty-international-urges-us-to-withhold-aid-to-mexican-armed-forces.*

> en; domestic violence; abuse of persons with disabilities; threats and violence against some members of the indigenous population; threats against lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons; trafficking in persons; and child labor, including forced labor by children.
>
> Impunity for human rights abuses remained a problem throughout the country with extremely low rates of prosecution for all forms of crimes.[78]

The State Department report specifies that "there were numerous reports the government or its agents committed arbitrary or unlawful killings, often with impunity," and that organized crime were also implicated in such killings, "at times in league with corrupt state, local and security officials."[79] Such violations of human rights would seem to fit adequately for suits under ACTA and TVPA.

Similarly, Amnesty International sustained that ten years of the "war on drugs and organized crime" in Mexico, has been characterized by widespread violence and impunity for perpetrators of human rights violations. There were 36,056 homicides registered by authorities in 2016.[80]

In addition, the Merida Initiative poses a legal problem because Mexican military and police are subject to a law of the United States Congress. This could imply a future political responsibility for those who acted in the framework of that act for violations of Mexican law.

The Merida Initiative and the resources allocated to it have deepened human rights violations in Mexico. Military and police forces are accused of violating human rights, and as we have mentioned, the ATCA could be an excellent tool for protecting human rights in Mexico; there exists ample jurisprudence which can be useful for this task. Last December in Mexico an Internal Security Act (*Ley de Seguridad Interior*), was debated and passed. It is clearly time to evaluate the fulfillment of human right standards and the role of security forces in Mexico under the framework of the Merida Initiative.

## V. Conclusions

We began this article by quoting John E. Howard, and his question: "Did you know that, under current U.S. law, foreigners can sue your company in U.S. courts?" His question was, in fact, a way to foreground our own investigation.

We ask ourselves, in terms of ATCA, can Mexicans sue Mexican Presidents and officials for extra-contractual civil liability for damages in the con-

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[78] United States Department of State Bureau of Democracy, *Mexico 2015 Human Rights Report*, (Abril 13, 2015, 1) (April 15, 2017, 3 PM) *https://www.state.gov/documents/organization/253239.pdf.*

[79] *Id*.

[80] Amnesty International, *Mexico 2015/2017,* Amnesty International Report 2016/2017, (December 12, 2017, 3 PM), *https://www.amnesty.org/en/countries/americas/mexico/report-mexico/*.

text of Mexican "war" against drug traffickers under the framework of the Merida Initiative, through which financial and technological resources are transferred from the US to Mexico to confront this "war."

After analyzing the Merida Initiative to Combat Illicit Narcotics and Reduce Organized Crime Authorization Act of 2008, the Torture Victim Protection Act of 1991, Foreign Sovereign Immunity Act of 2000, and related cases, we conclude that the ATCA could be an excellent instrument for the protection of human rights which can be invoked by the victims of the "war" against drug trafficking in the framework of the Merida Initiative.

The Merida Initiative and the resources allocated to it have deepened human rights violations in Mexico. Military and police forces are accused of violating human rights, and ATCA could prove a useful tool for the protection of those rights in Mexico. There is ample case law from US Courts which could be useful for this task. It is time to evaluate the fulfillment of human right standards and the role of security forces under the framework of Merida Initiative.

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# UNPACKING THE MEXICAN FEDERAL JUDICIARY: AN INNER LOOK AT THE ETHOS OF THE JUDICIAL BRANCH

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Abstract: *Based on 45 interviews conducted in 6 different jurisdictions in Mexico, this article presents a close examination of the distinctive attributes and practices that characterize the Mexican Federal Judiciary (Poder Judicial Federal). Interviewees included typists, clerks and court clerks, judges, and justices, as well as scholars and experts with an in-depth knowledge of this institution. From an insider perspective, the article sheds light on idiosyncrasies, customs, and organizational patterns that are not well known outside the MFJ, such as its strong hierarchical structure, the nature of the work done, employee salaries, the practices of legalism, the risks of drug-related trials, and structural gender inequalities. It also discusses phenomena like influence peddling, cronyism, and nepotism, all of which are widely practiced within the MFJ but kept undisclosed. These practices do not necessarily have a negative connotation within the federal judiciary because they have become normalized due to their widespread use. In fact, the notion of corruption is somehow ambiguous for many judicial employees. Despite all this, the MFJ has become a more professionalized branch where the vast majority of employees performed their job competently and efficiently.*

Key Words: *Mexican Federal Judiciary, Misconduct, Legal Studies, Qualitative Methods, Ethnography.*

Resumen: *El presente artículo aborda un análisis exhaustivo la cultura y costumbres que prevalecen en el Poder Judicial Federal en México. Este trabajo está basado en una investigación de campo que se realizó en 6 diferentes*

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*ciudades del país donde se entrevistaron a 45 personas, entre ellas oficiales administrativos, actuarios, secretarios de juzgados, proyectistas, jueces de distrito, magistrados de colegiados, personal del Consejo de la Judicatura, expertos y litigantes. El análisis de esta propuesta conlleva una perspectiva desde adentro respecto de algunas prácticas comunes al interior del Poder Judicial Federal como son la existencia de una estructura jerárquica poderosa, el tipo de trabajo de todos los días, los salarios, el legalismo exacerbado, los riegos de resolver juicios relacionados con el narcotráfico y cuestiones de inequidad institucional. También se discuten temas como el tráfico de influencias, el amiguismo y el nepotismo los cuales están ampliamente arraigados en la institución. De hecho, el tema de la corrupción tiene una connotación ambigua entre empleados del PJF porque no hay políticas institucionales para resolverlo ya que oficialmente este problema no existe. A pesar de lo anterior, el PJF se ha profesionalizado y la mayoría de empleados realizan sus labores de una manera eficaz y competente.*

Palabras clave: *Poder Judicial Federal, Conductas Ilegales, Estudios de Derecho, Métodos Cuantitativos, Etnografía.*

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## I. Introduction

### 1. *An Overview of the Judicial Branch*

In late February 2011, a documentary called *Presunto Culpable* (Presumed Guilty) was released in Mexican theaters. The documentary tells the story of Antonio Zuñiga (a.k.a. Toño), a 26-year-old street vendor in Mexico City who was sentenced to 20 years in prison for a murder he did not commit. Toño contacted two young Mexican lawyers to help review his case. After a thorough study of the case, these lawyers found legal inconsistencies in the trial that led to an official reopening of the case and a new trial. The film captures the proceedings of the new trial and the interactions between the defendant, the witnesses, the judge, and the Mexican criminal justice system. The documentary presents the shortcomings of crowded prisons in Mexico City and the fight to prove the defendant´s innocence.[1]

Watching Presumed Guilty confirmed many viewers' pre-existing view of the Mexican judicial system as an unfair, bureaucratic, discriminatory, and Kafkaesque institution. Although Mexican people are aware of the prevalence of corruption in societal and governmental settings, as well as how corruption is used as a tool to navigate the political and social systems, the content of the documentary was still shocking in several ways. First, the storyline was compelling because of the context and circumstances of the main character. Second, it was a true story that resonated in the minds of Mexicans due to the familiar circumstances of the case; that is, people believed it because such stories are not uncommon in Mexico. Third, Mexican society was suspicious because at some point a judge wanted to prohibit the film from being shown and this was seen as a cover-up.

Beyond the police, no other institution in Mexico generates as much dissatisfaction and lack of trust as the criminal justice system and its main components: the police, the office of the public prosecutor, and the /court system. When dealing with any of these agencies, most Mexicans assume that corruption, and the judicial branch in particular, hold the blame for the widespread impunity in the country. For different reasons, many Mexicans are unaware of the fact that the criminal justice system is not a monolithic institution but a complex organization composed of an array of governmental agencies belonging to different branches. A common misunderstanding is to assume that the public prosecutor's office belongs to, or is part of, the judicial system. This confusion has led many people to think that when a criminal walks out of prison unpunished during or after a trial it is because the judicial system is corrupt or inefficient. This is not always the case; many times legal techni-

[1] Roberto Hernández & Geoffrey Smith. *Presunto culpable*. DVD. Mexico City. Instituto Mexicano de la Cinematografía, (2008).

calities ignored by the prosecutor before the indictment create loopholes that force judges to release someone who might be responsible for a crime.

When Mexican people are asked what they think about the judicial system, most of them confuse state and federal judiciaries in addition to having a negative opinion of both. This attitude is illustrated in a 2008 survey from the Citizen Institute for Studies on Public Safety, which showed that only 8% percent of the population has high confidence in the judicial system.[2] This means that the vast majority of Mexicans distrust the judicial system as a whole, whether is at a local or federal level.

### 2. *Methodology*

Given the common misunderstanding of the federal judicial system, this article exclusively describes and problematizes the different idiosyncrasies, customs, and organizational patterns that have become part of the everyday life in the federal judicial branch and are not very well known outside its boundaries. The main focus of this article is to shed light on the inner workings of the federal judiciary in order to understand how this institution conducts its everyday business while dispensing justice. Although the primary focus is the federal judiciary, the patterns, legal culture, and problems described here may apply to some (but not all) state judicial systems in Mexico given the similarities and homogeneity of the Mexican judiciary. Although there is some mention of other criminal justice system institutions, such as the Office of the Public Prosecutor, this article centers on the Mexican Federal Judiciary—MFJ— (*Poder Judicial de la Federación)*.

This research project uses a qualitative research approach mostly based on semi-structured interviews and archival documents. The interviews took place during fieldwork in 6 Mexican cities (Acapulco, Mexico City, Morelia, Nogales, Puebla, and Tijuana) in the summer of 2011. There were a total of 45 interviewees: 16 women and 29 men. Out of those, 40 were employees working for the MFJ, 2 were expert attorneys who litigated in federal courts, and 3 were Mexican scholars with expertise in this institution. Among the 40 interviewees working for the MFJ, I interviewed 3 justices, 7 federal district judges, 14 district court law clerks, 4 appeals court law clerks, 5 typists, 2 process servers, 4 federal public defenders, and 1 council clerk. The rationale for this selection was to have a representative sample from all the areas of the MFJ and the number of people interviewed was enough to provide a rich and holistic description of the setting after having reached what is known as

[2] Instituto Ciudadano de Estudios sobre la Inseguridad A.C. Quinta encuesta nacional sobre inseguridad, (2008). *Available at http://www.icesi.org.mx/documentos/propuestas/cuadernos_icesi.pdf.*

the *saturation point*: where there was no new data coming in from the last interviewees and the same topics were repeated.[3]

To select interviewees I employed a mixed methodology of snowball and convenience sampling. Since I studied law in Mexico and litigated there for several years, I had an extensive network of peers, former classmates, and acquaintances working in the federal courts. I approached them and asked if they would agree to an interview about the MFJ. Most of them agreed as long as the information remained confidential. Through them I was able to contact other potential participants who also agreed to be interviewed. Thus, the snowball sample came from this strategy. In jurisdictions where I did not know anyone, I introduced myself to court officials and requested an interview. This approach was harder to do and took longer than the previous one since several potential interviewees turned down my request. However, I persisted. Although I spent more time convincing officials and rescheduling interview appointments, I ended up having a representative pool of court employees. Thus, the convenience sampling resulted from this planning. All in all, two thirds of the sample was interviewed using a snowball approach and one third using convenience sampling. The archival research was conducted mostly on official information made available by the Mexican Federal Judiciary either through its well-organized and informative website or through books, brochures, fact sheets, and press releases.

One innovative contribution of this article is that it gives a voice to Mexican public officials working in the judicial branch so they can express themselves about everyday life and practices in their work environment without censure. Since confidentiality for all interviewees was guaranteed, they were able to explain in detail the culture, unwritten rules, and patterns that would otherwise have been difficult to capture. Therefore, pseudonymous are used throughout the entire article. One primary goal of this article is to offer an internal perspective of the inner life of the MFJ provided by people who have worked, studied, or litigated in the Mexican Federal Judiciary.

### 3. *Federal vs. State Judicial System*

Similar to the U.S. federal system, Mexico's political authority is composed of a central government located in Mexico City (formerly known as Federal District) and 31 self-governing political divisions called states. Each state has its own constitution, governor, legislature, and judicial system. The state judicial systems are organized into a two-tier hierarchical structure of lower courts (*juzgados*) and appeals courts (*salas*). The former are headed by state judges (*jueces del fuero común*) and the latter by state justices (*magistrados del fuero común*). There is also a state supreme court that is the highest authority of

[3] Emily s. Adler & Roger Clark, An Invitation to Social Research: How It's Done, (Wadsworth, 2011).

each state judiciary, and most states now have a State Judicial Council (*Consejo de la Judicatura Estatal*) in charge of managing the budget, career civil service, and administrative affairs.

The Mexican federal judiciary on the other hand is one of the branches of the central government, the judicial branch, which is part of the governing model based on the division of powers. The Supreme Court of Justice is the highest authority of this institution. Lower and appeals courts distributed throughout the country are in charge of federal matters, such as drug related crimes, people trafficking, and arms trafficking. Compared to state judiciaries, the federal judicial system enjoys a better social status and recognition from the legal community, attorneys-at-law, and citizens who gone to court and know both the federal and state judiciaries.

The prestige of the Mexican federal judiciary comes from two sources. First, as a federal authority its budget is considerably larger than that of any of the state judiciaries, which allows it to have more human and material resources and to provide higher quality service to the community. Second, the federal judiciary has jurisdiction over the constitutional guarantee for a form of civil rights protection called an *Amparo*. An *amparo* is "a constitutional provision peculiar to Mexico which resembles United States writs of prohibition, certiorari, injunction, and habeas corpus."[4] *Amparo* means "protection, aid, or shelter" in Spanish. Although the *Amparo* was an original Mexican creation, it combines national and international influences from legal principles like the habeas corpus, injunction, certiorari, and error of mandamus.[5]

### 4. *Structure and Organization of the Federal Judiciary*

The organization and makeup of the Mexican federal judiciary is defined by the Mexican constitution (*Constitución Política de los Estados Unidos Mexicanos*). Article 94 states that the "judicial power of the Federation [*Poder Judicial Federal*] is vested in a Supreme Court of Justice, in an electoral court, circuit courts, unitary courts and district courts."[6] This article stipulates that the discipline, monitoring, and organization of the judicial branch (except the Supreme Court) will be in the hands of the Federal Judicial Council (*Consejo de la Judicatura Federal*), which operates according to the guidelines established in the constitution and the applicable laws.

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[4] Louis A. Robb. Dictionary of Legal Terms Spanish-English and English-Spanish 74 (Limusa, 1979).

[5] Sara Schatz et al., *The Mexican Judicial System: continuity and change in a period of democratic consolidation*, in Reforming the Administration of Justice in Mexico 197,223 (W.A. Cornelius & D. Shirk eds., 2007).

[6] Constitución Política de los Estados Unidos Mexicanos [Const.] as amended in 1994, Article 94, Diario Oficial de la Federación [D. O.] 5 de febrero de 1917 (Mex.).

The Federal Judicial Authority Organization Act[7] governs the internal affairs of the federal judiciary. This law regulates the work and the responsibilities of those who work in the judicial branch, and outlines the jurisdiction of the federal courts. There are other secondary laws, such as the New *Amparo* Act (*Nueva Ley de Amparo*), the Federal Civil Procedure Code (*Código Federal de Procedimientos Civiles*), and the Federal Criminal Code (*Código Penal Federal*) that regulate specific legal procedures and activities for legal proceedings.

The main components of the Mexican Federal Judiciary are: 1. The Supreme Court *(Suprema Corte de Justicia de la Nación)* composed of eleven justices (called *Ministros*) who function either as a full court (*Pleno*) or in two chambers. This is the highest court of the country. 2. Electoral Court *(Tribunal Electoral del Poder Judicial Federal)* is a specialized organ of the federal judiciary and the highest court for electoral disputes. It is composed of a full court (*Sala Superior*) and five regional chambers (*Salas Regionales*). 3. Federal Appeals Courts *(Tribunales Colegiados de Circuito)* are courts composed of three justices that are located throughout the country in 32 jurisdictions known as *Circuitos Judiciales Federales*, one for each state and one for Mexico City. They have jurisdiction over direct *Amparo* suits against definitive rulings, appeals (*Recursos de Revision*) against sentences (related to any legal matter except criminal trails) issued by district judges, administrative complaints (*Quejas*), and the like. 4. Criminal Appeals Courts *(Tribunales Unitarios de Circuito)* composed of a single justice . They are located in each state and in Mexico City (32 jurisdictions). 5. Federal District Courts *(Juzgados de Distrito)* are the lower courts and the MFJ's workhorse since they handle most of the proceedings and trial-related hearings. 6. The Federal Judicial Council *(Consejo de la Judicatura Federal)* is a recently-created institution in the Mexican Federal Judiciary. It was the result of a major overhaul of the judicial branch in 1994-1995. The Council is made up of seven members known as council members (*Consejeros*).

There are other important institutions in the MFJ that are subordinated to the Judicial Council, but enjoy some autonomy. One is the Institute of the Federal Judiciary (*Instituto de la Judicatura*), an organization specializing in training and providing legal education to members of the federal judiciary through classes, courses, and workshops. The other is the Federal Institute of Public Defense (*Instituto Federal de Defensoria Pública*), an organization with a good reputation among the judicial community for high quality and good service. This agency provides legal counselling for people dealing with the federal judiciary and who cannot afford to pay a private attorney. The aforementioned courts and institutions are the most important parts of the Mexican Federal Judiciary. The Supreme Court stands out as the most powerful and visible organ of the judicial branch in Mexico. Indeed, many people and some journalists appear to believe the Supreme Court is the entire federal

[7] Ley Orgánica del Poder Judicial de la Federación [L.O.P.J.F.] [Federal Judicial Branch Law], (Mex.).

judiciary. After analyzing the data collected from all the interviews, the following are the most important findings of the research project that reflect the culture, characteristics, and stratified organizational style of the Mexican Federal Judiciary.

## II. Understanding the Setting

### 1. *Hierarchical Structure*

One of the most visible features of the federal judiciary is its organizational structure. Similar to other government organizations in Mexico, the judiciary has built strong hierarchies with categorical levels of administration and power. Subordination to a higher authority—such as a judge, an appeals court, or the Supreme Court—is the principle that glues together the different units of this institution together. Hierarchies are deeply embedded in the ethos of the judicial branch and are most noticeable in two particular realms: its organization and the ranks in federal courts.

The Mexican Constitution and other secondary laws that regulate how the judicial branch should be organized have created a downward pyramid in which the Supreme Court rests at the top of a strictly ordered pyramid. These hierarchies stratify salaries, work settings, workloads, and duties, while creating a bureaucratic culture. Therefore, subordination, authority, and social status between junior and senior officials homogenize judicial criteria to decide cases because a complacent attitude grows out of obedience.

One example of this is the fact that there are no guidelines regarding the boundaries of the judge's discretionary power over his or her employees. The only yardstick is how much work the courtroom has, and the vast majority of federal courts have excessive workloads, notably district courts. In consequence, all employees work overtime and on weekends. The courtrooms' official hours are from 9:00 am to 2:30 pm. However, what greatly varies is how employees perform their duties. Some judges demand that employees work until midnight, with little or no time for lunch or dinner. Others allow employees to go home in the early evening and take work home. Some judges and justices do not care about employees' work schedules after official hours, as long as they finish their work. It is up to the judge or justice to organize the work setting, leaving employees powerless to decide how best to do their jobs. Many interviewees complained that this arbitrariness was a major issue in the everyday activities of district courts because it affected both employees and the administration of justice.

This quasi-authoritarian managerial style is a remnant from the old bureaucratic system that governed Mexico for decades. Political clientelism, populism, and loyalty to cliques were the tools the regime used to dominate society and administrative settings. The person in charge of any public office was the

boss and subordinates had to obey without complaint if they wanted to keep their jobs. The federal judiciary was not excluded from this influence. Cronyism still plagues this institution, and so do subordination and strict hierarchies.[8]

2. *Too Much Work!*

Another important feature that distinguishes and shapes federal courts is the excessive amount of work. This is by no means exclusive to the Mexican Federal Judiciary. In general, the entire Mexican administration of justice suffers from disproportionate workloads. Unlike other justice-related institutions in Mexico, the MFJ and the district courts in particular have to comply with fixed deadlines set by law to carry out everyday proceedings and trials despite their workload. The administrative branch of the MFJ, the Judicial Council, has created several mechanisms to expedite trial proceedings. Among these mechanisms, there is a program called *Sistema Integral de Seguimiento de Expedientes* or SISE (Case Monitoring System) to electronically monitor and follow every single step of a trial. There are also statistical summaries and reports that every district court has to submit to the Council monthly to show that the court does not have any backlog. In addition, the Council closely watches and monitors judges and employees to make sure that trial and appeals courts are run efficiently, productively, and according to the law.

Nearly 96% of interviewees (43) pointed out that the MFJ has too much work all the time, mostly in district courts. Interviewee Felipe said, *"Las jornadas de trabajo son muy largas"* (The work schedules are very long). Another interviewee, Lourdes, put it this way: *"Es demasiado el trabajo que hay que hacer en el colegiado, hay que analizar asuntos voluminosos y hacer trabajo de fondo, estudiar bien para poder hacer un buen proyecto"* (There is too much work in the appeals courts. You have to do in-depth analyses of cumbersome cases, examine it well to be able to make a good draft judgment).

Proceeding deadlines pose great challenges for district courts when they have to issue an arrest warrant for organized crime cases because the indictment usually involves multiple defendants and the file is thousands of pages long. Interviewees said that in those types of cases, almost everyone in the court has to stay overnight to work on the file in order to have the warrant ready for the due date. Interviewee Natalia said that, in 2006, her court handled the case of a former Mexican president who was indicted on charges of genocide for the killing of unarmed students in 1968. The indictment contained 80 files of documents, hundreds of pages each, and the warrant of arrest was issued on

[8] Beatriz Magaloni, *Authoritarianism, Democracy and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico*, in Democratic Accountability in Latin America, 266, 305, (S. Mainwaring & C. Welna eds., 2003). Carlos Elizondo Mayer-Serra & Ana Laura Magaloni Kerpel, *Form is content: How are justices appointed and how do they decide in the Supreme Court of Justice*, 23 julio-diciembre, *Revista Mexicana de Derecho Constitucional* (2010). Schatz et al, *supra* note 5.

time. Natalia stated, *"Estos trámites de muchos tomos y voluminosos no son tan raros y nos llegan con cierta frecuencia"* (These procedures with multiple files and massive ones are not that uncommon and we get them quite often).

There are two other court duties that exacerbate the workload in district courts, and to a lesser extent appeals courts: 1. Court shifts (*Turnos*) and 2. On duty shifts (*Guardias*). The first refers to the period that each district court accepts and processes indictments from the prosecutor´s office. This period varies from jurisdiction to jurisdiction depending on the number of district courts in each jurisdiction. On-duty shifts refer to employees' availability at all times if there is a legal emergency that requires court intervention. For instance, when an outstanding arrest warrant from a district court has been served late at night and the defendant wants to be bailed out as soon as possible, court employees must be available to process the petition. Both on-duty and court shifts require most employees to stay longer in the district court facilities. This not only imposes a heavier burden of work on them, but it also disrupts their personal life.

### 3. *High Salaries and Vocation*

According to more than 90% of interviewees (41), wages are among the best aspects of this institution. Except for the lowest level of the hierarchy, typists, all interviewees agreed that their salaries were remunerative although not everyone conceded that those salaries make up for all the work done in courts and the working conditions. For instance, interviewee Jazmín said, *"El salario sí compensa el trabajo y las responsabilidades de laborar en el tribunal porque es un buen sueldo comparado con otras instituciones o con el poder judicial del fuero común"* (The salary does compensate for the work and responsibilities of working at the court because it is a good salary compared to other government institutions or state judicial systems). Interviewee Héctor put it this way: *"Los salaries son buenos y existen buenas prestaciones, sin embargo no compensan todo el trabajo que se hace"* (The salaries are good and there are good benefits, but they do not compensate for all the work done).

It is worth mentioning that, except for typists, nobody else receives payment for overtime. In fact, the concept of overtime is alien to MFJ employees because they are not hired to work by the hour, but to do specific tasks. These tasks include judgments, conducting court proceedings, process serving, and everything else needed to run the court regardless of the amount of work and how long it takes to accomplish it. Court workers are paid for this entire bundle, so to speak, and working overtime is understood as part of the job. Anyhow, interviewee Natalia suggested that paying overtime could improve the administration of justice.

Interviewees used a particular phrase, *salarios buenos* (good salaries), to emphasize that the payment for their work was financially rewarding. They

acknowledged that salaries were a powerful incentive that attracted many lawyers to work at the MFJ. However, some interviewees thought that salaries were not high enough to make a career out of working at the MFJ. Given the disruptive job schedule and the endless amount of work, something else was needed besides remunerative wages to truly accept these working conditions. Several interviewees suggested having a vocation while others, passion. Others used the words addiction to the proceedings (*adicción a los asuntos*) and yet others highlighted the intellectual challenges of solving complicated legal matters as a thrill of working there.

Not all MFJ employees were of a mind to enjoy their jobs, according to interviewees. They argued that most employees in the court were proud and happy to work there, but a few coworkers lacked the motivation to perform their duties responsibly. According to these interviewees, unmotivated employees struggled to deal with the stress and busy schedules of the court because they did not like the work environment. Employees without any intellectual motivation worked at the MFJ only because of the good salary, but hated the demands of everyday proceedings. A few interviewees defined these people as *chambistas* (jobbers) a concept derived from the Mexican word *chamba*. These employees did not value the privilege of being part of the MFJ or the ethical and social responsibilities that come with it.

### 4. *Justices, Appeals Judges, and Council Member Salaries*

There has been heated debate in Mexico over the past years about the fairness of the salaries earned by high-ranking members of the MFJ. In the mid-2000s, it became public that many Mexican public officials, like mayors and Supreme Court Justices, had a salary higher than the President of the country did. This news caused an outcry and strong criticism from society and political pundits. As a result, the Constitution was amended in 2009 to set up caps on government employee salaries.[9]

The Supreme Court has also come under strong criticism because its operating costs are extremely high and even higher than those for Supreme Courts in other countries. Two Mexican scholars who have studied the Mexican administration of justice, Magaloni Kerpel and Mayer-Sierra, did a comparative analysis of Supreme Courts from different countries. Based on an analysis of information from 2009, they found out that Mexican Supreme Court Justices are among the best paid in the world compared to similar positions. In Mexico, a Supreme Court Justice (*Ministro de la Corte*) had an average annual salary of $320,765 dollars in 2009 (4,169,957 pesos at an exchange rate of 13 pesos per dollar). In Canada, a Justice made an average

[9] Sergio Javier Jiménez, *Ningún funcionario podrá ganar más que el Presidente*, El Universal, August 22, 2009, available at http://www.eluniversal.com.mx/nacion/170788.html .

of $296,940. In the United States, the salary was $222,301. In Germany, it was $197,937, and in Colombia, $136,763.[10]

Based on this institutional context it should not be a surprise that there was a great dissimilarity of opinions on whether or not the current salaries of high-ranking officials at the MFJ were fair and justified. Among those who disagree with the salaries was interviewee Pedro, who said, *"El sueldo de los ministros no creo que este justificado porque ganan un cantidad estratosférica y comparado con lo que ganamos el resto del personal es injusto por decir lo menos"* (I do not think Justices' salaries are justified because they make a stratospheric amount of money and, compared to what the rest of court employees make, it is unfair to say the least).

Most, but not all, low-ranking officials tended to disapprove of the high salaries of those at the top of the MFJ because they consider them unfair and disproportionate. According to the Supreme Court[11] in 2011, a court clerk—a middle-ranking official—made approximately $47,256 a year ($614,340 pesos) while a typist at the bottom of the hierarchy made approximately $14,671 a year ($190,728 pesos). The average salary for a low-ranking official would be between $16,000 and $18,000 a year, generally speaking. To put it into context, in January 2012 the daily minimum salary in Mexico was $62.33 pesos for an 8 hour shift, which accounts for $0.60 cents per hour of work. This means that even the lowest salaries in the MFJ are considerably higher than the minimum wage.

The topic of salaries—either one's own or somebody else's—was deeply engrained in the ethos of the MFJ because it was associated with different phenomena in the everyday affairs of the institution. For instance, good salaries were seen as the main reason for the lack of petty corruption (called *mordidas* in Spanish). Employees who wanted to change jobs due to the high levels of stress in district courts were normally dissuaded from doing so because no other government institution would match their salaries. Most MFJ employees work hard because they know that their salaries are among the best in the field, and given the strong competition for positions, they fulfill their work duties responsibly to keep their jobs. In addition, good salaries attract many young and brilliant lawyers to work at the federal court, which helps the institution to recruit the best applicants.

## III. Handling Misconduct

### 1. *The Ambiguity of Corruption*

The topic of corruption was a crucial part of the research project in order to learn what interviewees had to say about it. Most of them understood cor-

[10] Mayer-Serra, *supra* note 8.

[11] *Diario Oficial de la Federación* [*D.O.*] [Federal Official Publication], (Mex.).

ruption as a dishonest act done to obtain benefits—usually money—through unacceptable methods, such as bribery or extortion. However, nepotism, the use of connections, and cronyism were not precisely defined as corrupt behaviors, but as inconvenient traditional practices that were part of the institution and did not necessarily influence the judicial process. Not everyone adhered to this perspective though and several respondents condemned the latter phenomena, labelling them negatively by using categories ranging from inappropriate behavior and misconduct to gross corruption. Their responses extended from severe disapproval of the problem to resignation to the current status quo, as if simply accepting that nothing could be done to change the culture.

The concept of corruption among MFJ court staff and senior officials was not the same for everyone. . For some but not all senior officials, accepting any amount of money regardless of the circumstances was a corrupt act. Other high-ranking officials had a more flexible view and did not always condemn receiving money from the public if the money was intended to be a tip. According to them, a tip was a pecuniary expression of gratitude for a job done and occurred more frequently among low-ranking employees. Because practices such as cronyism, connections, and nepotism did not fit this profile, not everyone defined them as corruption *per se*. Some interviewees—typically the younger generations of judges—did condemn nepotism and cronyism as blatant acts of corruption because they had the potential to affect the outcome of a trial.

According to Transparency International (a non-governmental organization that monitors corruption worldwide), judicial corruption is defined as "any inappropriate influence on the impartiality of the judicial process by any actor within the court system."[12] If this definition were used as the yardstick to measure corruption in the MFJ, then this problem would have a narrower and more specific perception of which broad range of practices would be labeled as corruption. It would not be so difficult to figure out that the use of connections, nepotism, and cronyism could influence a verdict, and should undoubtedly be defined as corrupt acts. Yet that was not the case in the MFJ.

The vast majority of interviewees—including high-ranking officials—acknowledged that corruption exists in the MFJ. The only discrepancy among them was the amount of prevalent corruption: interviewees' estimates ranged from 1% to a maximum of 10%. Since more than half of the respondents' perception was between these two numbers, it is possible to deduce that the prevalence of corruption varies from 5% to 10% depending on the jurisdiction and the type of court. Corruption in this context is based on the definition provided by Transparency International—any inappropriate influence in the impartiality of a trial within a court by anyone. This definition of

[12] Transparency International, Global Corruption Report 2007 xxi, (Cambridge University Press, 2007).

corruption includes the use of connections, cronyism, and nepotism when employed to affect the outcome of judicial proceedings.

2. *Traffic of Influence and the Use of Connections*

The phenomena of traffic of influence (which can be translated as a combination of influence peddling and nepotism), connections, and favoritism among public servants have been deeply embedded in Mexican society for many decades.[13] The authoritarian regime of the last century based its political recruitment on a system of rewards, loyalty, and obedience to the boss. This system permeated the entire government administration and became part of the ethos of Mexican bureaucracy.

The *ancien régime* lost its power in 2000, and now a democratic transition is underway. However, the inertia of the past still maintains many of the old undemocratic practices that provided political stability in the past century. Among those practices are the traffic of influence and the use of connections. Even for those government institutions that have become more independent and democratic, such as the federal judiciary, it has been a challenge to eradicate these phenomena.

Eighty percent of interviewees (36) said that favoritism and connections indeed exist, while 20% of respondents (9) said they do not. Among those who denied the existence of these phenomena was interviewee Diego, who said, *"Anteriormente quizá si eran valiosas las palancas y los amigos, pero se ha transparentado la institución y ya no es necesario"* (Maybe before, contacts and friends were invaluable, but the institution has become more transparent and they are no longer necessary). Interviewee Wilfrido was among those who categorically admitted the existence of these phenomena as part of the everyday affairs at the MFJ. He said, *"Si ayudaría [tener amigos o contactos] porque esa es la actitud, es sólo un reflejo de la sociedad mexicana, como en todo. Siempre que hay exámenes pasan los que tienen palancas, claro también los otros, pero los recomendados siempre"* (Yes, it would help [to have friends or connections] because that is the only game in town. It is just a reflection of Mexican society, as in everything. Whenever there is a selection process [for court appointments], only those who have contacts pass. Of course, others do too, but those with connections always do).

3. *Caveats on the Use of Connections*

Among those who responded yes to the problem of the use of connections most did so with a caveat. They said that the use of connections and traffic of influence was not a systemic or consistent practice. It varied extensively

[13] Peter H. Smith, Labyrinths of Power: Political Recruitment in the Twentieth Century Mexico (Princeton University Press, 1979).

depending on the person who did it, as well as on his or her hierarchy in the institution, interests at stake, and the implications of engaging in such practices. Sometimes some people would use these practices under specific circumstances, and other times the same people would not use them even if they had the power to do so. There was no specific pattern of how or when the connections would be used. For instance, some interviewees knew cases in which junior employees have made it to the top of the hierarchy based on personal credentials. However, they also knew that a few individuals, usually relatives of high-ranking members, did not have the proper credentials and yet they made it to the top. However, these cases were more the exception than the rule.

One interviewee, Andrés, highlighted something important: favoring someone is more a combination of different circumstances than merely the use of connections and traffic of influence *per se*. He explained that the head of the MFJ has a double standard for appointing senior officials. On the one hand, the MFJ has set up a strict selection system to recruit the best candidates based on merit, such as written and oral exams, experience, education, and seniority. This process allows only the best of the best lawyers to advance to become judges and justices in federal courts. On the other hand, it has created exceptions to that system by which people without the right qualifications have also gotten ahead through a subtle mechanism based on connections.

A common example of this aforementioned mechanism—described by several interviewees—is when the Judicial Council makes "special" vacancy call for new judges and justices (*convocatorias para ser juez o magistrado*). These vacancies are specifically designed for employees working in any of the high-ranking offices, such as the Supreme Court, the Judicial Council, and the Federal Electoral Court. These vacancies exclude anyone else in the MFJ from applying, and the requirements are usually less demanding than general vacancy calls. This policy has conveniently left the door open to allow relatives, friends, and members of one's clique to fill senior positions. Several interviewees from senior and junior positions confirmed this procedure for appointing judges and justices using two different criteria. These interviewees used a particular concept-verb to describe this phenomenon: *campechanear*. *Campechanear* in Mexican Spanish means to mix different things, mostly in cooking. It comes from the word *campechana*, which is a seafood cocktail. In the context of the MFJ, interviewees defined *campechanear* as the Council's approach to select judges and justices using two different methods: 1. credentials and 2. connections, traffic of influence, or nepotism.

Even though the use of connections and traffic of influence is prohibited by law, many officials carry out such practices discreetly and without leaving traces. As professionals of the law, they know how to circumvent restrictions by finding loopholes. Since justices and council members are all at the top,

they know that their actions cannot be scrutinized by a higher authority, not to mention the inertia of secrecy that permeates parts of the MFJ.

That being said, the fact is that the use of connections and traffic of influence in the federal judicial system has gradually declined over the past decade in comparison with how widespread it was during the authoritarian regime a few decades ago. Several interviewees coincided in their responses saying that the MFJ changed after the 1994-1995 reform and became a more professionalized and respectable institution. Among those changes was the founding of a real system of meritocracy where employees with no connections can make it to the top. These responses coincide with analyses from scholars who have studied the federal judiciary and the 1994-1995 judicial reform.[14]

In addition, the use of connections and traffic of influence has been limited in general to administrative affairs, such as appointments of typists or personal assistants. Although there is no evidence that these phenomena pose a serious problem to trials or the administration of justice as a whole, there have been some exceptions to this generalization according to some interviewees.

Finally, there is evidence that not all senior officials use connections or traffic of influence to favor employees, friends, or relatives. At least 50% of high-ranking officials (5) in this sample said during the interview that these phenomena were ethically wrong and damaging to the institution. Therefore, they refused to engage in these practices and have tried to eliminate them. Notwithstanding, these phenomena are still part of the federal judiciary as most interviewees acknowledged. Interestingly, there is a similar problem that is particularly rampant in the MFJ: nepotism. The vast majority of interviewees said that it has been difficult to cope with nepotism because almost everyone benefits from it.

### 4. *The Normalization of Nepotism*

In the MFJ, connections and traffic of influence are used to favor friends and members of one's clique to obtain positions and climb the echelons of the institution. Nepotism, on the other hand, is used first to favor one's relatives in obtaining jobs, and then to help them climb the hierarchical ladder. The difference between nepotism and traffic of influence is that the latter refers to favoritism and/or preferential treatment in government affairs to ben-

[14] Pilar Domingo, Judicial Independence: The Politics of the Supreme Court in Mexico, Vol. 32 No. 3, *Journal of Latin American Studies* 705, 737 (2000). Héctor Fix-Fierro, Judicial Reform and the Supreme Court of Mexico: The trajectory of three years, Vol. 6 No. 1, *United States-Mexico Law Journal* 1,21 (1998). Schatz, *supra* note 6. Jeffrey K. Staton, Lobbying for Judicial Reform: The Role of the Mexican Supreme Court in Institutional Selection, in Reforming the Administration of Justice in Mexico 272, 296 (W.A. Cornelius & D. Shirk eds., 2007).

efit friends or one's clique while the former is favoritism shown by someone in power to relatives, usually by appointing them to jobs. These jobs do not have to be high ranking positions as long as they represent steady employment.

Nearly 80% of the respondents (35) admitted that nepotism exists as part of everyday life at the MFJ. It has become a naturalized practice because everyone—among senior officials—does it and benefits from it. Even junior employees, if they can, would use their connections to find a job for a relative because they know that MFJ salaries are better than those in other institutions. To get a job in this institution a person does not have to be a lawyer because there are dozens of administrative positions that do not require a law degree.

In Mexico, and certainly inside the federal judiciary, nepotism does not have the negative connotation that it might have elsewhere. This has to do with the sociocultural understanding of the Mexican family. Riding[15] argues that the family has been a powerful and conservative institution that has given political stability to Mexico. He asserts: "Those with jobs look to place unemployed relatives: in homes with extensive domestic service, the maid, chauffer and gardener may belong to the same family…Within the government, nepotism at the highest levels may be frowned upon, yet entire families will be brought into the bureaucracy by some relative with influence."[16] As the quote suggests, helping a relative get a job is not just socially acceptable but doing otherwise would be reprehensible in everyone's eyes.

Family is considered more important and respectable than one's job or any government office because it offers a support structure that no one else can provide. Family is also a reliable and a trusted domain, one that is probably more important than respecting the law or any personal interest. Although the concept of family has changed and become less traditional in the new millennium, some of those old features still prevail in Mexican society. Authors like Lomnitz,[17] Morris,[18] and Smith,[19] support the argument that family ties and socialization play a crucial role in reproducing phenomena such as nepotism and corruption.

Based on this contextualization of the Mexican family, it is not difficult to understand why nepotism is perceived as acceptable in the MFJ. As with other practices in Mexican society involving wrongdoing, people use euphemisms to refer to nepotism.[20] Senior and junior officials would never refer to

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[15] Alan Riding, Vecinos Distantes: Un Retrato de los Mexicanos (Joaquín Mortiz, 1985).

[16] *Id.*

[17] Claudio Lomnitz (ed.), Vicios Públicos, Virtudes Privadas: La Corrupción en México (Porrúa, 2000),

[18] Stephen D. Morris, Corruption and Politics in Contemporary Mexico (University of Alabama Press, 1991).

[19] Smith, *supra* note 13.

[20] Gabriel Ferreyra-Orozco, Understanding corruption in a state supreme court in Central Mexico: an ethnographic approach, Vol. 69, No. 3, *Human Organization* 242, 251 (2010).

nepotism using that word but instead terms such as *favores* (favors), *dar chamba* (give a job), and *favores de chamba* (employment favors). By using euphemisms, MFJ employees take away their disapproval of the word nepotism and no longer see it as harmful and objectionable.

Most of the interviewees (80%) who talked about nepotism used the phrase *favores de chamba* to describe this phenomenon, but others used different words, such as mafias, *malas prácticas* (bad practices), and *recomendados* (recommended people). Interviewee Elizabeth said, *"Muchos jueces de distrito que acaban de ser nombrados son hijos o sobrinos de magistrados o ministros. Aparentemente los exámenes de selección son la regla pero todo es una mafia desde arriba"* (Many newly appointed district court judges are children, nieces or nephews of appeals judges or justices. It seems that entrance exams are the rule, but it is a complete mafia coming from the top).

Nearly 20% of interviewees (10) said that the Judicial Council is well aware of the epidemic proportions of nepotism and has tried to stop or at least reduce it. The usual approach has been to change a bylaw to penalize its practice but none of those measures has succeeded for two major reasons: One is that most of the attempts to eliminate nepotism have not truly intended to fix the problem given that the Council and its members benefit from nepotism. Secondly, modifying the law to impose harder sanctions against those who engage in nepotism is condemned to fail because senior officials are lawyers who know the law better than anyone else and thus they can always find loopholes to circumvent it.

Meritocracy in the MFJ is more than just a reward system based on personal credentials. It also involves developing social networks to find opportunities. It is within this network of friends, acquaintances, former bosses, peers, and coworkers that *favores de chamba* are requested and given. Those who benefit from favoritism, either through connections, traffic of influence, or nepotism, are nicknamed *recomendados*, a derivative term from the verb *recomendar,* which means to recommend. At least 10% of the interviewees (5) mentioned that having *recomendados* in one's district court is a doubled-edged sword because they can be responsible workers and fulfill the demands of the job or they can be exactly the opposite. In either case, the head of the court has to tolerate the person because there is an unwritten rule among senior officials that, regardless of the performance of *recomendados*, their employment is always guaranteed. This may sound silly if the *recomendado* turns out to be a failure, but it is a procedure to assure them permanent employment status. According to interviewees, some, but not all, *recomendados* enjoy quite a few benefits that other employees do not, such as shorter work schedules, more time off, and less demanding work. In any case, the *recomendado's* assessment and working conditions would depend on who the *recomendado* is, who recommended him or her, the *recomendado's* position, and whether he or she is pursuing a career in the MFJ.

From the analysis of the interviewees' narratives, it can be inferred that nepotism is not a black-and-white phenomenon and is not necessarily always negative. For instance, job rotation is a common practice among brand new judges and justices because they are frequently assigned to different jurisdictions early in their careers before they settle into one. *Favores de chamba* is a pragmatic practice to provide employment for spouses if needed. Family members of judges and magistrates sometimes reach high-ranking positions not because of nepotism, but because they are smart and have to prove it by excelling at their jobs. Among the negative implications of nepotism and *recomendados* are an unfair system of appointments, abuse of power by senior officials, and an inconsistent meritocratic process.

Nepotism is not an isolated phenomenon, but one intertwined with other institutional practices, such as strong hierarchies, heavy centralism, and a male-centered culture, that have characterized the federal judiciary. Regardless of the outcomes, nepotism is a self-defeating practice in the administration of justice because it creates a second-class category for those employees who do not have relatives in powerful positions. It also contradicts the principles of fairness and equality that should be at the core of a federal judicial system. Nonetheless, it is essential to take into account the social context in which the phenomenon takes place in order to understand it more accurately and address it accordingly.

### 5. *Handling Drug-Related Trials: Are Cartels at Threat to the MFJ?*

During interviews, many interviewees said that drug cartels were a threat to the MFJ, but not everyone agreed with this perspective. Those who felt intimidated by potential harm from cartels cited cases where MFJ officials have been threatened or targeted by these criminal organizations. These interviewees usually knew of threats against peers or court employees in their jurisdictions or somewhere else, although they did not specify whether these threats came from drug cartels or someone else.

Some respondents said that threats from drug cartels against court employees were not common because drug traffickers, or their attorneys, for that matter, knew that staff and junior officials could not decide a trial. Only a judge had the power to free or jail a defendant in a sentence and most judges would not dare to acquit a criminal without evidence to support that decision. The corollary was that high salaries, social status, and the overall job benefits of working at the MFJ discouraged most senior officials from engaging in corrupt acts.

An interesting argument to explain the unlikelihood of a judge or junior official accepting bribes from drug cartels is that once someone does it, she or he has to keep working for the cartels forever. Judges are not stupid, and it would be improbable that any high-ranking official would agree to be bribed

by drug traffickers' lawyers. Yet, there are exceptional cases in which judges and/or justices might accept bribes from attorneys representing drug cartels members. Because this statement would be difficult to prove, there is no direct evidence of these cases. However, the *Michoacanazo* trial offers an example of a case in which a drug cartel or local officials probably influenced the judicial process by bribing a federal judge.[21]

Overall, many interviewees implied that threats against court staff and senior officials have increased in the last decade. The number and type of threats vary from jurisdiction to jurisdiction. Some threats came via phone calls to secretaries, and others were made to process servers face-to-face by angry defendants serving time in prison. In Tijuana, a junior official received a *corona de muertos* (a funeral wreath) at her office as a threat, implying that she would be dead soon. Two interviewees recounted the cases of two judges who had to flee the states of Chihuahua and Baja California after receiving death threats regarding the verdicts of trials under their jurisdiction. There is not enough information from the collected data to determine the percentage of these threats that comes from drug-related cases, but it is logical to conclude that not all of the threats were made by drug cartels. Sometimes angry parties who blame the judge or the judicial system for a verdict against them can also send threats.

Regardless of the origins of threats, the MFJ has developed mechanisms to cope with them to guarantee senior officials protection against potential harm. Among other things, the MFJ now provides armored vehicles for judges in district courts who handle high-profile drug trafficking cases or for some who work in jurisdictions along the Mexico-U.S. border. The Judicial Council, in coordination with the Attorney General's Office, supplies bodyguards for senior officials who have received credible threats. The effectiveness of bodyguards was proven in 2010 when a federal judge in the state of Nayarit who was handling high profile drug trafficking cases was attacked and his bodyguards saved his life, although one of them was killed.[22] Job rotation of senior officials in jurisdictions with high levels of organized crime has been another way to defuse threats and avoid potential cronyism between judges and the law firms that represent drug cartel members.

To protect the federal court premises, the MFJ has hired private security officers to guard all buildings belonging to the institution. The Council has invested in metal detectors and x-ray machines to scan suitcases, backpacks, and any bags that come into the federal courts. All employees and visitors have to wear badges while doing business in the courts. Visitors and litigants also have to sign in and show a picture ID to have access to the premises. In

[21] Gabriel Ferreyra, The Michoacanazo: A case-study of wrongdoing in the Mexican Federal Judiciary, Vol VIII No.1, *Mexican Law Review* 3, 31 (2015).

[22] *Atacan al juez Elorza Amores; matan a un escolta y hieren a 2*. LA JORNADA, August 20, 2010, available at *http://www.jornada.unam.mx/2010/08/20/politica/011n1pol.*

addition, people who want to talk to a judge need to make an appointment with a secretary (as a type of screening process) and justify their legal interest in speaking to the judge (unlike the U.S., in Mexico it is legal for trial parties to meet with the judge separately). Although a decade ago few of these measures—such as wearing badges to access courts—were irregularly implemented, they have now become part of the official policy in all MFJ jurisdictions and are strongly enforced.

These changes have had a positive impact among citizens and the community of attorneys that litigate in federal courts because it shows that the institution can be professional and well organized. In this regard, the federal judiciary distances itself from the state judicial systems, which tend to be less organized in terms of protecting their employees and premises—with a few exceptions—probably due to lack of money and institutional support from state governments.

### 6. *When the Rule of Law Leads to Impunity*

The MFJ has been praised for its unconditional respect for the rule of law. The institution itself is proud of this principle, and has an official policy to protect individual rights based on strict obedience to the law even if this generates impunity. For the MFJ, legality trumps the punishment of criminals and justice for victims. The most striking example of this attitude—and, unfortunately, the most common one—is when criminals walk free from prison due to legal technicalities or mistakes made in the public prosecutor's office. A judge in a district court spoke of a case under his jurisdiction to explain this official policy for applying the rule of law unconditionally:

> *Un caso que me pasó recién llegué a este juzgado es que había un juicio donde dos personas habían sido detenidas por delitos graves, y aunque sí eran responsables del delito, por la forma en que se llevaron a cabo esas detenciones fueron arbitrarias y violando gravemente las garantías de los detenidos de modo que resolví dejarlos en libertad.* (One case I had when I first came to this court was a trial in which two people had been arrested for felony charges. Although they were responsible for the crimes, I had to rule to release them because the arrests were carried out arbitrarily and in serious violation of the detainees' civil rights.)

This description is the archetypical representation of the most familiar face of impunity and injustice in the Mexican federal judicial system. The MFJ is not the only one to blame for these maladies. Other government agencies in the criminal justice system also play a role in this process, and errors such as deficient criminal inquiries, inadequate police investigations, faulty work done by the prosecutor's office, and a literal interpretation of the law contribute to the problem. Then, when a federal judge looks at the indict-

ment as a whole and the case appears to be deficient and inconclusive, the judge frees the perpetrator more often than not. It would be unfair to only blame the MFJ for releasing criminals on grounds of due process violations because the work of the public prosecutor's office is crucial to producing a credible conviction. Many times, the public prosecutor's office fails to provide convincing evidence that would withstand scrutiny in a court of law. In fact, faulty indictments are the main reason why judges release criminals based on technicalities. However, the MFJ has also contributed to the problem by reproducing judicial criteria and case law that reinforce legalism and blind adherence to the law.

Interviewee Quirina, an expert in the federal judiciary, was extremely critical of this common practice in the MFJ. She said that legitimacy in a trial should be justified by rational verdicts that bring justice to those who resort to the judicial system. Instead, she said, the MFJ has taken a path that solves disputes by strictly applying the law without really providing justice. She pointed out,

> *Los operadores de la ley—jueces, magistrados, ministros, personal de los tribunales—todavía funcionan con una mentalidad autoritaria porque los criterios judiciales con que justifican sus resoluciones y trabajo son rigoristas, legalistas, y olvidan la esencia de un juicio.* (Legal operators—judges, appeals judges, justices, and court staff—still work with an authoritarian mentality because the judicial criteria underlying their verdicts and work are rigorous, legalistic, and they forget the essence of a trial).

To put her criticism into context, Quirina said that after the 1994-1995 judicial reform that resulted in the establishment of the Judicial Council, all its "new" members belonged to the MFJ's rank and file—justices and counselors were appointed from a pool of federal judges and justices —who already had a preconceived notion of what judgeship meant. According to her, their judicial criteria and sentencing guidelines reproduced the authoritarian thinking and patterns that had prevailed at the MFJ during the tenure of the ancient regime. By not introducing a new generation of legal experts, who would have probably been exposed to different legal paradigms and interpretations of the law, the MFJ only changed its façade, but the mental framework remained the same.

In many ways, the MFJ keeps repeating old practices (e.g. nepotism, rigid judicial criteria, cronyism, and bureaucracy) which does not reflect well upon a branch of government that should uphold exemplary behavior in a transitional democracy. As long as the MFJ refuses to acknowledge the need for an overhaul of its bylaws and sentencing criteria, Mexican society will continue blaming this institution for the impunity and the lack of justice in Mexico.

## IV. Culture, Inequality, and Discrimination

### 1. *Structural and Institutional Inequalities at the MFJ*

Another subtle but common problem in the MFJ, rooted in patriarchalism and authoritarianism from the past, is structural and institutional inequality. This inequality, or rather inequalities, had not been acknowledged until recently, and then, just superficially. Inequalities at the MFJ are subtle and well established in both the institutional and cultural realms. Culturally speaking, MFJ ethos reflects the traditional values of Mexican society: patriarchalism, centralism, hierarchical divisions, formalism, bureaucratic organization, and a strong resistance to innovation. These features are represented in a myriad of ways, such as wage disparities, labor divisions, office space, social status, and above all gender discrimination.

First, there is a huge income gap between justices and council members and low-ranking officials despite the fact that most of the intellectual and physical work is done by the latter. Gender discrimination has led to inequalities in which many women have been confined to clerical work while men hold most of the powerful decision-making positions. According to the Judicial Council, more than 50% of the employees in the MFJ are women, but they only account for 20% of judges and justices . At the top of the institution, this disparity is even worse: out of eleven justices only two are women, and only until recently two women have joined the seven members of the Judicial Council.

Deep patriarchalism and strong Catholicism are two factors that have been woven together for centuries to keep Mexican women in traditional roles, such as housewives and mothers, or to restrict them to doing jobs considered feminine. This is not the case anymore in the overall conditions of Mexican society where women have been able to narrow the gender gap and make strides in urban settings over the past two decades. Nevertheless, broad gender inequalities still exist.

What came as a surprise during the fieldwork were the arguments interviewees used to justify gender inequalities. Except for one female, all interviewees agreed that the MFJ did not discriminate against women. The reality was—according to these respondents—that women did not want to become judges or justices because it conflicted with their roles as mothers and wives. They cited the long working hours, frequent job rotation in multiple jurisdictions, and sketchy schedules—including working on weekends—to support their claim.

Magdalena, a female judge with 32 years of experience in the MFJ, said: *"No es discriminación sino una decision personal de las mujeres de no participar porque ello implica muchos otros compromisos de cambiarse de adscripción y si se tienen hijos o están casadas lo piensan mucho"* (It is not discrimination [against women] but a woman's personal decision not to participate [in the selection process to

become judge] because it implies many other commitments in moving to another jurisdiction, and they [women] think twice about doing this if they have children or are married). Another interviewee, Sara, a brand new judge, said,

> *Muchas mujeres privilegian la vida personal por encima de cuestiones laborales y se resisten a ser titulares porque saben que van a tener cambios de adscripción, lo cual implica moverse con toda la familia y es difícil que el esposo siga a la esposa.* (Many women choose personal life over a professional career, and they decide not to become judges because they know they will have to change jurisdictions, which implies moving their entire family and it is not very likely that the husband will follow his wife.)

These two respondents show how most of the interviewees explain the gender gap among judges and justices. Although these arguments are true in the sense that gender inequalities in Mexico have long been present and are visible in many institutions, the MFJ has failed, first, to acknowledge this unequal treatment of women, and second, to implement changes to reduce gender disparity.

2. *Traditional Gender Roles and Stereotypes*

Only recently has the MFJ begun to take steps towards addressing this problem. For instance, aware that gender discrimination might exist, the Supreme Court created a new office called *Coordinación General del Programa de Equidad de Género del Poder Judicial Federal* (General Coordinating Office of the Mexican Federal Judiciary Gender Equality Program) in 2008. This office and its program aim to create awareness about gender equality among judges and personnel. The goal was for employees to become familiar with gender equality in their sentencing guidelines and to create a work environment free of gender discrimination and violence. This office was eventually replaced by the Interinstitutional Committee of Gender Equality of the Mexican Federal Judiciary in May 2010.[23]

The former Office of Gender Equality conducted ethnographic research within the Supreme Court in 2008-2009 to find out whether there was any discrimination against women and how pervasive the problem was. It also carried out a national survey among MFJ employees from all jurisdictions.[24] The findings from these two studies confirmed that institutional discrimination against women exists throughout the MFJ. The glass ceiling is one mechanism that perpetuates the problem.

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[23] Suprema Corte de Justicia de la Nación [Mexican Supreme Court], Webpage (2017), available at *http://portales.te.gob.mx/genero_imparticion_justicia/view/inside/antecedentes*.

[24] Suprema Corte de Justicia de la Nación [Mexican Supreme Court]. Resultados de los Diagnósticos Realizados en la Suprema Corte de Justicia de la Nación y el Consejo de la Judicatura en Materia de Equidad de Género 2008-2009 (2011).

The creation of an office for gender equality means nothing if no specific actions are taken towards changing the status quo. Although it is understandable that any policy intended to reverse long-term patterns of unfair treatment against women would take years to effect institutional change, there is evidence that gender inequality is not a priority for the head of the MFJ. Several trends reinforce this conclusion. For instance, a woman has never been a Chief Justice. Neither the Supreme Court nor the Council has ever considered installing a gender quota so that more women could have access to high-ranking positions. If the intention to reverse gender discrimination really existed, the Council would set up a recruitment process for female employees to help fill the judge and justice positions. However, this process would be considered discriminatory against men because there is a misunderstanding of what gender equality means in the workplace. Many employees, some women included, think that gender equality means to treat men and women equally without any consideration of the social roles mothers and wives play in the conservative Mexican society. This hegemonic male worldview has been institutionalized and, because the leadership of the MFJ is overwhelmingly made up of men, it seems unfeasible that there will be a change of the status quo in either the short or the medium term.

According to Judicial Council, there are almost 30,000 employees working in the federal judiciary. More than half of these workers are women, but they are greatly underrepresented in high-ranking positions. Only 20% of judges and justices are women. There were 733 circuit appeal judges —600 men and 133 women—and 356 federal judges—269 men and 87 women— according to the 2011 Jurisdictional Atlas.[25],[26] This gender inequality does not appear to be a concern for the judicial branch despite the existence of an office that is responsible for addressing gender issues within the institution. The Judicial Council has normalized this gender gap by ignoring the topic and addressing only women's issues related to legal matters. In other words, the Council and the entire federal judiciary may acknowledge the fact that Mexican women suffer from discrimination in society, but are incapable of admitting that women working in the judicial branch suffer institutional discrimination within the MFJ.[27]

## V. Conclusions

This article sheds light on the ordinary activities of the federal judiciary that are little known by most people outside the institution. Knowing these

[25] Consejo de la Judicatura Federal, Poder Judicial de la Federación, Atlas Jurisdiccional (2011).

[26] The latest edition of the Atlas Jurisdiccional in 2014 did not include any demographics, only data about new courtrooms nationwide and jurisdictions.

[27] Consejo de la Judicatura Federal, Poder Judicial de la Federación (2011), available at *http://www.cjf.gob.mx/ http://www.cjf.gob.mx/*.

activities offers a different perception of the MFJ and the complexity of the administration of federal justice. These data show that the negative image that the judicial branch has had in the past overshadows its positive features. What is more important is that this document provides a better understanding of the setting and context of the MFJ, which serves as background to comprehend more complex phenomena such as nepotism, abuse of power, misconduct, and corruption.

The Mexican Federal Judiciary is an institution that reproduces the traditional patterns of bureaucracy that have characterized Mexican society—hierarchies, complex regulations, and a strong administrative system. It also portrays a culture of intense work in which excruciating work schedules, effort-intensive jobs, and stressful environments are characteristic of everyday life in the MFJ. Despite these difficult work conditions, most employees and judges accept them as natural features of federal courts. Nearly two-thirds of the interviewees (33) suggested that the unifying factor that holds this setting together is the high salaries and a passion for working in these courts. Practices such as nepotism have become normalized in some sectors of this institution—usually among high-ranking officials—and have therefore lost their negative connotations. Nepotism in particular is widespread, and nearly 80% of the interviewees (35) acknowledged its existence. Because it is not seen as an immoral or unethical phenomenon, the head of the MFJ has little or no interest to tackle the problem.

Whether it is high-ranking officials' use of connections, nepotism, or influence peddling, these practices still exist because of the culture of strict obedience, loyalty, and powerful hierarchies derived from the inertia of the ancient régime. According to respondents who acknowledged misconduct, these practices are not as prevalent as in the past, and have been considerably abated. Except for nepotism, misconduct such as influence peddling and corruption occur only exceptionally and are not a huge problem within the MFJ. Interestingly, there is a doublespeak discourse from some senior officials regarding these phenomena: on the one hand, they officially condemn these practices because they that affect the MFJ, but on the other hand, they reproduce them and benefit from them.

Finally, corruption is a phenomenon that remains part of the MFJ in the broader context of Mexican society and as a legacy from the authoritarian regime. More than 80% of respondents (37) admitted that corruption takes place at the federal judiciary, but all of them emphasized that it happened only exceptionally. Even those who mentioned a percentage of corruption, such 1%, 5%, or 10%, added that it was a rare practice within the larger context of the institution. It is important to understand this emphasis on corruption as an exception because it hints at the institutional mindset of the problem: Yes—employees would admit—there is still corruption in the federal judiciary, but it is not as widespread as it used to be and compared to the rest of the federal bureaucracy, the MFJ is doing a better job on this issue.

It is a fact that there is corruption in the MFJ—exceptionally but it does occur. Corruption related to drug trafficking and cartels is even rarer than any other kind of corruption because the implications of getting involved with drug cartels are too dangerous, interviewees suggested. None of the respondents mentioned a single case of corruption related to drug trafficking trials. Instead, they said the opposite was true because hardly any judges or justices would do business with cartel members given how organized crime conducts their business. This does not mean that this type of corruption does not take place; it does, but in more subtle ways and it requires more complex mechanisms and behaviors as in the *Michoacanazo* case.[28]

There are still many challenges ahead for the MFJ before it can become a fully independent and reliable branch of government in the context of the 21st century. Yes, the institution is more independent than before, but legal and political contingencies still make it susceptible to influences from the two other branches of government. A particular phenomenon that deserves special attention is the responsibility of the federal judiciary in the problem of impunity in Mexican society. The MFJ is still caught in old schemes of legalism that perpetuate this problem in the name of adherence to the rule of law. For most federal judges—in trial and appeals courts—the rule of law is considered a sacred paradigm by which verdicts must adhere to a literal interpretation of the law. This strict judicial criterion has allowed many criminals to walk free, and senior officials justify their decisions on legalistic grounds. With the recent overhaul of the Mexican judicial system that switched from an inquisitorial to an adversarial system this problem of impunity could increase. The MFJ should be more flexible in their interpretation of the law in order to keep up with the dynamics of social reality. Because of this shortcoming, there is a disparity between what the law holds as legal and the real world of everyday life, and many times the work of the federal judiciary is unable to make a connection between these two realms and dispense justice to citizens.

These are the major issues that the Mexican federal judiciary must face in the coming years in order to leave behind the negative practices that still prevail within. It is impossible to predict how long it will take for this branch of government to transform into the institution that Mexican society demands. Regardless of this uncertainty, it appears that only when a new generation of judges (younger, more educated, progressive, and gender equal that includes males and females) have filled in enough positions as justices and council members at the top of the MFJ to exert a majority in the Supreme Court and the Judicial Council will this institution be able to leave behind the conservative and rigid thinking inherited from the past century. Then there will come a time when corruption, misconduct, and wrongdoing will be rare occurrences because the principles governing this branch will be professionalism, honesty, compassion, ethics, and respect. Hopefully, this will be the case in the near future.

[28] Ferreyra, *supra* note 21.

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# THE RIGHT TO SELF-DETERMINATION OF PEOPLES: NOTES ON ITS COMPATIBILITY WITH THREE MODELS OF GLOBAL ORDER

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Abstract: *The right to self-determination has become an increasing legitimate demand of peoples seeking recognition and autonomy. In the beginning, this right was conceived in favor of peoples that depended on colonial powers, but today it has become a claim of any people that considers itself a people, as in the case of indigenous peoples or non-colonized peoples. This concept of the right to self-determination seems to be the path leading to a more heterogeneous world. Conversely, the rise of various problems that affect us globally seems to require the creation of international political institutions capable of solving these problems, which would most likely lead us toward a more homogeneous global order. Although both tendencies have powerful reasons that make them irreversible, it is not clear how they can co-exist. In this article, the author discusses whether a broad notion of the right to self-determination is compatible with three different models of global order proposed by Thomas Christiano, Rafael Domingo, and James Bohman, respectively.*

Keywords: *Self-determination, external self-determination, internal self-determination, global order, global democracy, global community, statist global order, pluralist order.*

Resumen: *En la actualidad, el derecho a la autodeterminación se ha convertido en una demanda legítima creciente de los pueblos que buscan su reconocimiento y autonomía. Aunque este derecho inicialmente fue concebido a favor de los pueblos que dependían de las potencias coloniales, en la actualidad se ha vuelto una demanda de cualquier pueblo que simplemente se asuma como tal, como por ejemplo los pueblos indígenas o colectividades no colonizadas. Esta concepción del derecho a la autodeterminación parece conducirnos a un mundo más heterogéneo. En una dirección opuesta, el incremento de diversos problemas*

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*que nos afectan globalmente parece requerir la creación de instituciones políticas internacionales con la capacidad para solventarlos. Esta necesidad parece conducirnos hacia el establecimiento de un orden global más homogéneo. Aunque ambas tendencias cuentan con poderosas razones que las vuelven irreversibles, no está claro cómo pueden armonizarse. En este artículo, el autor discute si una noción amplia del derecho a la autodeterminación puede ser compatible con tres diferentes modelos de orden global propuestos por Thomas Christiano, Rafael Domingo y James Bohman.*

Palabras clave: *Derecho a la autodeterminación, autodeterminación externa, autodeterminación interna, orden global, democracia global, comunidad global, orden global estatista, orden pluralista.*

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## I. Introduction

In 2001, the Mexican Congress amended the Mexican Constitution to guarantee the right to self-determination for indigenous peoples. This constitutional reform was the result of a very intense movement claiming the rights of indigenous peoples triggered by the Zapatista Army of National Liberation (EZLN) years before. Parallel to these events, similar changes have taken place since then in the new constitution of Venezuela and in different municipal legislations in many Latin American States, such as Colombia, Ecuador, Bolivia, Nicaragua, Guatemala and Chile.[1] The common denominator of all these cases consists in recognizing and vindicating the rights of indigenous

[1] Stephen Allen, *The UN Declaration on the Rights of Indigenous Peoples: Towards a Global Legal Order on Indigenous Rights?* in Theorising the Global Order, 187, 203 (Andrew Halpin & Volker Roeben ed., . Hart Publishing 2009).

peoples who have been historically oppressed and marginalized. Furthermore, on the basis of self-determination claims, there has been a central reaction against the pressures of both the neoliberal economy and assimilationist-homogeneous culture.[2]

However, indigenous peoples are not exclusively entitled to the right to self-determination. When the right to self-determination began to strengthen at the end of World War II (there had been an attempt for it to be considered a general norm in international law after World War I but it failed),[3] it was conceived only in favor of peoples living in territories that were not self-governed, but depended on colonial powers.[4] Self-determination was conceived as the right of those peoples to decide their political future. This does not mean, of course, that claims of peoples in favor of recognition, equality and independence are a recent phenomenon. Rather, they have been inherent to the formation of nation-States.[5] Nonetheless, as soon as this right gained acceptance, though not without several obstacles, the number of subjects entitled to self-determination has increased to the extent of including, with some limits, indigenous peoples and non-colonized peoples. Catalonia and Crimea are very recent examples, but many scholars disagree that these peoples have such a right. Let us call the conception of the right whose holders are only colonized peoples *restricted self-determination*, and the conception of the right whose holders are both colonized and non-colonized peoples *wide self-determination*. Whatever view taken on this, it is not possible to deny today that *wide self-determination* is a powerful argument that seems to back and foster claims of growing minorities that seek recognition, autonomy or even secession. Perhaps, it will eventually prevail over *restricted self-determination*. If so, the world would increasingly become more heterogeneous than ever before. This does not necessarily mean that we will see a dramatic increase of multiple States, but there will at least be an increasing fragmentation of peoples into minorities due to their claims of recognition and self-determination. The difficulty of this scenario is that if States cannot deal with these claims, they will face the challenge of governing over these minorities.

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[2] François Houtart, *Las autonomías multiculturales en el contexto de la globalización*, in La autodeterminación de los pueblos, 7, 15 (Juan Casañas ed., Icaria 2008).

[3] Milena Sterio, The Right to Self-Determination under International Law: "Selfistans," Secession, and the Rule of the Great Powers, 10 (Routledge 2013).

[4] In this article I use "colonial powers" and "colonial peoples" referring to "colonialism" as a practice of domination that involves the subjugation of one people to another. However, this political sense of the concept is not the only one and cannot be reduced to a simple definition. For a general view, I suggest reading Margaret Kohn & Kavita Reddy, *Colonialism*, The Stanford Encyclopedia of Philosophy (Edward N. Zalta ed., Fall 2017), https://plato.stanford.edu/archives/fall2017/entries/colonialism/; and for a more in-depth analysis, see Pablo González Casanova, *Colonialismo interno [una redefinición]*, La Teoría Marxista Hoy. Problemas y Perspectivas 409-434 (Atilio A. Boron et al., CLACSO, 2006).

[5] Rodolfo Stavenhagen, Conflictos étnicos y estado nacional, 7 (Siglo Veintiuno Editores, 2000).

At the same time, and contrary to heterogeneity driven by the right to self-determination, there is a different and possible trend that seems to lead to a more homogeneous planet. As a result of the intense and relatively recent globalization, different problems and necessities concern all the peoples all over the world. These problems –such as economic crises, poverty, security, climate change, terrorism, war, the Internet and international trade regulations– need institutions, relationships and processes on a global scale that require the coordinated and joint action of all the countries since these problems cannot be solved by a single person, people or State.[6] This is why scholars and politicians have been debating different proposals to delineate the contours of a global order that involves the integration of peoples, the inevitable vanishing of States' sovereignty, and the creation of institutions that can keep the global order. If this is the only way to deal with global threats, the new arrangement organizing both social life and world order is significant because the emerging institutions make decisions and impose rules that bind and affect distant individuals, communities and States across the world, whether these have agreed or not. Moreover, if minorities within States claim rights to self-determination and these rights are denied to them, it is likely that this would generate a conflict that would challenge the capacity of institutions to keep peaceful global order, especially if these minorities regard the global process as a threat.

Thus, both the right to self-determination and the need for global institutions aim at protecting important values and legitimate claims, as well as dealing with current problems. However, can the right to self-determination be compatible with the global order? In this article, I will demonstrate that although it would be desirable for both elements to be compatible, broad self-determination seems to be overturned and therefore impossible if analyzed under the light of the three influential models of global order discussed here. This does not mean that global order is necessarily against self-determination; but rather, if we imagine a global order in terms of these theories, it is possible that the right to self-determination can be overturned, or that our understanding of this right must change.

In order to do so, in the first section, I will describe the right to self-determination, highlighting its principal legal features according to international law. It is important to note that my starting point is a *legal* concept of the right to self-determination that is supposedly shared by the international community. Although I will mention the main philosophical and political arguments justifying it, my aim is not to further the debate, or to give a philosophical and historical explanation of this right. This will be a topic for later research.

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[6] See: Charlotte Ku. *Taking stock: global governance in a post-Westphalian Order*, in International Law, International Relations and Global Governance, 158 (Routledge 2012). Also: David Held & Anthony McGrew. *The Great Globalization Debate: An Introduction*, in The Global Transformations Reader, 1, 7 (David Held & Anthony McGrew ed., Polity Press, 2003).

In the second section, I will analyze this right in the light of three theories of global order, namely, the statist approach (Thomas Christiano), the global approach (Rafael Domingo) and the pluralist approach (James Bohman). I clarify some points regarding this selection. First, these theories are not the only ones that give an explanation of or delineate a global order, but I decided to choose them because each one presents a contrasting view from the other two, and because the homogeneity, which I regard as a trend that goes against the heterogeneity of self-determination, is clearer in these theories than in others. And second, the three theories share the same liberal roots, but do not deny the existence of other theories arising from different and valuable philosophical-political traditions, for instance, republicanism or critical perspectives. However, this article aims to open up broader research.

## II. The Right to Self-Determination

In general terms, the right to self-determination can be understood as the right of peoples to freely determine their political status and to pursue their economic, social and cultural development. As we established below, I believe the broad concept of this right is problematic because of three important features related to the holders of self-determination, their relationship with the State, and the relation between the two components of self-determination (internal and external self-determination), as well as a possible global order. In order to understand this clearly, I will (a) address the justification of the right to self-determination; (b) explain wide self-determination and the two rights involved, and (c) lastly, comment on the aforementioned difficulties.

### 1. *Why Self-Determination?*

There are two kinds of arguments on which the right to self-determination is based.[7] The first one holds that membership to a cultural or historical people is important, not only because it shapes the identity of individuals, but it also makes their freedom possible. Our freedom requires individuals to be in a context where each one has options and acquires knowledge, and this can be fulfilled only if we rely on practices that are, by definition, social.[8] It could be argued that this implies that individuals are irremediably linked to or determined by the community's identity or practices. However, this is not true. In fact, each person is able to shape and reshape his or her identity as much as he or she wants, but, as Young reasons, each person evolves his or

[7] Iris M. Young, Inclusion and Democracy, 256 (Oxford University Press, 2000).

[8] Peter Kraus, *The politics of complex diversity: A European Perspective*, 12 (1) Ethnicities, 3, 19 (2012).

her identity in relation to cultural ties in a different way, and no one has the same attitude towards his or her community. This argument only points at the importance of the community in the initial shaping of both the self of individuals and their ability to exercise their freedom. Thus, individuals need the right to self-determination in order to preserve the sources of their selves and the means by which they become free people.

The second argument holds that structures of power, exploitation, and domination can be easily constructed in a context of social and cultural differentiation. On the basis of difference, peoples exclude others and take advantage of them. As a result, minorities are marginalized, exploited, oppressed, erased or assimilated by the larger majority. For this reason, the right to self-determination can be used as a shield to resist the threats perpetrated by the majorities. The Zapatist movement mentioned in the introduction of this article is an example of peoples who decided to confront the threats coming from both the State they belong to —oppression, discrimination, marginality— and international levels through, for instance, the economic charges imposed on them by international trade agreements.

Both arguments explain why legal efforts have been made in favor of the right to self-determination at an international level and have now become stronger. The right to self-determination has helped to bring to light the fact that current States are plurinational rather than the expression of a single homogeneous nation.

### 2. *Wide Self-Determination: External and Internal Self-Determination*

As noted above, the right to self-determination is the result of various efforts at an international level. It first came into being in the Charter of the United Nations (1945) immediately after World War II. However, its seeds can be found prior to that, guiding the remapping of Europe with the emergence of new States after the collapse of Austria-Hungary at the end of World War I.[9] However, by virtue of the Charter, this right only "contemplated that member States should allow minority groups to self-govern as much as possible."[10] Greater progress in this was achieved decades later with the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), the UN International Covenant on Economic, Social, and Cultural Rights (1966), the UN International Covenant on Civil and Political Rights (1966) and finally the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (1970). Based on these documents advocating the decolonizing movement in the world, many scholars and politicians have supported the idea that all groups, not only

[9] Sterio, *supra* note 3.

[10] *Id.*

those that are colonies, ought to be entitled to self-determination (wide self-determination).[11] Meanwhile, other scholars refute this extension (restricted self-determination).

I will not go deeper into this debate, but rather, I will assume the existence of a right to self-determination in its wider sense, the holders of which are both colonized and non-colonized peoples. This right, in turn, involves two rights, namely internal self-determination and external self-determination.[12]

According to internal self-determination, peoples can co-exist within a larger central State, but the State guarantees them the exercise of rights such as self-government, political autonomy, and cultural, religious and linguistic freedoms. Mainly, this is the right that has been defended for non-colonized peoples, specifically in plurinational contexts, and has gained acceptance at the international level. Furthermore, this is the kind of self-determination that is typically claimed for indigenous peoples and is the meaning given to the 2001 reform of the Mexican constitution. In this respect, all the international documents (International Legal Organization Convention 107 [1957] and 169 [1989], the UN Declaration on the Rights of Indigenous Peoples [2007], and more recently the American Declaration on the Rights of Indigenous Peoples [2016]) take into account the exercise of the right to self-determination by indigenous peoples within existing States without the possibility of secession and becoming a new State.

Regarding external self-determination, peoples are entitled to separate from their mother States in order to achieve self-government, to determine their own political status, and to be free of alien domination. This right to secession has only applied exclusively to colonial peoples, keeping in mind that, according to a restrictive interpretation of self-determination, once the peoples became independent, such a right expired. Consequently, after one people become independent, it would not be acceptable for a group within it to claim its right to secession and therefore, become independent. However, given that now there is a growing opinion that this right should be recognized for non-colonized peoples as well under particular conditions, it seems that the right to external self-determination remains latent whenever peoples

[11] An accurate and brief summary of the features of each document concerning the right to self-determination can be found in Milena Sterio's book which is quoted throughout this article.

[12] Abdulqawi A. Yusuf argues that there is also a third normative strand of the right that has to do with the peoples' right to freely pursue their economic, social, and cultural development, i.e. socio-economic self-determination. However, I will not include this interesting vein since the purpose of this section is to present the general concept of the right to self-determination, which will allow me to analyze it in the light of certain theories of global order. Abdulqawi A. Yusuf, *The role that equal rights and self-determination of peoples can play in the current world community*, in Realizing Utopia. The Future of International Law, 375,391 (Antonio Cassese, Oxford 2012). In addressing internal and external self-determination, I will mainly use Milena Sterio's analysis. *Supra* note 3, at 18-22.

decide to exercise it.[13] Actually, there are several examples of non-colonized peoples that, contrary to the restricted interpretation, have asserted the right to external self-determination, such as those in the Aaland Islands, Kosovo, or more recently, Crimea (although in this case, it has yet to be internationally recognized). What is more, in different countries, this right is guaranteed in their own legal systems, as in the cases of Ethiopia and Saint Kitts and Nevis, whose constitutions have a secession clause.

Thus, regardless of the different arguments that deny the existence of a right to external self-determination inherent to peoples, the wide version of self-determination implies that all peoples -whether colonized or not- are inherently entitled to this right. This means that, whenever they so desire, they are entitled to exercise internal or external self-determination.

### 3. *Preliminary Comments on Self-Determination and Global Orders*

Before analyzing models of global order, I will make some preliminary comments on three problems of self-determination that cannot be overlooked.

First, since self-determination is a collective right, the subject entitled to this right is the people, but it has not been clear how to define what a people is. This is important since it allow us to recognize the holder of such a right.[14] Internationally, for example, it has been said that for a group to be a people, it must meet both objective and subjective requirements.[15] The former consists of sharing common characteristics such as language, religion, history, cultural heritage and territorial integrity. The latter requires that they must perceive themselves as a distinct 'people'. Let us focus on territorial integrity. Territory is frequently a main element used to define the existence of a people, but it is problematic since wars, economic crises, and all the consequences of globalization cause peoples to abandon their own territory and relocate to another, or disperse to different several countries. This fact can produce the assimilation of those peoples into the people of the State where they migrate and can erase individuals' cultural ties. But if individuals do not assimilate, they form

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[13] An interesting analysis of the theories that explain when a people is entitled to external self-determination, although applied to Catalonia, is Ferran Requejo & Marc Sanjaume, *Recognition and Political Accommodation: from Regionalism to Secessionism-The Catalan Case,* in Recognition and Redistribution in Multinational Federations, 107,132 (Grégoire, J.-F. and Jewkes, M., eds., Leuven 2015).

[14] Alain Badiou explains the different ways in which "people" is used and the difficulties each implies. According to him, there are two negative senses of the word "people". The first one relates to racial or national identity, and this violently brings a despotic State into existence. The second subordinates the recognition of a "people" to a State that is assumed to be legitimate. See Alain Badiou, *Twenty-four notes on the uses of the Word "people"*, in What is a People?, 21, 31 (Jody Gladding trans., Columbia University, 2016).

[15] Sterio, *supra* note 3, at 16.

minorities without any rights, much less the self-determination that guarantees their own identity. Thus, for example, it would be very doubtful that if a people were forced to abandon their own territory because of economic crises or wars originated by external actors (as is common today), the lack of territory would be enough to deny these people any right to self-determination.

Second, and related to the previous issue, since the subject of this right is a people, it means that a people are not necessarily confined to the boundaries of a State. This can trigger the emergence of distinct groups within a State claiming the right to self-determination. At least three different groups in a State can claim this right: 1) indigenous peoples, 2) non-indigenous peoples, but members of the same State, and 3) migrants. If they are indigenous peoples, their right to self-determination can be recognized. This has been the case in different Latin American countries, particularly Mexico, whose constitution defines the country as a *pluricultural nation*, originally based on indigenous peoples who preserve their own social, economic, cultural and political institutions. However, in these cases, self-determination is recognized in terms of the State where the peoples live and not in terms of peoples who are seeking recognition. To put it differently, the dominant group regarded as the legitimate people is the one that defines the sense in which marginalized groups can exercise the right to self-determination. If those groups are not indigenous but are members of the same State, any claim to self-determination can be refused. The example of Catalonia in Spain or Quebec in Canada sheds light on this respect. Finally, in the third case, migrant people can become a minority within States but without any right to either representation or self-determination. It should be noted that in these three different cases, the common factor is cultural ties. Nonetheless, it would be interesting to think that the process of globalization and the development of telecommunications could open new scenarios where individuals without cultural ties could voluntarily shape a people. It might even be the case of distant individuals around the world who decide to become a people, as some cosmopolitan proposals maintain.

The third problem is that since self-determination fosters heterogeneity in a world society, it is not clear to what extent its two components —internal and external self-determination— are compatible with global institutions or global governments. Each component raises its own problems. On the one hand, for example, by virtue of internal self-determination, a people could choose an autocratic government, but if it had to participate in creating global institutions, the rest of the peoples —let us suppose they are not autocracies but democracies— would be at a disadvantage since autocrats do not have to take into account the people's opinion to make a decision, whilst democratic governors have to do so. And this relation would be unfair.[16] As a result, in

[16] Thomas Christiano. Self-Determination and the Human Right to Democracy (March 25, 2017) (unpublished manuscript).

order to have legitimate institutions, autocracies would have to become democracies. Nonetheless, I doubt whether this conclusion is truly compatible with the right to govern itself without outside interference since it would seem that the right to self-determination is conditioned to a democratic form of government, a condition imposed from outside. To put it differently, if global institutions require peoples to decide to be democracies, I do not think this is a free choice made by virtue of the right to self-determination. On the other hand, with external self-determination, it might develop into a global order in which peoples may not leave the political order without burdensome costs. This is not too far from reality since the global economy, for example, is something that affects all peoples and they cannot escape from it.

Thus, bearing in mind the twofold character of self-determination and the three problems that I briefly discussed, the next section will analyze three different models of global order and whether self-determination is compatible with each of them.

## III. Three Models of Global Order

In recent decades, there have been different proposals on global order dealing with global problems and the growing trend to create supranational institutions classified under various taxonomical divisions. In this article, I will only consider three specific theories that can be identified as statist, plural and global. These theories envisage a minimum (statist theory), medium (plural theory) or maximum (global community theory) design of global order. After presenting each theory, I will analyze each one in terms of self-determination, *i.e.* the people, and both internal and external self-determination.

### 1. *Statist Global Order (Christiano)*

In general terms, this view maintains that international institutions are important in the global order to keep peace between States, as well as to safeguard democracy, deliberation and human rights. Nevertheless, in creating international institutions, democratic States are the main players since they are the main vehicles of accountability of political power.[17] Christiano argues that this kind of global order is the result of a fair and voluntary association of States, based on the idea that international law and institutions are created as long as States give their consent during the treaty-making process. How-

[17] Thomas Christiano, *Is Democratic Legitimacy Possible for International Institutions?* in Global Democracy: Normative and Empirical Perspectives, 69, 70 (Archibugi, Daniele et al. eds., Cambridge University Press 2012); Jonathan Kuyper, *Global Democracy* in The Stanford Encyclopedia of Philosophy, http://plato.stanford.edu/archives/spr2016/entries/global-democracy/ (May 15, 2016).

ever, he argues, it is necessary to complement this model with the relevance of individuals at an international level. Thus, by creating global institutions, two requirements must be fulfilled: first, States must be robustly democratic, giving adequate protection and representation to minorities; and second, treaties must be fairly negotiated among States.[18]

Considering this, the right to self-determination in Christiano's version is very restrictive (Christiano 2013).[19] First, this right belongs to a community that is a well-defined group with jurisdiction over a specific territory. It should be noted that Christiano is only thinking of peoples whose boundaries correspond to those of their States. Thus, for example, peoples who are forced to migrate or a group of individuals that belong to a State but decided to become independent, are not entitled to this right.

Second, since his model of global order requires peoples to be democratic, it would seem that internal self-determination would not allow peoples to choose their own government freely because it has to be a democratic one. If so, it seems that internal self-determination is not properly a right. To overcome this problem, Christiano reasons that self-determination stems from a human right to democracy.[20] To put it differently, a people have full rights to self-determination when its members' human right to democracy is fulfilled. Thus, by virtue of self-determination, a people could become an autocracy or any other kind of government different other than democracy provided that all the individuals unanimously decide to choose such a government. Nonetheless, the problem remains since even if a people becomes an autocracy through this process, at international level it is required that peoples be robustly democratic. In addition, as Christiano suggests, if self-determination were respected and peoples freely choose their government, it might be the case of an autocratic State having to participate in creating global institutions. In these circumstances the other peoples —that are not autocracies but democracies— would be at a disadvantage since an autocrat does not have to consult his decision with his people whilst democratic governors would have to do so; and this relation would be unfair. In those cases, Christiano solves the problem by arguing that whenever an international institution is created, non-democratic peoples need to be organized democratically to participate in that process. The problem is that this solution is unrealistic, but beyond this, I think the basis on which Christiano builds his arguments is not convincing. According to him, self-determination derives from the right to democracy and not vice versa. Nonetheless, if democracy is understood as a kind of

[18] These two requirements constitute a standard of legitimacy. However, Christiano argues that it leads us to an impasse since in order to bring it about, it calls for democratic deliberation and decision making without the possibility of global democratic institutions to guarantee such a process. See Christiano, *supra* note 18, at 79-92.

[19] Christiano, *supra* note 17.

[20] *Id*. at 22.

government, individuals should have the right to choose such a government; and thus, they have to have the right to self-determination. Christiano would perhaps contend that in order to respect that right, each person would need to participate in minimal egalitarian democratic circumstances, which is why he argues that prior to self-determination, individuals are entitled to the right to democracy. However, I would answer that this right cannot be considered a right to democracy, but to participation. If so, internal self-determination can be preserved.

Finally, in Christiano's explanation of global order, external self-determination seems to be protected as long as the respective peoples participate voluntarily and equally in the creation of international institutions. In this way, peoples participate whenever they decide to do so. The problem with this concept is that it does not consider the fact that there are international institutions that necessarily come in to being and peoples cannot reject them without facing burdensome costs. Thus, in those circumstances, external self-determination cannot be guaranteed. Moreover, alien domination could not be avoided in treaties in which one party takes advantage of the other, since treaties would be negotiated fairly in order to prevent a situation of this kind. So, it would be necessary to have institutions that, as Christiano recognizes, do not yet exist.

2. *Global Community (Domingo)*

To deal with the problems of globalization, this model tries to be more democratic by creating a system which protects human rights, and providing it with democratic mechanisms for citizen input at the global level.[21] Archibugi, for example, argues that we should move towards a "cosmopolitan democracy", which consists of the simultaneous development of democracy at different levels of governance that are mutually autonomous but complementary.[22] Nevertheless, there is a more radical proposal that I address here. Domingo holds that the current international society, which is basically composed of States, should give way to a 'global community' that emphasizes the person as its main subject, and fosters unity while avoiding homogeneity.[23] The global community would be formed by persons, peoples, political organizations, and so on. He argues that the global order does not attempt to eliminate local, national, or supranational orders; rather, it seeks to harmonize them although Domingo does not cast out the elimination of nation-states as a long-term goal. Additionally, he proposes the creation of the United Hu-

[21] Kuyper, *supra* note 17.

[22] Daniele Archibugi, The Global Commonwealth of Citizens: Towards Cosmopolitan Democracy, 97 (Princeton University Press 2008).

[23] Rafael Domingo, The New Global Law, 102 (Cambridge University Press 2010).

manity with a Global Parliament whose decisions would be legally binding and judicially controllable.[24]

Domingo argues that self-determination has traditionally been linked to peoples that correspond to States or nation-states and, therefore, such a right is based on sovereignty. By virtue of this right, each State determines or sets its own limits. As Domingo says, Kelsen considered that sovereignty was supreme, independent, and capable of limiting itself by means of legal order.[25] Nonetheless, if we held this notion of sovereignty and self-determination today, it would be impossible to make them compatible with new forms of organization congruent with globalization.[26] For that reason, he concludes, the universality of globalization, and the order he proposes, is incompatible with sovereignty. I should add that this implies incompatibility with self-determination, as well. He argues that self-determination is not necessarily equivalent to the right to be totally independent without any interference. If we decided to maintain this correspondence, the result would be the dichotomy of dependence/independence, and this is erroneous since in today's world, all communities are dependent or at least interdependent, but never truly independent.[27] Instead, self-determination means self-government and in this way peoples can establish their own legal order and both develop a specific cultural, social and economic region, and be recognized by the international order.

Notice that in this explanation, self-determination is a right which peoples are entitled to regardless of whether they correspond to States or to peoples who exercise jurisdiction over a clearly defined territory. I conclude this since Domingo calls into question the territoriality that is frequently attached to self-determination. But if so, he does not explain how self-determination can be achieved by peoples in those circumstances. In addition, he neither provides any criteria to identify what a people is.

As to internal self-determination, it seems to be protected since Domingo holds that self-determination must be understood as self-government. However, what might happen if there were peoples whose governments were not democracies or were not strongly committed to human rights? Apparently, if the global government ordered local governments to reform in order to be more democratic or to respect human rights, peoples would be compelled to comply with that order since the decisions of global government would be binding. In this case, as in Christiano's theory, internal self-determination is restricted to certain polity, and I have already commented why this seems to contradict self-determination.

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[24] *Id.* at 146.

[25] *Id.* at 70.

[26] *Id.* at 71.

[27] *Id.* at 87.

With regard to external self-determination, although Domingo points out that self-determination cannot be understood as independence since today all peoples are at least interdependent, it seems that there is a room to think that peoples can avoid alien domination in a global order. Domingo maintains that the global community avoids homogeneity because he sees it as made up of individuals, peoples and organizations. Nevertheless, it is not clear how homogeneity and alien domination can be avoided. If there is a global community called United Humanity, whose main organ is a Global Parliament, which entities would be represented? It would seem that the deputies would be representatives of individuals, peoples, political organizations and so on. If so, it would be unfair that the vote of one people's representative had the same weight as a representative of a political organization or a group of individuals that does not constitute a people.[28] Thus, without these clarifications in Domingo's approach, external self-determination is undermined.

3. *Pluralist Order (Bohman)*

One model that is half-way between the statist and the global model is the pluralist order. According to Bohman, in current circumstances of politics and justice, there are three experimental trends that lead us to different scenarios. The first one is economic and neo-liberal, which leads us to opening the borders to a world market. Although this can produce the greatest well-being, it is not democratic. The second one proposes closed political communities since it emphasizes the vulnerability of communities and therefore, stresses their right to self-determination as a means to protect them. However, at least explicitly, this description does not take into account the individuals who do not belong to any community or who are immigrant peoples. The third one, which is the one he favors, is a transnational democracy that "provides a basis on which we can reconceive democracy in a complex, pluralized and globalized context."[29] Let us see more in point in more detail.

Bohman argues that in order to deal with global problems, we need international institutions, but these must be the result of democratic conditions. This is linked to the republican principle of non-domination, which deals with both non-domination of individuals, and non-domination resulting from collective decisions. Thus, in an interdependent world and in order to avoid domination, individuals should have the power to influence problematic interdependencies. This democratic minimum is a minimum of powers, the necessary conditions needed for democratization that allow all those af-

[28] Habermas, for example, proposes a "transnational democracy" whose principal organs are two chambers, one representing individuals and the other, States. Jürgen Habermas. The Lure of Technocracy, (Polity Press 2015).

[29] James Bohman. *From Self-Legislation to Self-Determination: Democracy and the New Circumstances of Global Politics* in 17(1) Critical Horizons, 123, 133 (2016).

fected to be able to form and change the terms of their common life. In this way, self-determination is understood as non-domination.

It is interesting to note that the subject of self-determination is not the people or the citizens whose borders are aligned with the geographical territories of States. Rather, it belongs "to everyone equally in any situation with the potential of domination".[30] This makes interactions possible among multiple and overlapping *demoi.* One interesting implication of this argument is that peoples within States would no longer have to participate in making treaties or creating international institutions through their own States; rather, they would do so by themselves. Nevertheless, Bohman does not explain how this participation of multiple *demoi* could be effected. In addition, since self-determination becomes an individual right, we could ask to what extent the ties of the community or the people weaken or are dissolved.

With regard to internal self-determination, this concept does not accept that peoples may choose the polity of their preference. Since domination is at stake, all individuals should be entitled to participate in decision-making, and this can be achieved only if the polity is committed to democracy. Thus, peoples should be democracies. Again, self-determination is not as free as we would suppose.

In relation to external self-determination, it seems it is true that peoples would be free from alien domination. However, it might be the case in which there were different peoples insisting on participating in the decision-making that concerns them because there is a specific common problem. In this context, could we accept a burden to be imposed on certain people as a result of the decision of a majority? If the answer is yes, then it is obvious that alien domination would not be avoided. If the answer is no, international institutions would be needed to control the process of deliberation, and as Christiano says, such institutions do not exist. Nonetheless, Bohman does not provide a satisfactory solution.

## IV. Conclusions

In this article I have argued that self-determination has had a great importance because it is mainly based on two arguments: first, that this right protects the community, which is important in shaping both the self of individuals and the ability to exercise their freedom; and second, that it is a safeguard to resist the threats of structures of power, exploitation and domination perpetrated by powerful peoples or majorities within the same State. Further, I have mentioned that as a right, in terms of international law, it involves two rights, namely, internal and external self-determination. According to international law, not all the peoples are entitled to both rights. In order to

[30] *Id.*

maintain the stability of States, only those peoples who are oppressed by a larger number of people within the State they belong to can claim external self-determination. But I have assumed a broad notion of self-determination in which a people do not need to be oppressed to be entitled to both internal and external self-determination. This assumption is not arbitrary; it is a fact that nowadays even peoples belonging to traditional democracies are claiming the right to secession that international law only recognizes for colonial peoples.

I have also mentioned that in taking into account globalization, global problems and the unavoidable integration of the world, the *homogeneity* of a 'global order' is a trend that will apparently not change. Thus, I have explained three theories of global order that suggest three different scenarios of the political configuration of the world. After analyzing them, I have stated that everyone holds the right to self-determination I endorse. The three theories imply a new version of self-determination that tries to make it compatible with global order. It is important to note that something all of them have in common is their commitment to democracy. This is why even the statist theory —that seems to respect the free will of each people to determine their political regime— restricts self-determination to democracy. Moreover, it is worth mentioning that only the pluralist theory includes a new concept of the subject of self-determination: whilst Christiano and Domingo consider peoples holders of self-determination, Bohman argues that it instead belongs to individuals who are under conditions of potential domination, and this would imply a change in the boundaries of the people depending on each case.

Nonetheless, I am not convinced by these theories and I would not be willing to accept their explanations of the right to self-determination. I am aware that what I have discussed here is not enough to reach final conclusions on this topic, but let me present some important notes:

1. The right to self-determination outlined in these theories diverges from the concept that has been historically developed by peoples. It seems that if we hypothetically accepted the new scenario proposed by each theory, we would have to change this concept. But accepting changes would also imply eliminating important elements of this right. In other words, this would mean erasing the long battles through which peoples have won rights to protect the values they consider worthy. One of these elements is the holder of self-determination. In my opinion, it is a collective subject, a group of individuals, and not an individual without any ties to a community. As I explained at the beginning, collectivity is valuable not because it is a sum of individuals, but because individuals only form their selves and become free individuals within a community. This is one of the reasons for self-determination.
2. Another element to examine is the concept of "people" as the holder of self-determination. Migrations, new technologies, climate change and the natural gregarious disposition of human beings should lead us to

consider that the formation of peoples is a constant process. If so, it is not understandable why self-determination must be restricted to existing peoples. Simply bear in mind that a restricted concept could hide the domination of existing peoples over new ones.

3. More challenging is to note that since its inception, the right to self-determination was tied to the State in two ways. First, it depends on States' capacity to respect this right, like any other right. But in a global community, it would require the capacity of global institutions for the same purpose. If it is now very common to hear news about the violation of the rights of indigenous peoples caused by actions or omissions of current States, it is not clear why international institutions would be better in respecting the rights of all the peoples in the world. Second, self-determination was conceived as an aspiration of oppressed peoples to become independent States. However, if the tendency towards the disappearance of States is true, we should rethink self-determination as a claim that does not imply becoming a State. In this case, it would be very interesting to look at the experience of indigenous peoples and how they organize their lives within the structure of existing States. Moreover, this would give us a different example of how these groups conceive their own self-determination and would probably shed light on a new form of this right in an interconnected world with vanishing States.

I recognize that wide self-determination is very demanding considering the prevailing trend of self-determination at the international level, but it is useful to become aware of the difficulties involved if it continues gaining acceptance. If self-determination is limited in the light of these theories and if this is a common characteristic of all global theories, it is therefore necessary to outline a concept of self-determination that is compatible with a global order, and does not obliterate its meaning as a right to protect the freedom of individuals from forms of domination.

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# HUMAN RIGHTS EDUCATION AND TRAINING PROGRAMS IN MEXICO: A CROSS-CASE ANALYSIS OF PRACTITIONERS' PROFESSIONAL KNOWLEDGE AND PRACTICES

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Abstract: *In Mexico, human rights education and training programs are becoming one of the most recurrent outcomes in official settlements related to institutional violations and abuses of human rights. Despite their predominant role in addressing human rights violations, there is little systematic information on how these programs are conducted in practice. To fill the gap, this article presents a cross-case analysis of three qualitative studies that explore practitioners' professional knowledge and practices in implementing human rights education programs in Mexico. Each individual case examines some of the challenges practitioners face in the implementation of these programs, the institutional influence on their work, and the role of their own experiences in human rights practices.*

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Keywords: *human rights practice; human rights education; military training; practitioner's knowledge; training practices.*

Resumen: *En México, los programas de educación y capacitación en derechos humanos se están convirtiendo en uno de los resultados más recurrentes en las recomendaciones y dictámenes oficiales en relación a violaciones institucionales y abusos contra estos derechos. A pesar del papel predominante de la educación y capacitación en el tratamiento a violaciones de derechos humanos, existe poca información sistemática sobre cómo estos programas se llevan a cabo en la práctica. Para subsanar el vacío que existe al respecto, este documento presenta un análisis cruzado de tres estudios cualitativos que exploran el conocimiento profesional y las prácticas de los profesionales en la implementación de programas de educación en derechos humanos en México. Cada caso individual examina algunos de los desafíos que los profesionales enfrentan en la implementación de estos programas, la influencia institucional en su trabajo y el rol de sus propias experiencias en las prácticas de derechos humanos.*

Palabras clave: *práctica de los derechos humanos; educación en derechos humanos; entrenamiento militar; conocimiento profesional; prácticas de capacitación.*

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## I. Introduction

Mexico is at a critical and paradoxical moment with regard to human rights. On one hand, the number of cases of human rights violations and abuses has increased consistently since 2006.[1] At least 22 human rights activists have been killed in crimes related to their advocacy work, with more than 245 attacks and abuses reported during this time.[2] By 2012, 82 journalists had been killed and 16 more disappeared; in 37 of the cases the motives were confirmed as being related to their work, but only one of the 630 attacks against journalists has resulted in a criminal sentence.[3] From 2006 to 2011 more than 170 cases of torture, 39 disappearances and 24 extrajudicial killings by state security forces were recorded,[4] official figures for the most recent years remain unclear due to an arbitrary and flawed system of data collection.[5] Nevertheless, at least 99 new cases of torture were being investigated at the beginning of 2013,[6] eighteen more journalists were killed between 2013 and 2016,[7] and new cases of human rights abuses and violations which constitute crimes against humanity have been documented.[8] These figures do not take into account the disparity between official reports and records provided by local Non-Governmental Organizations (NGOs), the latter reporting a higher number of human rights violations and abuses.

On the other hand, there has been significant progress regarding the legal framework and state policy on human rights. In 2011 the constitutional reform on human rights recognized all international treaties Mexico has signed and ratified as legally enforceable instruments in domestic courts and tribunals.[9] The autonomy and mandate of the National Ombudsman has been extended; a new law regulating the use of public force has being devel-

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[1] UN [United Nations], Informe sobre la situación de derechos humanos en Mexico: actualización 2012 y balance 2013 (2013); Open Society Foundations, Undeniable Atrocities. Confronting Crimes Against Humanity in Mexico (2016); IACHR [Inter-American Commission on Human Rights], Situación de los derechos humanos en Mexico (2015).

[2] UN, *supra* note 1.

[3] Freedom House, Protecting Journalists and Human Rights Defenders in Mexico (2012), http://www.freedomhouse.org/sites/default/files/Protecting Journalists and Human Rights Defenders in Mexico.pdf; CPJ [Committee to Protect Journalists], Journalists Killed in Mexico (2016); Gabriela Martínez Sainz, *Theoretical Approaches to Human Rights Education*, noviembre, 2011.

[4] HRW [Human Rights Watch], Neither Rights Nor Security (2011).

[5] Open Society Foundations, *supra* note 1.

[6] Silvia Otero, *PGR indaga 99 casos de tortura en cinco meses*, El Universal, October 21, 2013, *http://www.eluniversal.com.mx/nacion-mexico/2013/impreso/pgr-indaga-99-casos-de-tortura-en-cinco-meses-210161.html*.

[7] CPJ, *supra* note 3.

[8] Open Society Foundations, *supra* note 1.

[9] SEGOB [Secretaria de Gobernación de México], Reforma constitucional en materia de derechos humanos (2011)

oped; and in 2012 a mechanism for the protection of human rights defenders and journalists was created.[10] In addition, local and federal governments accepted more recommendations issued by the local[11] and national human rights commissions in 2013 than in any previous years[12] and have welcomed visits and reviews from international bodies on the situation of human rights in Mexico.[13]

It is within this paradoxical context that Human Rights Education (HRE) and training have gained momentum in Mexico. For activists and NGOs, HRE programs represent an attractive strategy in direct response to structural violence, and a sustainable way to prevent further abuses.[14] These groups also employ HRE as a means of disseminating their work and as a path to influence policy implementation. HRE gives activists and NGOs a space to demand government accountability in the defense and protection of these rights.[15] In addition, public organizations including local and national commissions for human rights have also promoted educational and training programs. As a preventive strategy or as a corrective measure within the recommendations they issue, these organizations rely on educational and training programs to prevent and reduce abuses and violations of human rights[16].

Despite the important role assigned to HRE and training programs, there is limited information about the implementation and effectiveness of these programs. There are no official records of the programs developed by local NGOs, and those implemented by public organizations only report (if and when they do) on the number of activities and the total number of attendees. For instance, the National Human Rights Commission reported more than twenty thousand activities related to HRE and training between 2013 and 2015, which reached more than three million people.[17] However, there is no information available regarding the design of these activities, their objectives, or their assessment and follow-up strategies (or lack thereof). Regardless of the momentum of HRE and training programs, and their growing role in

[10] IACHR, *supra* note 1; UN [United Nations], Informe preliminar del Grupo de Trabajo sobre el Examen Periódico Universal (2013)

[11] In Mexico, in addition to National Human Rights Commission, each of the 32 states has a Local Commission with similar but focused particularly on the specific needs of the region.

[12] UN, *id*.

[13] IACHR, *supra* note 10.

[14] Silvia L Conde, *La educación en derechos humanos. Huellas del camino andado*, in Educación en Derechos Humanos 147–177 (J.C. Gutiérrez Ed., 2006).

[15] OSCE [Organization for Security and Co-operation in Europe] & ODIHR [Office for Democratic Institutions and Human Rights], Guidelines on Human Rights Education for Human Rights Activists (2013).

[16] CNDH [Comisión Nacional de los Derechos Humanos], Informe de actividades 2012 (2013).

[17] CNDH, Informe de Actividades 2014 (2015); Informe de actividades 2013 (2014); Informe de Actividades 2015 (2016).

addressing human rights violations, little is known about how these programs are conducted in practice. Likewise, there is no research on how educational and training programs are implemented, nor on the challenges they face in the process. Nor is there empirical evidence on the relevance, pertinence and impact of these programs.

To fill this gap, this article presents a cross-case analysis of three qualitative case studies that explore practitioners' professional knowledge and practices in HRE programs in Mexico. Practitioners were selected as the focus of the study due to their first-hand knowledge of the implementation process of these educational programs, including their impacts and limitations. The cases presented below discuss the ways in which practitioners develop their professional knowledge to teach human rights, and how this translates into practice. The findings of the cross-case analysis reveal some of the contextual challenges practitioners face in the implementation of HRE programs in Mexico, how these challenges combine with institutional influences to shape individual experiences, and how these experiences impact the development of professional knowledge and practices. The findings of the case studies demonstrate the experiential nature of practitioners' professional knowledge in the field of HRE, which has individual as well as institutional implications for the implementation of educational and training programs in Mexico.

## II. HRE and Training

Even though education has been considered an important means for the fulfilment of human rights since 1948, it is only in the last twenty years that HRE has gained importance as a field of its own.[18] At the international level, the UN proclaimed the Decade for Human Rights Education from 1995 to 2004, developed the World Programme for Human Rights Education and Training in 2005, and in 2011 adopted the United Nations Declaration on Human Rights Education and Training. At the local level, HRE has gained particular importance in emerging democracies and post-conflict societies,[19] NGOs and professionals increasingly rely on this educational model to frame their demands for social justice and adapt the language of human rights to local needs.[20]

The ultimate aims of HRE and training are twofold. First, they seek to provide individuals with relevant knowledge, skills and understanding of hu-

[18] CP Henry, *Educating for Human Rights*, 13 Hum. Rights Q. 420–423 (1991); Felisa Tibbitts, *Understanding What We Do: Emerging models for Human Rights Education*, 48 Int. Rev. Educ. 159–171 (2002); Educating for Human Rights and Global Citizenship, (Ali A Abdi & Lynette Shultz Eds., 2008).

[19] Tibbitts, *supra* note 18.

[20] Monisha Bajaj, *Human Rights Education: Ideology, Location, and Approaches*, 33 Hum. Rights Q. 481–508 (2011).

man rights. Second, they aim to empower individuals and foster the attitudes and behaviours needed for the protection and promotion of their rights.[21] To do so, HRE and training encompass a wide range of educational and training activities aimed at conveying information, raising awareness and promoting understanding about, for, and through human rights.[22] These activities include, but are not limited to: the design and publication of materials, the incorporation of content related to human rights in formal curricula and textbooks, implementation of courses, seminars and specialized programs at different levels, as well as public engagement and campaigns to raise awareness on human rights related issues.

HRE is designed to be as broad and flexible as possible so that it can be relevant for different people in different contexts. In this sense, it must to be able to convey relevant information on human rights according to the specific circumstances of the program, to address the interests and needs of diverse target groups, and finally, to develop approaches that empower individuals and foster their engagement with human rights.[23] The breadth and flexibility of HRE, although considered two of its main advantages,[24] also raise several challenges for the implementation of educational and training programs. The international model of HRE, developed by the United Nations, provides only general guidelines and recommendations, leaving the specificities of implementation to local governments and stakeholders,[25] thus allowing plenty of leeway for domestic interpretation of the content, guidelines and objectives. These abstract guidelines do not take into account controversial issues regarding the implementation of educational programs and activities. Such issues include the complexity of the concept of human rights,[26] the diversity of contexts where the programs are implemented,[27] the competing ideologies underpinning HRE,[28] and the diversity of teaching approaches that can be employed.[29]

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[21] UN, World Programme for Human Rights Education. Second Phase (2012).

[22] UN, United Nations Declaration on Human Rights Education and Training (2011).

[23] Felisa Tibbitts & William R. Fernekes, *Human Rights Education*, *in* Teaching and Studying Social Issues: Major Programs and Approaches 87–117 (Samuel Totten & Jon E. Pedersen Eds., 2010).

[24] Nancy Flowers, *How to Define Human Rights Education? A Complex Answer to a Simple Question*, *in* International Perspectives in Human Rights Education (Viola B. Georgi & Michael Seberich eds., 2004).

[25] UN, *supra* note 1.

[26] Margherita Rendel, *Some Problems in Teaching Human Rights*, *in* Human Rights, Education and Global Responsibilities 151–162 (James Lynch, Celia Modgil, & Sohan Modgil eds., 1992).

[27] Juliet Perumal, *Identity, Identification and Sociolinguistic Practices: Implications for Human Rights Curriculum in an Emerging Democracy*, *in* Safe Spaces. Human Rights Education in Diverse Contexts 63–82 (Cornelia Roux ed., 2012); Tibbitts, *supra* note 18.

[28] Bajaj, *supra* note 20.

[29] Claudia Lohrenscheit, *International Approaches in Human Rights Education*, 48 Int. Rev. Educ. 173–185 (2002).

Due to the diversity of activities and the broad aims pursued, HRE and training target a wide range of groups, ranging from school-age children to civil servants and law enforcement personnel.[30] Each of these groups has different needs in terms of content and strategies, but also specific interests concerning human rights;[31] as a result, the rationale behind the programs can change drastically depending on the target group. For instance, most of the activities directed to children tend to be preventive and focus on awareness-raising,[32] whereas professional training for civil servants or law enforcement usually has a corrective nature and focuses on preventing further human rights violations and abuses.[33] Considering all these differences, educational and training programs are a complex endeavour, particularly for those in charge of their implementation, in this case human rights educators. Educators act as mediators between human rights discourse, the objectives of HRE, and the realities of participants and stakeholders.[34] It is precisely because of this mediation process and their leading role within it that educators represent a vital source of information for understanding the implementation of HRE and training programs and their scope, possibilities and limitations.

## III. Practitioners as Educators

I use the term educators and not teachers or trainers since it better reflects the reality of a field like HRE. First, it acknowledges that the vast majority of individuals responsible for teaching human rights are not qualified teachers, though some of them may receive special training in pedagogy or teaching strategies.[35] Second, it emphasizes the interdisciplinary nature of human rights and consequently HRE, which relies not only teachers but also those from other professions to teach all the relevant aspects and achieve the expected learning goals.[36] Furthermore, the notion of educators is more representative of the field, considering that HRE and training programs commonly

[30] UN, *supra* note 1.

[31] Tibbitts, *supra* note 18.

[32] OSCE & ODIHR, Guidelines on Human Rights Education for Secondary School Systems (2012); CDHDF [Comisión de Derechos Humanos del Distrito Federal], La casa del árbol.

[33] OSCE & ODIHR, Guidelines on Human Rights Education for Law Enforcement Officials (2012).

[34] Monisha Bajaj, *Teaching to Transform, transforming to Teach: Exploring the Role of Teachers in Human Rights Education in India*, 53 Educ. Res. 207–221 (2011); David Suárez, *Education Professionals and the Construction of Human Rights Education*, 51 Comp. Educ. Rev. 48–70 (2007), *http://www.jstor.org/stable/10.1086/508638*.

[35] UN, *supra* note 1.

[36] Frank Elbers & Kazunari Fujii, Summary of on-line forum on the Third Phase of the World Programme for Human Rights Education (2013), *http://www.hrea.org/lists/hr-education/*.

take place in the non-formal[37] sector,[38] rather than within formal educational facilities or programs.

Human rights educators require a particular kind of professional knowledge to address these issues, and to translate different educational and training programs on human rights into specific practices. They need to convert abstract guidelines into contextually relevant teaching practices, while also translating the discourse of human rights into intelligible parameters applicable to everyday life.[39] Human rights ideas and principles may be difficult to comprehend for ordinary people,[40] increasing the complexity to the educators' endeavour. To do so human rights educators need professional knowledge on the theoretical principles of human rights, including instruments and norms, as well as an understanding of the context in which they are working and about the groups to which the programs are directed. In addition, they require some expertise in teaching approaches and pedagogical methodologies in human rights. Assessing educators' professional knowledge and practices is key to gaining a deeper and more comprehensive understanding of how HRE programs are actually implemented.[41]

## IV. Professional Knowledge in HRE

Despite of the role of educators' professional knowledge and practices for the application of HRE, there is no empirical research exploring them in detail. Research to date has focused on the role of educators' beliefs about HRE,[42] their ideological stances,[43] their teaching approaches,[44] their experiences teaching human rights,[45] and some of their efforts to contextualize human rights discourse.[46] Yet, none of these studies include educators' pro-

[37] Non-formal education refers to organized and structured activities outside a formal educational system. These activities often lack accreditation or official certification, but they have a clear structure and objectives (Smith, 1996).

[38] Henry, *supra* note 18.

[39] Christine Bell, Teaching Human Rights : Teaching and Learning Manual (1999).

[40] James Ron & David Crow, Who Trusts Local Human Rights Organizations? Evidence from Three World Regions, 37 Hum. Rights Q. 188–239 (2015).

[41] Ida Sabelis, *Contemplations on Diverse Approaches for Human Rights Education*, *in* Safe Spaces. Human Rights Education in Diverse Contexts 259–268 (Cornelia Roux Ed., 2012).

[42] Kevin Chin, *Exploring Facilitators' Beliefs about Human Rights Education: Evidence of Universal and Local Influences*, Res. Hum. Rights Educ. Pap. (2010).

[43] Bajaj, *supra* note 34.

[44] Tibbitts, *supra* note 18; Claudia Lohrenscheit, *International Approaches in Human Rights Education*, 48 Int. Rev. Educ. 173–185 (2002).

[45] Audrey Osler & Hugh Starkey, Teachers and Human Rights Education (2010); Safe Spaces. Human Rights Education in Diverse Contexts, (Cornelia Roux ed., 2012).

[46] Rachel Wahl, *Policing, Values, and Violence: Human Rights Education with Law Enforcers in India*, 5 J. Hum. Rights Pract. 220–242 (2013).

fessional knowledge in a comprehensive way, or examine their relationship with professional practices. In addition, there is a general lack of empirical research on the impact of educators' knowledge and practices in the implementation of HRE programs.

There is, however, extensive research in the development of professional knowledge and practices in education. Much of the literature has focused on the relationship between professional knowledge, experience and practice in formal education.[47] Though such studies may shed some light on the application of knowledge within the teaching and training professions, they cannot provide significant insight specifically for HRE, since professional knowledge and practice are strongly influenced by the content and context of each particular field.[48] Thus, it is necessary to examine this knowledge by taking into consideration the nature of the subject of human rights, the particularities of the HRE model and the complexity of its implementation. For the examination of professional knowledge, the present study focuses on four of its core elements: 1) practitioners' knowledge (in this cross-case analysis this encompasses both human rights and how to teach them), 2) practitioners' processes of deliberation and reflection, 3) practitioners' teaching practices, and 4) the ends practitioners pursue. Without a deep examination of how educators think and act in their professional practice, we cannot fully understand complexity of HRE, its potential and its limitations. This research is particularly relevant in a context such as that of Mexico, where there is an increasing push towards HRE yet there are no official guidelines for its implementation. In this context, educators' narratives provide relevant insights for the development and assessment of current and future programs.

## V. Research Design

Due to limited existing research on educators' professional knowledge and practice in HRE, the present study is exploratory in nature. Individual, in-depth cases studies were selected as the methodology for this research, to allow for an exploration of complex social phenomena in a real-life context[49]

[47] Lynn a. Bryan & Sandra K. Abell, *Development of professional knowledge in learning to teach elementary science*, 36 J. Res. Sci. Teach. 121–139 (1999),; Peter D. John, *The teacher educator's experience: case studies of practical professional knowledge*, 18 Teach. Teach. Educ. 323–341 (2002); John Loughran, What Expert Teachers Do. Enhancing professional knowledge for classroom practice (2010).

[48] Phronesis as Professional Knowledge : Practical Wisdom in the Professions, (Elizabeth Anne Kinsella & Allan Pitman Eds., 2012); Understanding and Researching Professional Practice, (Bill Green Ed., 2009).

[49] Robert K. Yin, Case Study Research. Design and Methods (3rd Ed. 2003); Gary Thomas, How to do Your Case Study. A Guide for Students and Researchers (2011).

while providing a comprehensive account of the relationships and process occurring within that context.[50] This methodology allows the use of multiple points of data collection, which brings different perspectives to each case, and allows the triangulation of the data within each case so as to strengthen the rigor of the analysis. To ensure reliability and accuracy, each case was analyzed separately using the same analytical framework, and a constant comparison technique was applied.[51] Following the within-case analysis, I conducted a cross-case analysis using a case-ordered descriptive meta-matrix[52] to compare and contrast emerging themes across the three individual cases.[53]

The data for the case studies were collected over a period of six months in Mexico, using the following methods:

1. *In-depth Interviews*

I conducted in-depth semi-structured interviews with each practitioner in the respective case studies.[54] The interview protocol used in the three cases was the same, although the probes for follow-up and further exploratory questions changed according to the responses of each participant and the specific issues raised.

2. *Think-aloud Task*

This method of data collection focuses on the practitioners' reasoning process, problem-solving and decision-making.[55] Each practitioner was presented with 26 statements on the definition, nature and implementation of human rights, and asked to what extent they agreed or disagreed with them. These statements were adapted from an earlier study conducted by Stenner on the subjective dimensions of human rights.[56]

3. *Observations*

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[50] Martyn Denscombe, The Good Research Guide for Small-scale Social Research Projects (4th Ed. 2010).

[51] Robert K. Yin, Qualitative Research from Start to Finish (2011).

[52] Matthew B. Miles & Michael Huberman, Qualitative Data Analysis: An Expanded Sourcebook (2n Ed. 1994).

[53] Copies of the data collection protocols, coding and analysis frameworks are available from the author upon request.

[54] Steinar Kvale & Svend Brinkmann, InterViews (2nd Ed. ed. 2008).

[55] Yvonne F Barnard & Jacobijn A. C. Sandberg, The Think Aloud Method: A Practical Guide to Modelling Cognitive Processes (1994).

[56] Paul Stenner, *Subjective dimensions of human rights: what do ordinary people understand by 'human rights'?*, Int. J. Hum. Rights 1–19 (2010).

I conducted participant observations of the practitioners' teaching activities in HRE programs.[57] Participant observation as method of data collection provides unique insight into the behaviour and practices of the participants.[58] The same unstructured, observational protocol was used for each session observed in each case study.

4. *Document Analysis*

Official publications and reports, program handbooks as well as teaching and learning materials were treated as data in each individual case. This method has been useful to research teaching practices in the past,[59] as well as to access practitioners' input in the design and assessment of educational programs. Each document was analyzed using the same structured protocol. In addition, I used my field notes for contextual information and triangulation during data analysis. Documentary data helped to contextualize the other methods of data collection and to make sense of the experiences of the participants through the researcher's gaze.[60]

The three cases presented in this article were selected as representative of the three different institutions I worked with in Mexico, which were the National Human Rights Commission, a State Human Rights Commission in a geographically central state, and a local NGO in Mexico City. These institutions deliver educational and training programs in human rights, to varying extents according to their institutional guidelines, agenda and resources. Although each of the three institutions represent an in-depth case study, the institutional affiliation of individual practitioners is not revealed in order to ensure anonymity.

5. *Case 1*

Oscar has been working as an educator in human rights programs for more than six years. He grew up in one of the most culturally diverse states in Mexico, with more than 16 Indigenous communities accounting for the 18

[57] Except for Case study 3, whose institution was planning the educational and training programs for the upcoming year at the time of my fieldwork.

[58] Research Methods in the Social Sciences, Social Sciences (Bridget Somekh & Cathy Lewin Eds., 2005).

[59] Ruth Kane, Susan Sandretto & Chris Heath, *Telling Half the Story: A Critical Review of Research on the Teaching Beliefs and Practices of University Academics*, 72 Rev. Educ. Res. 177–228 (2002).

[60] Research Methods in the Social Sciences, Social Sciences (Bridget Somekh & Cathy Lewin Eds., 2005).

percent of the Indigenous population of the country.[61] Oscar graduated from law school, which is where he first came into contact with the subject of human rights. After his studies, he worked in the field of human rights at a local organization in his home state, although his was mainly an administrative job. Later, by invitation, Oscar joined the educational and training department at the institution where he currently works. He has specialized in comparative human rights law, especially in the Americas, with a postgraduate diploma from the Inter-American Commission on Human Rights (IACHR). Oscar's main areas of expertise within HRE are programs directed at military forces, police and other law enforcement officials.

6. *Case 2*

Anna has been part of an educational team responsible for HRE programs since she graduated with a Bachelor of Arts in Education over 13 years ago. This has been her only job and though she had no previous experience in human rights, she did an internship on development and education with disadvantaged communities. In the years she has worked in her institution, Anna has received a specialized training in human rights and HRE which is mandatory for all the members of her team. She must attend and pass refresher courses each year as part of her professional development plan. Anna's main areas of expertise are children's rights and peace education, environmental rights, and the rights of people with disabilities.

7. *Case 3*

Eric was a legal practitioner and human rights activist for more than 20 years before recently joining the organization in which he works as a human rights educator. He studied law and philosophy, and for some time he was part of a religious organization with a strong focus on education and social justice. Eric has experience prosecuting human rights cases at the national and international level and has received specialized training by United Nations and the IACHR. His main areas of expertise are related to the implementation of international instruments of human rights and the legal practice of human rights; he specializes in educational programs directed at judges and prosecutors, although he also works with other law enforcement officials.

## VI. Findings

[61] INEGI, Perfil Sociodemográfico de la Población que Habla Lengua Indígena (2009).

1. *Learning to Teach Human Rights*

All three educators had a personal interest in human rights prior to working as educators in this subject. Even though their personal interests translated over the years into strong convictions on human rights and HRE, the three educators admitted that learning to teach human rights was a challenging process. One crucial aspect of this was the level of familiarity with human rights each educator had. Whereas Oscar and Eric had a fair amount of knowledge of this subject thanks to their legal studies, Anna, who comes from an education background, had no previous knowledge of human rights whatsoever. For her, the main challenge was her lack of understanding of the legal and theoretical issues connected to human rights. She acknowledged that her personal interest in issues of social justice served as motivation to develop a career in HRE, but agreed such an inclination was not prompted by an in-depth knowledge of the field:

> Well, I didn't know about human rights. It was only a personal interest […] maybe with not much [theoretical] content, without many theoretical phrases, it gave me the empirical part. That is how I discovered later that those things had a name; they were human rights (Anna, semi-structured interview).

For Anna, the process of learning to teach human rights included a process of developing specialized and interdisciplinary knowledge of these rights, from legal and theoretical aspects to their application. As part of her learning process, Anna's background in education helped her develop the necessary skills to teach this topic, but as she later explained in the interview, that alone was not enough to grasp the particularities of HRE and her work as an educator.

In contrast, for Eric, the most difficult aspect of learning to teach human rights was related to the skills he had to develop rather than the content itself. Eric's studies in law and his years of experience defending victims of human rights violations as a legal practitioner helped him to gain specialized and practical knowledge about these rights. However, he felt at first that he lacked the skills to convey and communicate his knowledge or to advise learners in the exercise and application of human rights. Eric's previous knowledge of human rights and his familiarity with educational programs facilitated some aspects of his work as an educator, although he believed he still had to work on developing new ways of communicating to teach human rights. For him, creating appropriate channels of communication and strategies to reach people and engage them in the promotion and protection of human rights is a challenging and ongoing process.

Oscar argued that his background in law was an essential element of his professional knowledge and helped him as he was learning to teach human rights. For him, these rights can only be effectively exercised and enforced

by having a strong understanding of their legal framework, which is why his legal knowledge has been key in providing learners with appropriate information on relevant instruments, laws and covenants. However, his lack of specific training in education and teaching made him feel like an "improvised" educator who had learned to teach human rights "on-the-go."

> I am an amateur [...] I learned to teach human rights on-the-go. I must confess to you that I am an impromptu educator who developed [my knowledge] along the way. And to be honest, the topic of HRE is not my strongest point. It is something I have not mastered (Oscar, semi-structured interview).

Despite his legal expertise in human rights, Oscar felt insecure about his professional knowledge and teaching practices because, according to him, it was still challenging to convey this knowledge and explain it in an accessible way to participants. Without any pedagogical or teacher training, Oscar relied on his own experiences of learning about human rights, either in law school or at the IACHR, to develop his own professional knowledge and teaching approach.

All three educators agreed that their professional knowledge requires, on one hand, a deep understanding of human rights from an interdisciplinary perspective, including but not limited to: their legal framework and instruments, the theoretical principles underpinning these rights, and the different policies available to implement them. On the other hand, it also demands a fair comprehension of the educational process, teaching approaches and pedagogical strategies, as well as the identification of learning needs in order to understand how HRE can be effectively implemented for the advancement of human rights. However, as they explained, these two aspects can only be fully developed through experience over time. Experiential learning of professional knowledge became particularly evident for them when confronted with ethical dilemmas or when assessing the learning needs of a group.

For example, Anna stated that working with vulnerable populations including children who have suffered domestic or sexual violence posed serious ethical dilemmas to her professional knowledge, especially at the beginning of her career. In these instances she needed to ponder her own ethical responsibilities and professional duties over the needs and best interests of the child. For example, she had to make judgements such as whether or not to report a case, what information she should give to a child witnessing violence in her home, or how to proceed in a case in which someone insinuated abuse had occurred without explicitly reporting it. These judgements, according to Anna, were more challenging when she started teaching human rights, as she had no experience dealing with such cases. As a result, she felt she did not have reference points needed to approach this population or to assess the particularities of each case properly. Through experience, however, Anna has

learned how to manage these cases in the best possible way for the children, while better coping with the emotional impact they have on her.

For Oscar, experience has helped him identify the learning needs of participants, and to adapt the content of his programs accordingly. He remembered the first time he taught police officers as having been a professional failure, as he was not prepared to address this population and had no institutional support or guidelines to follow. Over time, he has learned to identify the specific needs of police officers in the field of human rights, and he teaches them about instruments related to the legal use of force or how to incorporate international standards in their operations, for example, in a concrete way. Furthermore, Oscar has become familiar with the challenges police officers face and is now able to use these challenges to discuss legal instruments and ethical dilemmas related to human rights. Nevertheless, he felt that this experiential learning also has negative connotations. Oscar considers allowing novice educators to learn how to teach human rights through practice (by teaching) without any previous preparation unacceptable, because it is unfair to the learners who, in his view, become victims of the lack of training and professionalization of human rights educators.

Eric's teaching experiences have also facilitated a deeper knowledge of the populations he works with. When he started working with the army and police forces he was not familiar with their work or their perspective on human rights issues. Over time and as a result of teaching programs directed at them, he now has a comprehensive knowledge of the army in terms of military operations, hierarchy, and protocols. As he explained, it was only possible for him to acquire this knowledge and establish a strong relationship with soldiers and police officers after spending a considerable amount of time interacting with them during courses and seminars, listening to their opinions and taking into account their concerns when establishing the content of his programs. In addition, Eric has learned through his experience working as educator how to better design his courses to build upon learners' previous knowledge and experiences gradually. For instance, through a process of "trial and error" he has learned to divide the program that he imparts to judges and prosecutors into different stages, starting with basic concepts and definitions before helping them develop more specialized knowledge and skills on the implementation of human rights principles.

> We also have an introductory level for [public servants] that have had no contact with the new [rights-based] system. In this case, you have to give them a lot of information for them to understand the differences and characteristics of this new system. Then we have the advanced [level] for those who have previous training on human rights and the new system (Eric, semi-structured interview)

According to Eric, as a result of his teaching experience, he has learned to make professional judgements regarding participant learning, including decisions on when to move forward to a more complex level or when further teaching is needed. Thus, over time Eric has developed not only the skills to identify participant learning processes but also to adapt his program and teaching practices accordingly.

All three educators, regardless of the differences regarding their professional background or their level of familiarity with either human rights or education, agreed that experience was key in the development of their professional knowledge. The educators affirmed they have learned through experience but noted that in order to do so, they have had to reflect constantly on their practices and how to improve their teaching on human rights.

2. *Defining What to Teach About Human Rights*

The way in which each educator defined human rights had a strong impact on their conceptualizations of HRE and, therefore, the teaching practices that derive from it. For example, for Eric human rights must be relevant in practice and serve as political tools for social change. Thus, the efficiency and relevance of these rights relies on their application rather than their ratification in positive law or their recognition in legal instruments. For him, legal instruments are useless if they are not applied, and this stance was reflected in his teaching practices, as he tried to deliver training programs that are transformational, practical, and relevant to social issues. For Eric, the main aim of HRE is the development of critical and active citizenship, and as such, he believes educational and training programs should focus on individual empowerment and social engagement, starting by raising awareness so individuals can advocate for their own rights. For this reason, in his teaching practice Eric pays special attention to the instrumental aspects of human rights and the capacity of these to solve social issues. One of the main aims of his programs is to change individual practices, which at the same time may be able to transform and improve institutional structures to encourage the promotion and protection of human rights.

> [The goal] is not only that [judge or a procecutor] knows the theory, the ethical or legal aspects [of human rights] and that he is not supposed to torture. If the institution allows him to torture, he will keep using this strategy to advance a case, he can still use it as a [legitimate] tool for investigation. He will torture anyway, because regardless of what you tell him [during the course] he has incentives constructed by the institution to justify and advance the use of these resources [like torture] that should not be used. As long as there are no institutional modifications, changes to create other incentives, there is a risk that HRE is just a pretense (Eric, semi-structured interview).

Similarly, Anna argued that human rights are first and foremost tools to fight for social justice. Although she acknowledged the different dimensions comprising these rights, in her view social and activist perspectives should be prioritized over legal or political ones in order to address structural issues and social problems. Thus, Anna favoured a practical and down-to-earth approach to HRE that takes into consideration individual and contextual needs.

> For me this is something very important, and we have discussed it a lot within the team. It may not be explicit [in the curriculum] but most of [the educators] agree on this. For me it is enough that kids and young people come [to our programs], even if they apparently don't learn anything about human rights, only to realize that things can be different […] It is important that they are able to see themselves as equal to an adult […] to empathize with others' suffering […] to respect each other, to discuss and share, and teach each other what we know (Anna, semi-structured interview).

Since Anna focused more on socio-emotional and moral aspects of human rights rather than legal or theoretical ones, for her the aim of HRE is to foster empathy as a means to promote and protect human rights. Thus, her courses and teaching strategies are designed to allow participants to experience an environment of respect and promotion of human rights in and through the program. Anna emphasized the importance of empathy in HRE, not only as a teaching strategy but also as a learning outcome. By doing so, Anna's concerns for social justice and equality were present throughout the programs, from the way she established and explained the content of human rights, to the group discussions she lead during the sessions.

Oscar interpreted human rights as social commitments and he established the overall aims and objectives of his teaching practices based on this interpretation. For him, HRE is a persuasive process to foster acceptance and conviction regarding human rights. Teaching human rights, then, is about presenting learners with a notion of human rights that is relevant, desirable, and convenient for their personal and professional circumstances. Learning about human rights is thus is a process of acceptance and of developing a strong conviction about rights that ultimately leads to changes in attitudes and behaviour. For Oscar HRE is a dialogical process to persuade learners, through respectful dialogue, about the importance of human rights rather than an imposition of these rights on them. Oscar's programs were designed to acknowledge first the challenges of learners' work related to the protection and promotion of human rights and then to raise their awareness regarding the relevance of these rights not only at a professional but also at a personal level. The influence of how each of the educators defined human rights and conceptualized HRE as a result was evident not only in Oscar's case but in all three cases.

3. *Translating Knowledge into Practice*

Even though the teaching practices of the three educators shared some similarities regarding what they wish to accomplish during their programs, their objectives differed significantly when applied. For Oscar, Anna and Eric, the main aim of their practice was to raise awareness and foster personal conviction and commitment towards human rights among participants in their programs. All three of them agreed on the need to persuade individuals of the importance of human rights, because only through personal commitments can a sustainable culture of respect and promotion of rights be achieved. When asked about the strategies or practices they implemented to achieve this goal, the three educators provided different accounts and examples.

Oscar argued that he appeals to the rights of the participants to raise awareness and foster acceptance of the discourse of human rights. This is not an easy task, considering the mistrust of human rights among the groups he teaches, some of who still consider these rights a discourse that "only protects criminals." Through discussion of real-life cases concerning military and police officers, Oscar emphasized the relevance of human rights for participants in their work. He explained not only how respect for human rights and the application of the mechanisms that protect them in their daily work is beneficial for them and their interests, while also emphasizing the implications for them at a personal level. For this reason, Oscar's teaching practices relied constantly on the analysis of international instruments demonstrating how they can be implemented in real-life scenarios:

> [Soldiers] ask you very interesting questions; for instance they asked me: 'Can I use my gun if the aggressor is pointing [a gun] at me?' And I tell them they can. This is when we analyze international instruments on human rights. We look at videos of real cases of criminals being captured; some of them were tragic situations where people have died. This is the kind of material that helps me the most (Oscar, semi-structured interview/observation).

For Oscar, a dialogical approach to his teaching practice is particularly relevant to addressing difficult and skeptical audiences like the military and police forces. He strongly believes that HRE could help to persuade the armed forces on the significance of human rights in Mexico generally, and for them in particular, even though they are the group with the largest record of complaints of human rights violations in the country. By establishing a dialogue with them, Oscar has learned about the particular challenges that soldiers and law enforcement officers face related to the protection of human rights. As he explained, their questions and even their objections to human rights are frequently discussed during his programs, and he has taken them into consideration in order to redefine the content he is teaching or the way he explains

certain concepts. In doing so, his aim is to convey a more comprehensive and "down-to-earth" understanding of human rights that is relevant to them.

For her part, Anna appealed to participants' empathy in her teaching practices in order to raise awareness and encourage their commitment to human rights. She believed that the best approach to teaching human rights to children and young people was through experiential learning, giving them the opportunity to experience what it is like to exercise their own rights and identify alternatives to respect the rights of others. For Anna, the goal of her teaching strategies is to help participants to stand up for their rights by empowering them, but also to help them to become more empathic so they could care about the rights of others who express skepticism and mistrust towards these rights. To do so, Anna has developed several age-appropriate group strategies to discuss sensitive topics like bullying, sexual harassment, human trafficking and/or domestic violence. These activities and strategies are grounded in experiences that are relevant to them and their everyday lives. For instance, Anna has designed games that are appealing to participants, which at the same time facilitate the comprehension of abstract ideas like fairness, inclusion, or respect. These strategies served to explain the relevance of human rights and the mechanisms available for their protection, and ultimately, to discuss and reflect on the application of these rights in the lives of children.

Anna's teaching practices and the content of the programs she teaches are adapted to the specific needs of the group she is working with. However, due to the fact that she teaches vulnerable populations, she argued that most of the time these needs or specific circumstances become evident only after she starts working with the group, and she has to respond rapidly to them. Anna recalled how this happened to her when she was working with homeless children, she realized she needed to change her examples and explanations to address the participants' circumstances:

> And then, what do I do? Here is where I have learned... What I should tell [the kid living on the streets], so what I say won't hurt him... If you tell street-kids... the homeless population: 'You have the right to have a family,' [They will reply] What? Because [for them] their family is their 'gang.' Then you need to learn to explain to them: 'The right to have a family is to have someone to look after you, who cares about you... you can call it dad, grandmother, aunt, brother... or your gang…' and then the whole discourse changes (Anna, semi-structured interview).

According to Anna, learning to teach human rights to vulnerable populations implies finding the best way to approach them and making the content of the programs relevant to them. This is one of the most complex challenges she has faced as an educator. Because of this, Anna's teaching practices take into consideration learners' needs as the starting point to discuss what human

rights are, and the role of human rights in their particular circumstances in order to persuade them of their actual relevance.

Eric's teaching strategies, on the other hand, appealed to the benefits of implementing human rights for the participants' work and professional responsibilities. For him, this was the best way to interest participants in the subject and, at the same time, emphasize the operational and practical aspects of human rights. Eric insisted on the applicability of human rights in all his programs by translating legal instruments and resolutions of human rights cases into specific responsibilities for judges and prosecutors, favouring an interactive approach and building upon participant experiences. He believed that, with greater interaction and examples that relate closely to participants, it was easier to engage them in the subject. One concrete strategy that he used regularly was the analysis of legal cases, either about human rights or that have been resolved using the new judicial system, which is rights-based.[62] By doing so Eric was able to use his previous experiences as a legal practitioner to focus on the challenges that judges, lawyers and prosecutors face in the implementation of the legal framework of human rights in Mexico.

> Now resolutions by judges are starting to appear that are adopting the [human rights based] perspective. The idea is to use them [in the sessions] to analyze and discuss them with the participants so they can see that it is possible to apply this perspective (Eric, semi- structured interview).

The analysis of legal cases is key for Eric, since he can take advantage of the experience of participants, use their contributions as triggers for group reflection, and encourage participants to propose different resolutions or alternative rulings. This exercise helps judges and prosecutors to develop the necessary skills for the analysis of such cases through a rights-based perspective as it empowers them to implement this perspective in their own practice.

The approaches of the educators to HRE had significant similarities despite working with considerably different populations. Not only have they adapted the content and strategies used in the programs according to learners' needs, but all three educators favoured a pragmatic approach to HRE. This approach was translated into different teaching strategies and methods, from analysis of court rulings in the case of Eric, to Oscar's analysis of cases of human rights violations committed by the army, or Anna's use of role-playing games to encourage children to become more empathic. In all cases, the emphasis was on the implementation of human rights, rather than on the development of factual learning on the subject, as well as being focused on fostering positive attitudes towards human rights. As a result, the three educators agreed that their professional practices focused mostly on persuading learners about the relevance and significance of human rights. They all felt

[62] Mexico had a mixed judicial system until 2008, when an accusatory-adversarial system was implemented as a result of a national reform of the criminal justice system.

it was necessary to first convince individuals that human rights matter, before teaching them how to put them into practice.

4. *Facing Professional Challenges*

The three educators drew on their personal experiences to discuss what they considered to be the main challenges faced in HRE in Mexico, and the impacts of said challenges on their professional knowledge and practices. The problems identified were similar and mostly related to three issues: 1) the skeptical attitudes of the populations they work with; 2) the context of violence in Mexico; and 3) the complexity of implementing HRE programs in the country. For instance, all three educators made several references to negative attitudes and widespread mistrust and skepticism towards human rights, not only on the part of participants attending HRE programs but also on the part of the Mexican population in general. This generalized disbelief is the reason why Eric highlighted the need to develop persuasive skills as a core element of his professional knowledge as an educator, so that he can convince individuals as well as organizations about the importance and significance of human rights. This is not a simple task, convincing individuals to change their personal and professional practices or promoting institutional change is especially challenging:

> In many cases there is still a lot of ignorance, but I believe that there is also a lot of skepticism [about human rights]. I mean, people do not believe that this [new, rights-based judicial] system will solve anything or that it is any different from the previous one, that it can resolve some of the problems. Then what I need to do is to keep on encouraging people to truly believe in these issues, to believe that there is an opportunity [to change things]. It's not that [human rights] are a panacea, nor that they will resolve all our problems, but they give us new alternatives (Eric, semi-structured interview).

Eric recognizes that one of the main challenges of HRE regarding the skepticism and mistrust towards human rights relates to the profile of the participants it is aimed at addressing. He has found that public servants, judges and prosecutors with more years of experience are those who find it most difficult to accept the discourse of human rights, or see the value in their practice, whereas younger generations tend to be more receptive. The main challenge for Eric was to develop programs that would be capable of convincing the most skeptical groups, regardless of their longevity in their profession or their rank as public servants.

Similarly, Oscar explained that there are a lot of misconceptions about human rights amongst soldiers and police officers which make his teaching practice more challenging. He argued that it is common amongst these populations to consider human rights as mechanisms that demerit their authority

and hinder their work by protecting criminals and freeing guilty prisoners. Such misconceptions make it difficult for Oscar to convince soldiers and police officers that these rights can also protect them, and be useful in their professional practice. According to Oscar, the first step is to listen attentively to their reasons for objecting to the discourse of human rights and to understand the professional challenges they face as the result of their work. For him, a way of reducing the skepticism amongst these populations is to direct HRE programs at mid and higher ranking professionals, because if they can be convinced about the relevance of these rights for their work and regular operations, they could have a "multiplier effect" on lower ranking officers. By doing so, it would become possible to have a greater impact on the prevention of human rights violations by members of these populations. Even though the military and police officers can be skeptical groups, Oscar was convinced about the long-term benefits that HRE can bring to them. He argued that his teaching practices have improved as a result of his work in trying to convince these groups about the relevance of human rights for their personal and professional lives.

Oscar and Eric discussed how violence and human rights violations across Mexico make it much more difficult for them to persuade participants about the importance of respecting and protecting these rights in their professional practice. Anna believes the high levels of violence that are increasingly affecting young people and children in the country makes it difficult for them to develop empathy or relate to ideas of social justice. Anna stated that the environment and social structures for most of the children and young people in Mexico are counterproductive to HRE, either because of the lack of respect for human rights or because of the obstruction of their exercise. For all three educators, the most difficult challenge in their profession remains how to teach and persuade individuals about the importance and value of human rights in their lives in a country where these rights are violated on a daily basis.

Finally, some of the challenges educators identified were related to the process of implementing HRE programs, from the lack of training needs assessments to their inability to evaluate their efficiency or measure the social impact of their work. Also, the lack of relevant training in HRE or examples of good practices for educators makes it difficult for them to develop their professional knowledge, clearly define their teaching objectives and learn the necessary skills to reach them. For instance, Oscar constantly felt he was an "improvised" educator that learned to teach human rights "on-the-go" due to the absence of training programs and institutional support for his career development. He tended to be insecure about his teaching practices because despite his own knowledge of the content of human rights, he has difficulties in conveying his knowledge and persuading participants efficiently.

All three educators agreed on the importance of the transformational nature of HRE programs; however, implementing transformational programs

presents a challenge in assessing both their teaching practices and participants' learning. Eric also highlighted the difficulty of developing participatory programs to coordinate between society and grassroots movements, which makes it is difficult to assess the social impact of HRE. Anna, for her part, affirmed that the transformational purpose of HRE was almost impossible to achieve considering the limited time she has with each group, and the lack of resources for these programs. Even after setting more realistic objectives and lowering expectations for her own programs, this shortage of resources that makes it difficult for Anna to conduct an in-depth assessment of the program's impact or do follow-up with participants. Similarly, Oscar questioned the assessment within HRE, considering the objectives they have established unrealistic, and the groups they reach out to as difficult. His concerns relate to the capacity of educators to evaluate if participants have "fully learned" human rights and understand the transformational implications of such learning:

> How can I know if the participants indeed are changing their own perspective [towards human rights], if they have changed their views? How can I possibly know if what I am teaching them will help to prevent human rights violations? (Oscar, semi-structured interview).

His concern is not only about the "measurement" of human rights learning for each participant, but also about the overall effectiveness of the educational programs and the evaluation of their social and institutional impacts over the short and long term. As Oscar explained, the problem is in establishing a correlation between what could be considered good outcomes —such as a decrease in human rights violations— and the educational programs and activities. For all three educators, then, the assessment of human rights programs remains a major challenge that, regardless of their experience, was difficult to overcome, especially since it involves institutional views on the subject which can often conflict with their own. For example, whereas the National Human Rights Commission grounds the assessment of HRE programs on the number of courses taught and participants present, the State Human Rights Commission is more concerned about the reputation of the programs it delivers, while the local NGO is more attuned to the political capital they can develop as a result of their programs. This contrast was evident in the way each institution reported their results in HRE:

For this reason, in 2013 7,394 training events were conducted, representing an increase of 589% compared to the 1,073 activities in 2009.

Institution A - Annual Report

The [Institution] has a backup and a history of over 20 years of work and dedication to protecting, promoting and strengthening human rights in the

city. Throughout this time it has established itself as a clear leader within the public human rights, not only nationally but internationally.

Institution B - Annual Report

[…] Gather evidence on institutional politics and practices against human rights, to denounce the power structures and authoritarian practices of the government. Develop proposals to transform public institutions, empower civil actors and encourage them to participate in public affairs.

Institution C - Website

Despite these challenges, the three educators were convinced of the importance of HRE and training as a means of preventing further violations and abuses, and in achieving a culture of respect for human rights. Anna and Eric believe that, through HRE, they are able to empower individuals and change social structures in Mexico that impede the exercise of these rights. For both of them, HRE is an effective tool in promoting social justice. Oscar, on the other hand, was more cautious about the effects and possible outcomes of HRE. Even though he is convinced about the importance of human rights, he believes it is necessary to maintain a critical attitude towards HRE and the persuasion it requires, in order to avoid any sort of "indoctrination." For Oscar, being critical about their own profession is the only way practitioners can identify the limitations of human rights and HRE but also about their own strengths and areas of opportunity as educators. Oscar's apprehension regarding HRE focused more on its current implementation in Mexico and how it is assessed rather than its educational objectives or aims. Even though Anna and Eric identified some challenges with its implementation, they tended to maintain a more optimistic attitude towards HRE. Beyond their criticisms and the challenges each one faced, the three educators considered HRE a valuable and worthwhile attempt to significantly change individual and social realities in Mexico.

## VII. Discussion and Conclusions

The purpose of this article was to explore the professional knowledge and practices of human rights educators, in order to understand their impact on the development, implementation, and assessment of HRE programs in Mexico. As the findings of this cross-case analysis show, there are similarities in the way the three educators developed their professional knowledge, beyond the uniqueness of each case and the particular process of each educator. One of these similarities is with regards to the kind of knowledge educators need to teach human rights, as it is evident from educators' accounts and observations of their practice, that it is much more complex and challenging than simply having familiarity with international instruments, national poli-

cies or human rights legislation. Professional knowledge appears to demand a deep understanding of the issue of human rights from an interdisciplinary perspective, which was a challenge for all educators regardless of their level of familiarity with the subject. As the educators noted, they each had to develop a subject-matter understanding that could be conveyed in a significant and relevant manner to diverse populations. This finding is consistent with previous research about teaching human rights[63] emphasizing how educators must deal with the complexity of human rights definitions, meanings and approaches in order to make sense of this subject prior to teaching it. The three cases examined in this article show the diverse ways in which educators make sense of human rights, and the different nuances of their own definitions. This cross-case study shows that in practice, contrasting teaching strategies and objectives for HRE programs are grounded in educators' individual views, even though in theory the educators share similar aims.

Evidence from the cross-case analysis confirms that educators' professional knowledge also encompass pedagogical knowledge.[64] This knowledge covered learning processes, teaching practices and methods needed to transform what educators teach –human rights– into significant and meaningful content for learners. In particular, educators' pedagogical knowledge focuses on teaching strategies and methods specific to the subject of human rights, inclusive of its complexity and critiques. Notions of how learners learn, class management and lesson planning are also important. Such pedagogical knowledge can be found among educators teaching in other disciplines[65] and is consistent with previous research into teachers' knowledge,[66] which suggests knowing a subject is not sufficient for teaching it. The three cases examined above demonstrate that constructing a sophisticated understanding of the issues as well as building pedagogical knowledge are necessary conditions to teach about and for human rights.

According to the findings of the three cases, the nature of professional knowledge in the field of HRE is experiential,[67] implying that both the con-

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[63] Rendel, *supra* note 26.

[64] Lee S. Shulman, *Those Who Understand: Knowledge Growth in Teaching*, 15 Educ. Res. 4–14 (1986).

[65] Examining Pedagogical Content Knowledge, (Julie Gess-Newsome & Norman G. Lederman eds., 2002); S Brown & Donald McIntyre, Making Sense of Teaching (1993); Punya Mishra & Matthew J. Koehler, *Technological pedagogical content knowledge: A framework for teacher knowledge*, 108 Teach. Coll. Rec. 1017–1054 (2006).

[66] Deborah Loewenberg Ball, Mark Hoover Thames & Geoffrey Phelps, *Content Knowledge for Teaching: What Makes It Special?*, 59 J. Teach. Educ. 389–407 (2008).

[67] David A. Kolb, Experiential Learning: Experience as the Source of Learning and Development (1984); Ruth Heilbronn, *The Reflective Practitioner*, in Critical Practice in Teacher Education 29–38 (Ruth Heilbronn & John Yandell eds., 2010); Max Van Manen, *Can Teaching Be Taught? or Are Real Teachers Found or Made?*, 9 Phenomenol. + Pedagog. 182 (1991).

tent and the pedagogical aspects of this knowledge can only develop through the experience acquired by educators. In this sense, educators' own teaching practices derive not only from their professional knowledge, but also inform and refine it, as earlier studies on professional knowledge in teaching suggest.[68] Connelly, Clandinin, and Fang He suggest that educators' professional knowledge is the sum of their own experiences rather than objective or independent factors,[69] which is consistent with the findings of the present cross-case analysis. The teaching experiences of the three practitioners interviewed for this article lead them to refine their pedagogical approach and to reflect on broader educational issues such as their teaching style, the strategies they employ as teachers, and the purpose of their professional practice.

Nevertheless, the impact of the educators' professional experiences and teaching practices goes beyond "reflection-in-action"[70] and influences their views on human rights, something which seem to be a distinctive feature of the field of HRE. Their understanding of human rights is grounded mainly in their experiences of implementing educational programs and teaching this subject in a particular context, to a specific target group. Their practices shaped their knowledge on the subject of human rights and helped them to develop a more sophisticated understanding of the advantages, limitations and applicability of human rights in Mexico. In addition, in reflecting on their experiences and practices, practitioners were able to constantly assess and adapt their own professional knowledge to maintain its relevance and pertinence, which is key in Mexico due to the generalized mistrust towards human rights because of widespread violence. Teaching human rights then becomes a process of constant application, evaluation and construction of professional knowledge through practice.[71] As this cross-case analysis shows, educators in Mexico learn to teach by teaching, and they construct knowledge through reflection upon their own concrete teaching experiences.

These findings have significant implications for understanding the professional profile required to implement HRE programs in Mexico, and can be used to inform the design of professional training programs for human rights educators in Mexico. By understanding that the development of professional knowledge in this field is first and foremost an through an experiential learning process,[72] the need to establish mentoring programs becomes evident. Novice educators can benefit from access to mentors and experienced edu-

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[68] Kinsella & Pitman, *supra* note 48.

[69] Michael Connelly, Jean Clandinin & Ming Fang He, *Teachers' personal practical knowledge on the professional knowledge landscape*, 13 Teach. Teach. Educ. 665–674 (1997).

[70] Susan Hart, Thinking through Teaching (2000); Terence H. McLaughlin, *Beyond the Reflective Teacher*, 31 Educ. Philos. Theory 9–25 (1999); Donald A. Schön, *The Reflective Practitioner: How Professionals Think in Action* (1983).

[71] Kinsella & Pitman, *supra* note 48.

[72] Abraham Magendzo, *Pedagogy of human rights education: a Latin American perspective*, 16 Intercult. Educ. 137–143 (2005).

cators while they learn to teach; both by getting additional support and by sharing best practices, reflecting and thinking critically together about human rights and how to address the challenges of their practice. The creation of such communities of practice has proved to be influential in how educators in other fields develop professional knowledge.[73] Mentoring programs could enable professionals from different fields to consider teaching human rights as a career, as it would provide them with the opportunity to develop the necessary knowledge, fill any content or pedagogical gaps and learning from the experiences of others in a safe space. Such professional diversity could enrich HRE programs, especially in the Mexican context, by fostering an interdisciplinary teaching approach and using practitioners' experiences in their own fields to make human rights relevant for the challenges the different groups of learners face. This approach could make HRE programs more pragmatically relevant, which in turn, could help to counteract the mistrust and widespread skepticism towards these rights by showing the scope and possibilities of their application.

The findings of this cross-case analysis also provide examples of how HRE is implemented in a context as violent as Mexico, in which human rights are not upheld. Educators focus much more on raising awareness and convincing learners about the relevance and significance of human rights rather than conveying information or providing them with knowledge *about* these rights and *for* their exercise. Such findings question the emphasis in previous models of HRE on the content or the development of skills,[74] showing instead that the work of educators in these "hellish" contexts is more challenging than skills development.[75] A focus on persuasion is paramount due to the generalized mistrust and skepticism towards human rights in Mexico, which is an understandable reaction considering that violence is normalized, and human rights violations and abuses occur on a daily basis. In this sense, the educators' strong commitment to human rights seems to be a core element of their professional knowledge as well as a necessary condition for their teaching practices, since it is easier to persuade learners about something they already believe themselves. However, and considering the role of reflection for their professional knowledge, it is important that educators also have spaces to think critically about these rights, to consider learners' objections and to reflect on the strengths and weakness of human rights as well as the possible alternatives to address their limitations.

Overall, practitioners responsible for teaching human rights in Mexico present a flexible and dynamic kind of professional knowledge that is relevant

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[73] Ruth Heilbronn, Teacher Education and the Development of Practical Judgement (2008).

[74] Tibbitts, *supra* note 18; Lohrenscheit, *supra* note 29.

[75] Obiora Chinedu Okafor & Shedrack C Agbakwa, *Re-Imagining International Human Rights Education in Our Time : Beyond Three Constitutive Orthodoxies*, 14 Leiden J. Int. Law 563–590 (2001).

not only contextually, but that is constructed and refined through their own experiences. Professional knowledge and experiential learning allow practitioners to teach human rights while addressing the needs of the Mexican context in a meaningful way, incorporating their previous teaching experiences and informed by learners' particular needs. It also allows educators to translate abstract guidelines and principles of human rights into specific decision-making criteria for participants in educational and training programs in ways that can foster a commitment to human rights. This does not necessarily mean practitioners have all the answers on how to implement HRE programs in Mexico, but it indicates that professional knowledge and experience provide practitioners with an effective framework to guide their actions.

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# BULLYING: CASE STUDIES ON COMPREHENSIVE REPARATION OF DAMAGE

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Summary: *Bullying is a type of behavior that has been studied more from psychological and sociological perspectives, but little has been done about the legal consequences that generate this type of illegal act. In Mexico, there are special laws in some states, but there is no genuine public policy that provides a mechanism of redress for the victim. Therefore, this investigation conducted a study of comparative law on the treatment given to bullying in the United States. This article also presents a study of the legal system that punishes the administrative form of bullying in Mexico, highlighting the most advanced states such as Coahuila, Jalisco, Nuevo León, Oaxaca, Quintana Roo, Veracruz, Yucatán and Zacatecas. This article also makes an assessment of bullying and its treatment to identify gaps in legislation and the failure of public policies to protect the best interests of the children. In these cases, the Federal Supreme Court of Justice (SCJN) rulings on these cases are analyzed and compared to the damage suffered by those affected and the need for comprehensive reparation.*

Key Words: *Bullying, the best interests of the children, comprehensive reparation of damage, right to education, moral damage.*

Abstract: *El bullying es un tipo de conducta que se ha estudiado más desde la psicología y sociología, pero poco en cuanto a las consecuencias jurídicas que provoca este tipo de acto ilícito. En México existen leyes especiales en algunos estados del país, pero sin una verdadera política pública que prevea mecanismos de reparación para la víctima; por ello la investigación realiza un estudio de derecho comparado sobre el tratamiento que en Estados Unidos se le da al bullying; así también transita por un estudio del sistema jurídico que sanciona de forma*

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*administrativa el bullying en México, destacando los Estados más avanzados tales como: Coahuila, Jalisco, Nuevo León, Oaxaca, Quintana Roo, Veracruz, Yucatán y Zacatecas. Así también se hace una valoración sobre el bullying y su tratamiento para definir los vacíos legislativos y el fracaso de las políticas públicas para la protección del interés superior de la niñez en estos casos, analizando así la solución que ha dado la Suprema Corte de Justicia de la Nación (SCJN) frente al daño sufrido por los afectados y su necesaria reparación integral.*

Palabras clave: *Responsabilidad civil, reparación integral, bullying, justa indemnización, daño moral.*

## Table of Contents

## I. Introduction

Relationships among children and youth are the product of the lives of adults, including the forms of coexistence in their homes; This context produces acts of violence by the minors. However, according to Mexican law so-called bullying has been treated from a psychological perspective and only in special cases results in administrative sanctions against the aggressors or school representatives. In Mexico, different states in the country have laws that address the issue, but there is no legislative harmonization for dealing with bullying.

The scope of these laws does not cover the victims' human rights such as the right to life, to physical and moral integrity, and ultimately to the dignity of the person. This is because in terms of bullying, the legal system in Mexico is reduced to recommendations that only punish the aggressor's behavior, obviating comprehensive reparation on the basis of the best interest of the child.

The general objective of this research is to make a comparative study of laws on school bullying in the country and their understanding to identify legislative gaps and the flaws of the public policies that exist to protect the best interests of children in these cases. This is done by analyzing Supreme Court of Justice of the Nation (SCJN) resolutions regarding the damage suffered by the victim and the necessary comprehensive redress.

For this research, the contemporary methods of comparative studies on law, legal policy and case studies have been used.[1] The socio-political context of this article is found in the Constitutionalization of Civil Law, in a number of trends that are calling for the need to rethink the paradigms of legal positivism in force even now, in the twenty-first century. In the case of school bullying in Mexico, this article demonstrates the inconsistency and ineffectiveness of laws that are not supported by genuine public policy.

The research is also conducted on the basis of a comparative study of laws in the United States and the judicial treatment given to school bullying. Subsequently, we analyzed the legal system that penalizes administrative forms of school bullying in Mexico, highlighting the most advanced states in the country such as Coahuila, Jalisco, Nuevo León, Oaxaca, Quintana Roo, Veracruz, Yucatán and Zacatecas. Finally, a study was performed in a model case of damage caused by bullying at an educational institution in the State of Mexico and the opinion issued by the Mexican Supreme Court of Justice.

[1] Gisela María Pérez Fuentes and Karla Cantoral Domínguez, *Retos de la Investigación Jurídica en los Posgrados de Calidad. Mitos que Conspiran en Contra,* in Temas actuales de estudios jurídicos 23-56, (Tirant lo Blanch ed., 2016).

## II. Bullying: Legal Considerations Regarding This Psychological And Social Phenomenon

Bullying is a behavior presented by children or adolescents in educational institutions and adults are responsible for preventing such behaviors. The socio-legal path can be through appropriate institutional devices, dialogue, and prevention, as well as disciplinary sanctions.[2]

Bullying or school bullying is used as a synonym in Mexico and is defined as specific forms of aggression that carries an imbalance of power between peers, who possess more real or figurative power and uses said power to inflict damage intentionally, systematically and repeatedly on those who are perceived as weaker.[3]

Bullying is an English word of Dutch origin, whose current meaning dates from the late seventeenth century.[4] For purposes of this article dedicated to the field of educational institutions, some authors maintain that it implies any form of psychological, verbal or physical abuse produced among schoolchildren repeatedly over a certain period of time.[5]

In Mexico, in the opinion of the SCJN, what is important is the result of the violation to the dignity of the child because of its aggressive attitude.[6] Bullying is identified as a specific aggressive behavior in which a person is abused when exposed, repeatedly and over time to negative actions by one or more person(s).

In Spain, it is stipulated that in the case of bullying, there is a dichotomy in the disciplinary regulations in damages laws for the same legal reality, depending on whether the offense is of a criminal or civil nature. The law is the same for minors regardless of whether the bully is under the age of fourteen or between fourteen and eighteen.[7] Bullying manifests itself in behavior that involves a complex legal-social event in terms of its consequences by involv-

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[2] *See* Juan Antonio Seda, *Responsabilidad en la Convivencia Escolar*, in Bullying: Responsabilidades Y Aspectos Legales En La Convivencia Escolar 17, (Noveduc ed., 2014).

[3] Alejandro José Mena and Adriane Xavier Arteche, *Bullying en Guatemala y Brasil: Una Problemática en Contextos Diferentes*, volume 48, no. 2, Revista Interamericana de Psicología 166-171, Inter-American Society of Psycology (2014).

[4] Oxford Living Dictionary available at: *https://en.oxforddictionaries.com/definition/bully*.

[5] Maria Teresa Mendoza Estrada, La Violencia en la Escuela: Bullies y Víctimas 9 (Trillas ed., 2011).

[6] Bullying escolar. elementos que conforman su definición, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo II, October 2015, Tesis 1a. CCXCVIII/2015, page 1638 (Mex.).

[7] *See* Ana María Pérez Vallejo and Fatima Pérez Ferrer, Bullying, Ciberbullying y Acoso con Elementos Sexuales: Desde la Prevención a la Reparación del Daño 145-160, (Dykinson ed., 2016).

ing the battered child, other children who watch and do not say anything, the children's parents, teachers, and school representatives.

The 2006 World Report on Violence against Children[8] exposed the impact of all forms of aggression suffered by children in schools. According to a recent Organization for Economic Co-operation and Development (OECD) study,[9] 20% of 15-year-olds in Mexico are bullied at least once a month. In addition, as indicated by The National Institute of Statistics and Geography (its acronym in Spanish, INEGI) to achieve effectiveness in public policies it is essential to obtain data and statistics that makes it possible to classify the diverse cases involving violence against children and teenagers,[10] among which are cases of school bullying.

The complex phenomenon called bullying is not only an act of aggression that consists of behaviors that can be described as harassment, but also has legal implications and responsibilities. Olweus, one of the pioneers in the study of victimization in school environments, offered a definition of school bullying, considering it as a physical and / or psychological persecution conducted by one student against another whom he chooses as a victim of several attacks, from which the victim finds it difficult to leave on their own.[11] Olweus's study indicates that the aggressor/harasser can be an individual or a group.

Bullying has been generally identified as having the following characteristics:[12]

1. With intent to harm, being understood as such that it does not constitute an isolated event and is directed to a specific person to turn that person into a victim. It has been considered that certain jokes can reach the degree of bullying, but the context needs to be assessed in terms of the discrimination that it may engender and whether it has affected the victim's or intended subjects' dignity.
2. Imbalance of power, this means that there is an inequality between the aggressor and victim that may be physical, psychological or social, so that an imbalance of forces in interpersonal relationship is generated.

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[8] UNICEF, World Report On Violence Against Children, prepared by Paulo Sergio Pinheiro, 2006, available at: http://www.unicef.org/lac/Informe_Mundial_Sobre_Violencia_1(1).pdf

[9] OECD, Programme for International Student Assessment PISA 2015 Results, Student´s Well Being, 133-147, vol. III, 2017, available at: http://www.oecd-ilibrary.org/education/pisa-2015-results-volume-iii_9789264273856-en;jsessionid=100se8uodlvt5.x-oecd-live-03.

[10] Instituto Nacional de Estadística y Geografía [National Institute of Statistics and Geography], Violence Against Children and Adolescents: Conceptual, Methodological and Empirical Considerations for the Case of Mexico, booklet number 6, 2016 at 29-30.

[11] Dan Olweus, Conductas de Acoso y Amenaza entre Escolares 24-25 [Bullying Behaviors And Threats among Schoolchildren] (Morata Ed., 2004).

[12] *See* Ana María Pérez Vallejo and Fatima Pérez Ferrer 53, *supra* note 7.

3. Personal helplessness, this is to say that the affected person is in a situation that results in a loss of hope.
4. Passive observation; third parties generally know of such situations of harassment, turn a blind eye toward the aggression.

We argue that in order to assess bullying the impact on the dignity of teenagers (male/female) should be legally considered whether the bullying was physical, psychological or social. This implies that harassment may manifest itself in different ways, such as: social marginalization, verbal aggression, humiliation, direct or indirect physical aggression, intimidation (that can occur through threats), blackmail or even unwanted image publications on technological devices.

These aggressive attitudes provoke psychological, social and legal consequences for both the victim and the aggressor. In case of the victim, it can imply failing at school, psychological trauma and a risk for its balanced development that affects a person's dignity.

In the case of the aggressor, it may be the beginning of future anti-social behaviors. However, it must be addressed civilly along with those displaying these attitudes. In most Mexican civil codes regulate the damage caused, in which the one responsable for causing the damage must repair it, unless that the responsibility falls on the people of him in charge.[13]

With regard to evidence of bullying, the Supreme Court of Justice[14] has stated that proof of intent is extremely difficult to obtain and unnecessary as the damage to the victim is caused regardless of the aggressor's intent. However, schools must have some means of inquiry, which is what in traditional civil law is known as an analogy of a good parent.

## III. Bullying In Comparative Law

To understand the judicial treatment that has prevailed in situations of bullying in Mexico we first examine some key cases in the United States, as well as their legal consequences. Even if the legal system follows the common law tradition, the influence it has had on some Mexican institutions that deal with matters like bullying cannot be ignored. Later, the Mexican states with special laws to punish bullying in the administrative field are examined.

[13] In this regard, see Article 2029 of the Código Civil de Tabasco (Tabasco Civil Code) published in the Periódico Oficial del Estado (State Official Gazette ) on April 9, 1997, last reform: January 13, 2016 and Article 1911 of the Código Civil de la actual Ciudad de México (Civil Code of the present City of Mexico), published in the Diario Oficial de la Federación (Federal Official Gazette) on May 26, 1928, last reform published on December 8, 2016.

[14] Bullying scolar. Estándar para acreditar la negligencia de un centro escolar, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo I, November 2015, Tesis 1a. CCCXXIII/2015, page 955 (Mex.).

1. *United States*

In US law, the Supreme Court has played a major role in shaping public policies and in the decisions of public authorities because the US Constitution establishes that it is a Federal Republic. This means that from a judicial standpoint there are fifty different systems –one for each state that makes up the Union. Organized into what is known as a system of federal courts, the judiciary consists of the Supreme Court, the Courts of Appeals and district courts.[15]

In order to assess the judicial treatment given to bullying, some cases that occurred in the United States of America are highlighted below.

*Case 1*

Fifteen-year-old Phoebe Prince[16] of Irish origin, resident of the United States, hanged herself on January 2010, after months of being tormented by her classmates. When the news of Phoebe's death reached the students who harassed her, they continued to ridicule Phoebe on social networks. One of them responded to Phoebe's suicide by updating her Facebook status to "Mission accomplished."

Phoebe had started dating a 17-year-old boy. Shortly after, the boy left her for another girl. Along with a group of friends, this girl began stalking Phoebe at South Hadley High School.

The group of nine teenagers, 7 women and 2 men, cornered Phoebe in school halls, in the library, in the cafeteria and on her way home. They verbally insulted her, shoved her, knocked books out of her hand and sent her threatening text messages. One day on leaving the school, they threw a can at her. She went home and committed suicide. Two of the student aggressors were sentenced to one year's probation and one hundred days of community work.

*Case 2*

In Connecticut, an elementary school student sued the district school for negligence after the student was mocked every day for four years. The parties finally settled out of court and issued a joint statement that included an apology from the school district and a promise to revise their anti-bullying policy.[17]

There are similar cases of teachers and school staff encouraging or even participating in acts that intimidate students. In this type of lawsuits, the

[15] Mario Melgar Adalid, La Suprema Corte de Estados Unidos 283-284, (Porrúa Ed., 2012).

[16] Jessica Brookshire, *Civil Liability For Bullying: How Federal Statutes And State Tort Law Can Protect Our Children*, Cumberland Law Review 6,8 (2014-2015).

[17] *Id.*

plaintiff can prove that the individuals are personally responsible for their intentional acts. Bullying is a constantly evolving phenomenon and claims for damages can arise in different scenarios. Some victims of rumors and similar types of harassment may, for example, sue for defamation, but these defamation claims can be complicated because they raise constitutional questions regarding First Amendment rights.[18]

*Case 3*

Vicky, a high school freshman, moved to a new high school in November.[19] During her first week there, she meets Bertha in the cafeteria. Bertha insults her, criticizing Vicky's choice of clothes, hairstyle and appearance. Bertha encourages her friends to echo these comments. Vicky begins to avoid the cafeteria and tells her mother about Bertha, but does not complain to the school staff.

Bertha is annoyed because Vicky no longer eats at the cafeteria, so she seeks Vicky out, physically abuses her and throws her books. After the incident, Vicky has cuts on her hands and knees. She goes to the school nurse who asks how she got hurt. The nurse files a report of the incident with the assistant school principal. Vicky returns to the nurse four times with more and more serious injuries over the following weeks.

The assistant principal pulls both girls out of class and questions them about Vicky's injuries. Vicky accuses Bertha while Bertha denies any intentional behavior, claiming that Vicky is clumsy and wants to blame her because Vicky does not like her. The assistant principal tells both girls to behave more respectfully towards each other and sends them back to class. Vicky tells her parents what happened and says she is afraid of going to school. Her parents let her stay home for a couple of days.

When Vicky returns to school she is terrified by a series of anonymous notes left in her locker. The notes are drawings of an executioner with her name under them. She goes to the principal's office and asks if she can call her parents. The school secretary listens to her and asks Vicky to talk to the assistant principal again, which she does.

Bertha shoves Vicky against a bus, resulting in a concussion. Vicky's parents call the assistant principal to discuss the matter. He says Vicky has had difficulty socializing and low grades while Bertha is popular at school. Vicky's parents are not able to convince the assistant principal.

Three days after Vicky goes back to school, she is severely injured when her head pushed against her locker, resulting in head and neck lacerations

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[18] *See* Jessica Brookshire, *Civil Liability* 7, *supra* note 16.

[19] J.D. Payne and Anne M., American Jurisprudence Trials, vol. 111 number 123, 11-13 (2009).

requiring stitches and permanent damage to an ear. This case shows us the lack of sensitivity in some schools where they minimize bullying and do not measure the consequences, which can be fatal.

Therefore, in the case of trials filed against schools for bullying stemming from administrative personnel conduct (teachers or students in the educational institution), the following elements must be taken into account: nature and type of aggression, age and maturity of the victim, and the degree of the school's intervention in the behavior of the people in charge.

*Case 4*

Jessica Logan[20] sent a naked photo to her boyfriend. In a short time, the photo was sent to hundreds of students in at least seven high schools in the Cincinnati area. Classmates began to insult Jessica verbally calling her "porn queen". Jessica began to miss school to avoid verbal insults, but at home she received cyber-attacks regarding the naked photo. Despite the problem Jessica graduated from high school, but the harassment did not end. After the relentless and hateful mockery of classmates, friends and even strangers, Jessica Logan hanged herself in her room. The Logans sued the Sycamore Community School Board for deliberate indifference to sexual harassment. The Logans alleged that the school and the school resource officer did not do enough to help Jessica. The parties reached an out-of-court settlement of $154,000 for Jessica's family and $ 66,000 for attorney's fees.

A school should address bullying cases that are known or should reasonably have known about as part of its duties of reasonable care. Harassment among classmates that occurs in corridors, classes, extracurricular activities or on the school bus presents sufficient evidence to make the school aware of it. The potential civil liability charges can be a way for school districts to make changes so that they may become aware of the legal implications of handling or dismissing harassment situations.[21]

As we can see, there are few cases in the United States condemning the redress of harassment damages in schools, perhaps due to the fact that the small number of cases brought to the appeal stage has not involved full reparation.[22]

2. *Legal Framework on Bullying in Mexico: An Analysis of Mexican States*

The legal system that sanctions school harassment or bullying in Mexico is based on the following:

[20] *See* Jessica Brookshire, *Civil Liability* 12, *supra* note 16.

[21] *Ibidem,* 18-19.

[22] *See* J.D. Payne, and Anne M., American Jurisprudence Trials 63-64, *supra* note 19.

-Political Constitution of the United Mexican States: Articles 1, 3 and 4 of the Federal Constitution, which protects the *homine principle*. This refers to the broad protection of the rights of the person, the right to education as a fundamental right and safeguarding of the best interests of children.[23] As the Mexican Supreme Court has held, these articles and the international treaties to which Mexico is a party coincide in that every person has the right to education. The content of basic education should be aimed at enabling the autonomy of the holders of this right and at helping them become members of a democratic society. The State must guarantee that basic education is mandatory, universal, free and accessible to all without discrimination. Moreover, parents are granted the right to choose the type of education given to their children and the individuals to impart that education, as long as they follow the basic requirements of that right.[24]

Education is an intrinsic human right and an indispensable means of enjoying other human rights.[25] The right to education must cultivate a sense of dignity of the human person and fight against discrimination and inequality. To protect children's rights, the State must ensure that education is provided equally, in integrated, safe and violence-free spaces where children can develop their skills and competencies and learn the values that will allow them to coexist in society.[26] In this sense, the institution providing educational service is obligated to protect children's rights to dignity, integrity, education and non-discrimination, regardless of whether it is a public or private school.

-The Federal government has tried to develop a public policy for a bullying-free school through the National School Coexistence Policy,[27] which is based on educational and conciliatory principles to avoid possible cases of school violence. However, the program does not provide any solution for cases with negative effects on the affected child, which implies a lack of legal policy for

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[23] Articles 1, 3 and 4 of the 1917 Mexican Constitution, *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

[24] Fundamental Right to Education. Its Normative Reference in the Mexican Juridical System. First Chamber of the Supreme Court of Justice of the Nation [S.C.J.N.] [First Chamber of the Supreme Court of Justice], Judicial weekly of the Federation and its Gazette, tenth epoch, book 37, December 2016, Thesis 1a. CCLXXXIV/2016, page 368 (Mex).

[25] General comment No. 13 "The Right to Education", implementation of the International Covenant on Economic, Social and Cultural Rights, twentieth session, 1999, point 1.

[26] Sentence issued in the direct *amparo* number 35/2014 dated on May 15, 2015 by the First Chamber of the SCJN.

[27] The National School Coexistence Program is a preventive and formative educational program that is implemented on the basic education level so as to promote the creation of environments of school coexistence that contribute to prevent situations of harassment in public basic education schools, see https://www.gob.mx/escuelalibredeacoso/articulos/programa-nacional-de-convivencia-escolar.

such cases. On the other hand, there is a legal system of an administrative nature that tries to address bullying, as discussed below.

-General Education Law.[28] It does not define the bullying, but only refers to the fact that the education provided by State agencies should promote non-discrimination, peace and non-violence in all of its expressions.[29] Article 8 establishes the obligation to implement state public policies guided by the transversality of criteria in the three branches of government to eliminate cases of violence.

In the case of educational authorities in their respective fields, their activities will include the implementation of a program to reinforce the prevention of school violence from home and respect for teachers.[30] Education regulations also stipulate that measures must be taken to preserve physical, psychological and social integrity of the students when teaching thus showing respect for the rights of personality while leaving the procedure open to legally specify such protection. The law recommends social and psychological training for teachers and staff working at schools.[31]

-General Law of Protection of the Rights of Children and Adolescents.[32] A specific chapter is devoted to the right to education, in which the federal and local authorities must develop protocols for action in situations of bullying or school violence. These protocols are directed at personnel and those exercising the parental authority, guardianship or custody of children. Based on this General Law, adjustments have been made to state laws for the protection of children. For the purposes of this article on bullying, the sanctions imposed on this conduct will be analyzed.

In addition, decisions taken by administrative authorities in areas like education should be assessed on the basis of the best interest of the children, as well as on all the implemented measures since consideration of the higher interest as something paramount requires awareness of the importance of their interests in all measures. Moreover, it is important to have the will to prioritize those interests in all circumstances, as determined by the Mexican Supreme Court.[33]

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[28] Published in the Federal Official Gazette on July 13, 1993, whose last reform was published on March 22, 2017.

[29] Article 7, section VI of the Ley General de Educación, [General Law of Education], as amended, Diario Oficial de la Federación [D.O.], 13 de Julio de 1993 (Mex.).

[30] Article 33 of the Ley General de Educación, [General Law of Education], as amended, Diario Oficial de la Federación [D.O.], 13 de Julio de 1993 (Mex.).

[31] Article 42 of the Ley General de Educación, [General Law of Education], as amended, Diario Oficial de la Federación [D.O.], 13 de Julio de 1993 (Mex.).

[32] Published in the Federal Official Gazette on December 4, 2014, last reform published on June 23, 2017.

[33] Derechos de las niñas, niños y adolescentes. El interés superior del menor se erige como la consideración primordial que debe de atenderse en cualquier decisión que les afecte. Segunda Sala de la Suprema Corte de Justicia de la nación [S.C.J.N.] [Second

### A. *Definition and Competent Authorities to Resolve Cases of Bullying in the Different States of Mexico*

State laws that incorporate administrative penalties for bullying have been studied for this investigation.

School harassment is defined in the state of Coahuila as repetitive and intentional behavior, by any means, in which one or more students seek to intimidate, subdue, intimidate and/or frighten, either emotionally or physically, one or more students at any level of a public or private school, for the purpose of (a) causing physical or emotional harm, or damage to property; (b) placing the victim(s) in a situation of reasonable fear of having harm done to their person(s), dignity or property; (c) creating for the victim(s) a hostile environment within the school; (d) violating victims' rights at school; and (e) materially and substantially altering the education process, as well as a school's peaceful and proper running.[34]

In the same sense, in its State Education Act the state of Jalisco defines violence or bullying as harassment and intimidation among students, and refers to a systematic, physical, verbal, psychological, and written sexual act by means of signs or touching, generated among students.[35]

In its special law on bullying, the state of Nuevo Leon also contemplates the concept: understanding as a form of psychological, physical, verbal, sexual or cybernetic aggression or abuse inside or outside public and private educational institutions, in which one student receives from one or more other students repeatedly and without apparent provocation on behalf of the recipient. Such aggression or abuse attacks their dignity and disrupts their school performance, social integration alone or within groups, as well as their participation in educational programs, impairing their willingness to participate or take advantage of the educational programs or activities at the school, causing a feeling of reasonable fear of suffering harm of any kind.[36]

### B. *Sanctions in State Law*

The most interesting aspect of these special laws is ultimately the legal solution imposed on school bullying, in the sense of coercing unlawful acts and

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Chamber of the Supreme Court of Justice], Semanario Judicial de la Federación y su Gaceta, Décima Época, Libro 38, Enero 2017, Tesis 2a. CXLI/2016, Page 792 (Mex).

[34] Ley para la prevención, atención y control del acoso escolar para el estado de Coahuila de Zaragoza [Prevention, Care and Control of School Harassment Act for the State of Coahuila de Zaragoza], as amended, Periodico Ofical [P.O.] November 13, 2015 (Mex.).

[35] Article 175 de la Ley de Educación del Estado de Jalisco [Education Act for the State of Jalisco] as amended Diario Oficial [D.O.], September 6, 1997.

[36] Article 3 of the Ley para prevenir, atender y erradicar el acoso y la violencia escolar del estado de Nuevo León [Law to Prevent, Address and Eradicate Harassment and School Violence in the State of Nuevo León], as amended Diario Oficial [D.O.], July 1, 2013.

resolving administratively. However, the prescribed sanctions do not reflect the protection to be given to the victim and therefore there is no comprehensive reparation mechanism. This can be seen in the following examples of the types of sanctions that appear in the special state laws.

I. Private reprimand: A verbal warning and a preventive written report to the instigator or accomplice about the consequences of his conduct, and the measures applicable to a future recurrence;
II. Treatment and/or specialized treatment: The obligation of the instigator or accomplice to comply with remedial action when appropriate;
III. Class Suspension: Temporary cessation of class attendance, accompanied by assignments that, according to the current study program, must be completed during a period of time to be determined by the school principal in accordance with the relevant regulations; and
IV. Transfer to another school: Definitive relocation of the school where the perpetrator or accomplice is located, when the previous sanctions have been exhausted and there is a recurrence of their conduct. They will be directed to the education system for relocation.[37]

The special laws are not homogeneous in terms of the procedure for imposing such sanctions. For example, the states of Nuevo Leon,[38] Oaxaca[39] and Yucatán[40] stand out because they guarantee a hearing and due process in dealing with the identification of bullying. Other laws stipulate that the

[37] Article 32 of the Ley para la prevención, atención y control del acoso escolar para el estado de Coahuila de Zaragoza [Prevention, Care and Control of Bullying Act for the State of Coahuila de Zaragoza]; Article 46 of the Ley para prevenir, atender y erradicar la violencia entre estudiantes del Estado de Quintana Roo [Law to Prevent, Address and Eradicate Violence Between Students for the State of Quintana Roo], as amended Diario Oficial [D.O.], November 17, 2015; Thus, also Article 44 of the Ley de prevención y atención del acoso escolar para el Estado de Veracruz de Ignacio de la Llave, [Prevention and Care of School Harassment Act for the State of Veracruz of Ignacio de la Llave], as amended Diario Oficial [D.O.], January 8, 2016; Article 38 of the Ley para la prevención, combate y erradicación de la violencia en el entorno escolar del Estado de Yucatán [Law to Prevent, Combat and Eradicate Violence in the School Environment of the State of Yucatán] as amended Diario Oficial [D.O.], July 26, 2012; As well as Article 77 of the Ley para prevenir, atender y erradicar el acoso escolar en el Estado de Zacatecas, [Law to Prevent, Address and Eradicate School Harassment in the State of Zacatecas,], as amended Diario Oficial [D.O.], June 12, 2014.

[38] Article 76 of the ley para prevenir, atender y erradicar el acoso y la violencia escolar del estado de Nuevo León, [Law to Prevent, Address and Eradicate School Harassment and Violence for the State of Nuevo León], as amended Diario Oficial [D.O.], July 1, 2013.

[39] Article 45, Section XII of the Ley contra la violencia y acoso entre iguales del Estado de Oaxaca [Law against Violence and Harassment between Equals of the State of Oaxaca] as amended Diario Oficial [D.O.], February 9, 2015.

[40] Article 38 of the Ley para la prevención, combate y erradicación de la violencia en el entorno escolar del Estado de Yucatán [Law to Prevent, Combat and Eradicate Violence in the School Environment for the State of Yucatán] as amended Diario Oficial [D.O.], July 26, 2012.

sanction should be imposed directly on the schools by the Ministry of Education.[41]

In Nuevo León it is the school brigades that resolve the cases of harassment through the necessary measures to carry out preventive actions of this figure, using prior mediation, when it is not possible to reach an agreement between the parties, the determinations of the Brigade will be adopted by majority vote of its members and disciplinary measures may be applied to the actors of the unlawful acts of harassment.[42]

In some states, the authority of the educational institution (generally the director) imposes the sanctions as stipulated in the States of Coahuila,[43] Jalisco,[44] Veracruz[45] and Zacatecas.[46]

### C. *Penalties for School Personnel in Case of School Violence*

In the state of Coahuila, school personnel is subject to a penalty when: (a) they tolerate or consent to school harassment or retaliation; (b) do not take steps to prevent and intervene in cases of bullying or retaliation; (c) use force against a student without justification; (d) hide from the parents or guardians of the perpetrators, accomplices or victims, cases of bullying or retaliation; (e) provide false information or withhold information from the authorities about acts of violation to this law; (f) commit another act or omission contrary to this law; and (h) violate any provisions of the Law on the Responsibilities of State and Municipal Public Servants of the State of Coahuila of Zaragoza.

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[41] For example, Article 42 of the Law to Prevent, Combat and Eradicate Violence in the School Environment for the State of Yucatán stipulates that when the educational institutions repeatedly fail to comply, the school can be closed down. Article 48 of the Veracruz special law also stipulates possible closure due to recidivism. In the case of Quintana Roo, the Ministry of Education may penalize school personnel who fail to comply and, where appropriate, dismiss school principals, see Article 11, section VIII.

[42] Articles 26, 27, 28, 29, 68 and 69 of the Ley para prevenir, atender y erradicar el acoso y la violencia escolar del estado de Nuevo León. [Law to Prevent, Address and Eradicate Harassment and School Violence for the State of Nuevo León], as amended Diario Oficial [D.O.], July 1, 2013.

[43] Articles 33 and 34 of the special law of Coahuila, which establishes that the school principals or their designees are responsible for enforcing the corresponding sanction, after due investigation, and respecting the student's right to be heard himself or through his/her parents. Where the seriousness of bullying has criminal consequences, it will be handled according to the intervention plan and the competent authority will be informed.

[44] Article 180 of the Ley de Educación del Estado de Jalisco, [Education Act of the State of Jalisco], as amended Diario Oficial [D.O.], September 6, 1997.

[45] Article 8, sections XIII, XIV and XV of the Law to Prevent and Address Bullying for the State of Veracruz of Ignacio de la Llave,

[46] Article 30, sections XV and XVI of the Law to Prevent, Address and Eradicate School Harassment in the State of Zacatecas.

The following sanctions apply to school personnel who fail to comply: (a) a report in their personal file; (b) suspension from teaching or administrative duties for up to one year without pay and without being counted for seniority purposes; (c) disqualification from holding any school staff office for one year or more, or permanently. The secretariat may privately warn the educational institution that fails to comply with the obligations of this law, publically admonish it when repeated non-compliance occurs, or proceed to its closure when the two previous sanctions have been insufficient to remedy the non-compliance.[47]

In the case of Nuevo León, disciplinary measures against educational institution workers in cases of bullying will be penalized according to that established in the provisions of the State Education Act. The State Ministry of Education will sanction, in case of recidivism and when it deems necessary, the individuals who provide the education service. In addition to that established in Education Law of the State of Nuevo Leon, the following measures may be enforced: (a) written reprimand; or (b) a fine of up to three thousand five hundred times the general minimum daily wage in force in the geographical area, the amount of which will depend on the seriousness of the offense and the date when the offense is committed. Fines imposed may be doubled in the event of recidivism.[48]

The law of Nuevo León stresses that the imposition of sanctions against public servants, as well as disciplinary measures for students, does not exclude the possibility of civil, labor or penal actions that may be appropriate.[49]

### D. *Types of Abuse Among Schoolchildren*

According to the special laws of the different states of the country, like those in the state of Coahuila,[50] the types of bullying among schoolchildren are considered the following:

I. Physical: When there is assault or physical damage to a student or his or her property.
II. Verbal: When there is emotional harm to a student through insults, contempt or ridicule in public or in private.

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[47] Articles 35 and 36 of the Prevention, Care and Control of School Harassment Act for the State of Coahuila de Zaragoza. These penalties concur with that stated in Article 48 of the Prevention and Care of School Harassment Act for the State of Veracruz of Ignacio de la Llave.

[48] Article 71 and 72 of the Law to Prevent, Address and Eradicate Harassment and School Violence for the State of Nuevo León.

[49] Article 75 of the Law to Prevent, Address and Eradicate Harassment and School Violence for the State of Nuevo León.

[50] Article 10 of the Prevention, Care and Control of School Harassment Act for the State of Coahuila of Zaragoza.

III. Psychological: Where there is intimidation, harassment, blackmail, manipulation or threat against a student.

IV. Cybernetics: That done through the use of any electronic means like the Internet, web pages, social networks, blogs, emails, messages, images or videos on cell phones, computers or other digital technologies.

V. Sexual: All discrimination and violence against another student related to his or her sexuality, as well as sending messages, images or videos with erotic or pornographic content through digital technologies.

VI. Social exclusion: When the student victim is excluded and isolated, or threatened with being so, from school coexistence on the grounds of discrimination of any kind.

In view of the various types of abuse that arises from bullying, we can affirm that reparation for the victim must be claimed through a civil trial for moral damage against the persons who committed the wrongful act in which the existence of psychological and sociological effects stemming from this act of aggression must be demonstrated. The ways in which the consequences of bullying are manifested include: depression, low grades, and low self-esteem, among many others. Moreover, when the aggression takes place in a school environment, bullying can produce civil responsibility for other people's actions.

## IV. Case study: Inter-american Court of Human Rights Ruling

The presence of the principles of solidarity and equality is assumed in the full spectrum of comprehensive reparation of damage under the consideration that it is oriented at a person's full development. That is why the interpretation of contemporary civil responsibility as a fundamental right is based on comprehensive reparation that includes an equitable, but not quantified valuation, and is based on the principle of constitutional solidarity.[51] Compensation is not fair when it is limited by obstacles or fees, instead of it being the judge who quantifies compensation based on criteria of reasonableness; it is the legislator who arbitrates.

The following analyzes a case regarding the form of assessing damage and the recognition of the right to the comprehensive reparation as ruled by the Inter-American Court of Human Rights. It will allow us to understand forms of reparation in situations of bullying. School bullying can also be expressed

[51] Pietro Perlingieri, The Civil Law In The Constitutional Legality According To The Italo-Community System Of The Sources 728 and SS., (translated and coordinated by Agustín Luna Serrano and Carlos Maluquer de Motes y Bernet, Madrid, ed. Dykinson, 2008).

through discriminatory gestures that promote rejection and exclusion due to illness, as is the case explained.

The reports and resolutions issued by the Inter-American Commission[52] and the Inter-American Court of Human Rights have reiterated the fact that the State is obligated to prohibit the use of corporal punishment as a method of disciplining children and adolescents under the custody and protection of schools.[53] In addition to the situation of vulnerability in which they find themselves, it is necessary to guarantee the new paradigm of the right to an integral reparation, where the compensation for the damage caused by school bullying is not limited to an amount fixed by law, but this integral reparation admits example, the establishment of mechanisms of non-repetition to avoid serious violations derived from the harassment and physical and intellectual mistreatment of infants.

The Inter-American Court of Human Rights ruled on the following case against Ecuador in 2015. The events forming the basis of this case took place in 1998:

On June 20, 1998, Talía, a three-year-old girl, had a nosebleed that would not stop. Her mother took her to the Catholic University Hospital, a private health institution located in Azuay, Cuenca. Talía was in the hospital for two days and was later taken to the Pablo Jaramillo Foundation Humanitarian Clinic ("Humanitarian Clinic"), a private health institution located in Cuenca. At the Humanitarian Clinic, Talía was diagnosed with thrombocytopenic purpura (a blood disorder characterized frequently in different parts of the body) by Dr. PMT, a Red Cross doctor, who informed Teresa Lluy that Talía urgently needed a transfusion of blood and platelets.[54]

This medical treatment ended up harming Talía's life project. Due to the Red Cross staff's lack of care, one of the blood transfusions was contaminated with the HIV virus or AIDS because one of the donors had the virus without knowing it and the hospital did not verify the blood until the day after the donation and after Talía had already received the transfusion. As a result of the incident, the girl's family filed both criminal and civil proceedings. Despite the evidence proving the causal nexus –that is to say that Talía had been specifically infected by a donor's blood and that the viruses found in the blood of both the donor and Talía were genetically identical– the criminal trial was declared that the action had prescribed. The civil trial was declared null in the absence of a criminal conviction.

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[52] Inter-American Commission on Human Rights, Report on Corporal Punishment and Human Rights of Children and Adolescents, Organization of American States, adopted by the Commission at its 135-8th regular Session, 2009, pp. 17-19.

[53] Brothers Gómez Paquiyauri, 2004, Inter-Am. Ct. H.R., (ser.) (C) No. 110, at. 124 (Jul 8, 2004), as well as "Juvenile Re-education Institute", 2004, Inter-Am. Ct. H.R., (ser.) (C) No. 112, at. 311 (Sep 2, 2004).

[54] Case of Gonzales Lluy et al. v. Ecuador, 2015, Inter-Am. Ct. H.R., (ser.) (C) No. 298, at. 75 (Sep 1, 2015).

On the other hand, the child was discriminated against at school and a difference was made in the school's treatment because she had HIV. The educational authorities suspended and dismissed Talía on the grounds that the best interests of the children in the school needed to be safeguarded.

As a result, the Inter-American Court of Law declared Ecuador responsible for the violation of the rights to life, personal integrity, education, guarantee and judicial protection. So the Court ordered a form of reparation that included measures of rehabilitation (medical, psychological or psychiatric treatment, and free medicine) and satisfaction (a public apology, a scholarship for university and postgraduate studies for Talía). Moreover, housing and compensation for pecuniary and non-pecuniary damage were awarded.

In the case of pecuniary damage, the Court established, in equity, in favor of Teresa and Iván Lluy, the sum of US $50,000.00 (fifty thousand dollars of the United States of America) each. For non-pecuniary damage, the court ordered a compensation equivalent to US $350,000.00 (three hundred and fifty thousand dollars from the United States of America) for Talía Gonzales Lluy; US $30,000.00 (thirty thousand dollars of the United States of America) for Teresa Lluy, and US $25,000.00 (twenty-five thousand dollars of the United States of America) for Iván Lluy.[55]

In the case of the violation of the right to education the following elements were considered:[56]

1. The school authorities: her teacher, the principal of the school and the deputy secretary of education, instead of providing Talía with specialized attention in view of her vulnerable situation, assumed she was a risk for the other children and suspended and then expelled her.
2. The educational authorities did not take measures to combat the prejudice concerning Talía's inadvertently contracted disease, in order to avoid discrimination and stigma in all areas against people suffering from HIV/AIDS.
3. The obstacles Talía suffered in access to education had a negative impact on her overall development, which is also a differentiated impact taking into account the role of education in overcoming gender stereotypes. Talía's case illustrates that HIV-related stigmatization does not affect everyone the same way and that the impact is more severe on members of vulnerable groups.

As seen in the above case, the comprehensive reparation includes compensation of both pecuniary and non-pecuniary damage: a criterion that can be applied by analogy to reparation in case of scholar bullying. The Inter-American Court of Human Rights has said that the reparation of damage to

[55] Gonzales Lluy et al., 2015, Inter-Am. Ct. H.R., (ser.) (C) No. 298, at. 409 and 416 (Sep. 1, 2015).

[56] Gonzales Lluy et al., 2015, Inter-Am. Ct. H.R., (ser.) (C) No. 298, at. 262, 263 and 290 (Sep. 1, 2015).

the person cannot be affected by existing or future fiscal considerations. So it must be paid to the beneficiaries in full, as stipulated in the judgment.[57] This case is analyzed particularly because bullying is a form of violence and is related to discrimination because it is also a form of violence based on unequal treatment, which as we have seen in the resolution, the elements for a integral reparation are applied.

## V. Implementation of the Principle of Conventionality in View of Damage Caused by Bullying in Mexico

In Mexico, even if there are specific laws on bullying, civil, criminal or administrative regulations also apply. With the use of the control of conventionality, a judge can rule on specific cases regarding legal actions of reparation for non-pecuniary damage and establish the parameters for compensation based on the principles of equality and non-discrimination[58] when the bully is a child or teenager.

This is because Article 1 of the Federal Constitution establishes the parameters for legal operators to interpret the laws in accordance with the principles recognized in the international human rights treaties to which the Mexico is a party, and specifically to protect the right to dignity, physical integrity and childhood education from bullying-related behaviors. This article makes it possible to set parameters for comprehensive compensation for the affected party.

Mexican case law recognizes full reparation of damage or fair compensation, as an important paradigmatic change because in accordance with the criteria issued by the Inter-American Court of Human Rights, the right to comprehensive reparation allows, as far as possible, to annul all the consequences of the offense and restore the situation that should have existed in all probability, if the act had not been committed, and if this were not possible, it is appropriate to pay fair compensation as a compensatory measure for the damage caused, which in no way should imply generating gain for the victim. Hence the modern tort law looks at the nature and extent of the damage to the victims and not the perpetrators. Thus, the damage caused is that which

[57] "Juvenile Re-education Institute", 2004, Inter-Am. Ct. H.R., (ser.) (C) No. 112, at. 337 (Sep 2, 2004).

[58] Pasos a seguir en el control de constitucionalidad y convencionalidad ex officio en materia de derechos humanos, Suprema Corte de Justicia de la Nación, [S.C.J.N.] [Supreme Court of Justice], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo I, December 2011, Tesis P. LXIX/2011, page 552 (Mex.). See Control de constitucionalidad y convencionalidad ex officio. Condiciones generales para su ejercicio, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo I, February 2016, Tesis 1a./J. 4/2016, page 430 (Mex.).

determines the compensation. Its nature and amount depend on the damage caused.[59]

The following is a case study on bullying that was ruled on by the Mexican Supreme Court, asserting its jurisdiction due to the interest and importance of the issue in Mexico.

1. *Reasons for the Supreme Court to take Bullying Cases*

During the 2009-2010 school year, a 7-year-old boy started second grade. He began to express discontent with the way his Spanish teacher treated him –shouting at him and leaving him without recess. The boy's refusal to attend his school in the State of Mexico led his classmates to act aggressively against him.[60]

Considering the state of things, the boy's mother met with the Spanish teacher without reaching any solution. In January 2011, the parents of the child by their own right and on behalf of their son appeared before a civil judge and sued the school and the teacher for moral damage. However, the defendants were acquitted because physical and psychological abuse against the child was not proven. The second hearing confirmed this criterion. Then, in a second petition the child's parents sought a direct *amparo* trial to obtain an *amparo* for to reset the procedure so that the court of origin would receive the minor's opinion.

The civil judge issued a new resolution, in which he acquitted the defendants of the claims. So, the child's parents petitioned for another appeal. In its sentence of October 2, 2013, the Second Civil Chamber of the Superior Court of Justice of the State of Mexico ruled that the plaintiffs did not present conclusive evidence to show that the child had experienced bullying and discriminatory behavior at the hands of the teaching staff at the Institute.

The plaintiffs petitioned again for an *amparo* trial. In view of the interest and importance of the trial, the Supreme Court of Justice of the Nation (SCJN) exercised its authority to assert jurisdiction. The First Chamber issued a resolution, the sources of which will be analyzed in terms of civil liability in cases of bullying.

The SCJN began its study of the moral damage by placing the valuation of civil responsibility and comprehensive reparation of the damage in context, considering that while the existing laws in the country have developed public policy through special laws and action protocols, all aim at addressing,

[59] Derecho fundamental a una reparación integral o justa indemnización. Su concepto y alcance, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo I, April 2017, Tesis 1a./J. 31/2017, Page 752 (Mex.).

[60] Sentence issued in the direct *amparo* number 35/2014 with dated on May 15, 2015, by the First Chamber of the SCJN.

combating and eradicating bullying by considering it same as a psychological figure or defining certain distinctive traits for bullying. However, these policies are based on the fact that bullying is a recent legal figure, when it is really an attitude that affects the best interests of children in specific cases. Therefore, judicial intervention is justified.

### 2. *Enhanced Protection of the Rights of Children*

Children's safety at school is a fundamental basis for exercising the rights to dignity, integrity and education; and to ensure their permanence in an educational system. The principle of higher interest orders all state authorities to ensure that the protection of the rights of the child is carried out by means of strengthened measures to combat discrimination.[61]

The attitude of bullying can cover discriminatory treatment when it is the reason that the victim belongs to a specially protected group in Article 1 of the Federal Constitution. One example of this is when a child is harassed because of his or her race, economic situation, sexual preference, or disability.[62] In the case of children, reinforced measures are applied in terms of dignity. This means it is possible to design a fundamental plan and for it to be determined according to their own desires, as well as to have the minimum material conditions that guarantee a person's existence.

### 3. *Non-Pecuniary Damage*

The SCJN developed a test to evaluate the civil liability in cases of bullying. If a person in a bullying case is charged for acts of aggression, the following must be corroborated: 1. the existence of bullying 2. physical or psychological harm; and 3. the causal link between bullying and harm. When the school is sued, it must also prove 4. the school's negligence.[63]

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[61] Bullying escolar. Medidas de protección reforzada para combatir la discriminación, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo II, October 2015, Tesis 1a. CCCIV/2015, Page 1641 (Mex.).

[62] Interés superior del menor. Uso justificado de las categorías protegidas en el artículo primero constitucional, en las contiendas que involucran los derechos de los niños, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo I, March 2014, Tesis 1a. CVII/2014, Page 546 (Mex.).

[63] Bullying escolar. Carga de la prueba para demostrar la existencia del daño moral, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo I, November 2015, Tesis 1a. CCCXXXIV/2015, Page 951 (Mex.).

In the event that a student or teacher is sued and is found responsible, the school must answer for the damages. If the school is negligent and is sued for wrongful acts or harmful conduct, the school is liable.

In the legal sphere, the complexity of bullying and its relationship with children's rights justify a series of presumptions and differentiated standards for weighing the facts. Therefore, it was deemed appropriate to apply a diminished standard both for the attribution of responsibility and for the evaluation of the acts constituting bullying.

Moral damage is a consequence of the violation of the rights of the person.[64] The SCJN held that in order to update the right to compensation for non-pecuniary damage in the event of bullying, the defendant's responsibility must be credited, which may be of contractual or non-contractual origin, which can in turn be subjective or objective.

Cases of bullying are subjective in nature as the aggressor's conduct or the school's negligence is important.[65] In order for a fact or omission to cause damage and so indicate responsibility, it is necessary for it to be illegal and for the other elements of responsibility to be defined. Responsibility in cases of bullying can stem from both positive behaviors and omissions in child care. When liability for an action is claimed, the damage is attributed to a specific aggressor, who is charged with a series of acts of aggression against the child. If the behavior is proven to be the one that harmed the victim's dignity, physical and moral integrity, the harmful act will be the aggressor's or bully's behavior (a minor or a specific teacher).[66]

In order to determine the type of liability in the event of bullying, the generator of liability shall be analyzed, or, if an aggression was demanded by the action of one or more persons in particular, or if the school's care duties are not complied with.

### 4. *Assessment or Valuation of the Evidence in Case of Bullying*

Bullying consists of any repeated act or omission that physically, psychologically, emotionally affects a child or adolescent, his belongings or the child or adolescent is sexually assaulted when under the care of a public or private

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[64] See Gisela María Pérez Fuentes and Karla Cantoral Domínguez, Daño moral y derechos de la personalidad del menor 25-31 (Ed. Tirant lo Blanch 2015).

[65] Bullying escolar. Constituye un caso de responsabilidad civil extracontractual de naturaleza subjetiva, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo II, October 2015, Tesis 1a. CCCXII/2015, page 1636 (Mex.).

[66] Sentence in the direct amparo number 35/2014 dated 15 May 2015 by the First Chamber of the SCJN, p. 44.

school institution. The SCJN breaks with the doctrinal feature of extended time to identify bullying as it is a complex legal fact: If a case can prove repeated verbal or physical aggression, it will be valid to presume that it is a situation of harassment.[67]

Determining liability for bullying is done by means of three fundamental tests: psychological evaluations, sociological opinions, and hearing the victim's opinion. The evidence in the above case showed that the child was physically and psychologically abused at school, as a result of mockery, ill treatment and commentaries on behalf of his peers and teachers.

### 5. *Negligence by the School and its Teaching Staff*

When a school is sued, another element of school negligence should be tested. In order to hold the school responsible, it is necessary for the damage caused to be accompanied by a duty of care of the person responsible for the victim, that is, civil liability for external acts, known thus in common law doctrine as vicarious *responsibility* which is a figure found in US law.

Wrongfulness may derive from two different sources: 1. that the person responsible has been obligated to act according to a standard and failed to comply with that legal obligation, or 2. that the person responsible failed to comply with a generic duty of care that requires the provision of a service. These duties are generated and evaluated in the light of the best interests of children. In cases of bullying, schools must diagnose, prevent, intervene and positively modify coexistence at the school.

The ruling in the above case considered that once it was demonstrated that bullying occurred in a situation under the control of the school, the educational center would have to show that it fulfilled the due diligence required for providing educational services. In this way the burden of proof is reversed and placed on the representative of the school center. The SCJN argues this position attending the principles of "Ease of probation" and the difficulty for the victim to prove a negative act.[68] It is legally understood that it is a manifestation of reinforced measures in the case of the best interests of children.

[67] Sentence in the direct amparo number 35/2014 dated 15 May 2015 by the First Chamber of the SCJN, p. 49.

[68] Bullying escolar. Los centros escolares tienen la carga de la debida diligencia, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo I, November 2015, Tesis 1a. CCCXXXI/2015, Page 958 (Mex.).

6. *Causal links between behavior and damage*

Bullying can generate both property and non-property damages,[69] which can in turn, be present or future.[70] Evidence of the moral damage to the child caused by bullying is provided when a number of assaults, whether minor in themselves or on separate occasions, end up damaging moral integrity by their repeated, systematic and habitual execution.[71]

In case of liability for bullying by students or teachers, the causal link between school harassment and the physical or mental harm done to the victim should be proven. On the other hand, liability for negligence is proven when there is evidence that the fulfillment of the duty of care would have prevented the victim's rights from being affected. Moral damage was originated by the aggression and the neglect that the child suffered, that is to say, the causal link between the behaviors and the damage is supported by evidence that the civil liability falls on both of the Spanish teachers in the particular institution in question.

7. *Economic Situation of the Victim in Compensation for Moral Damage*

In a broad sense, moral damage can lead to two types of consequences: non-property or property damage. Compensation for the non-property damage derived from moral damage is mitigated since it cannot be simply restored by financial compensation. Injuries to the nature and intensity of the victims' affections, feelings or psyche have to be taken into account.

In the compensation of the property damages arising from moral damage, trying to redress the victims' economic losses is necessary (valid) whether said

[69] Bullying can include physical injuries and economic losses arising from the harassment, such as tuition payments, medical fees, and therapy sessions, among others. Sentence issued in direct *amparo* number 35/2014, p. 73.

[70] Daño moral. Su clasificación atendiendo al momento en que se materializa, Primera Sala de la Suprema Corte de Justicia de la Nación, [S.C.J.N.] [First Chamber of the Supreme Court of Justice], Semanario Judicial de la Federación y su Gaceta, Décima Época, tomo I, June 2014, Tesis 1a. CCXXXIII/2014, Page 449 (Mex.). "Moral damage has two types of projections: present and future. In all of them the judge must assess not only the current damage, but also the future; therefore, in addition to the economic or extra-economic nature of the consequences derived from moral damage in a broad sense, these can also be distinguished according to the moment in which they materialize. Thus, the damage is current when it is already produced at the time of sentencing. This damage includes all the losses actually suffered, both material and extra-patrimonial; in the latter, the disbursements made for the care of the damage would enter. On the other hand, the future damage is one that has not yet occurred when the judgment is issued, but it is presented as a foreseeable prolongation or aggravation of a current damage, or as a new future impairment, derived from a situation of the current event. For future damage to result in reparation, the likelihood that the benefit will occur must be real and serious, and not a mere illusion or conjecture of the victim's mind."

[71] Sentence issued in direct *amparo* number 35/2014, p. 78.

damage is present or future. If, as in the case of moral damage, the victim is in need of psychological therapy, the current and future cost of treatment should be considered as compensation to comprehensively repair the moral damage.

Mexican law has evolved, says SCJN, from one that imposed well assessed limits on the redress of damage or established it through fixed formulas[72] to one that considers the need for just and comprehensive reparation.[73] In this case law evolution, it is seen in the case of analyzing bullying.

8. *Case Resolution*

When the sentencing determines that the amount of compensation must concur with the defendant's degree of responsibility, which must also be assessed, as well as the social aspect of the damage caused; that is, the importance or social implications the wrongful act may have. In this case, it is the school that in addition to its negligent acts must financially respond for the teacher's wrongful conduct.

In the trial a serious level of involvement was attributed to the case as the child's social behavior altered, deeply affecting family and school life. To define the compensation for property damage derived from the moral damage in this specific case, the cost of psychological therapy every two weeks was taken as a basis. The resulting total stood at MXP $64,800.00 (sixty-four thousand eight hundred Mexican pesos) since this therapy would be required for a three-year period.

With regard to compensation for moral damage, the serious impact on the child's dignity, the high degree of the teacher's and school's responsibility, and the average economic capacity of the latter was taken into account. Therefore, the *amparo* was granted so that the TSJ Chamber of the State of Mexico could issue a new sentence in which the school was obligated to the pay the amount of MXP $500,000.00 (five hundred thousand Mexican pesos)

The First Chamber of the SCJN considers bullying is a complex phenomenon that needs to be addressed as a process consisting of different stages. Thus, it is necessary to design a strategy to combat bullying, although for the purposes of the *amparo* trial, the last considerations of the sentence in the sense of "recommendations to address the phenomenon of bullying school," are not strictly part of the nature of the judgment.[74] The truth is that this

[72] Amparo in Review 75/2009, resolved on March 18, 2009, by the First Chamber of the SCJN.

[73] Direct *amparo* in Review 1068/2011, resolved on October 19, 2011, by the First Chamber of the SCJN.

[74] Concurrent vote formulated by the Minister Jorge Mario Pardo Rebolledo in the direct amparo 35/2014.

criterion[75] corroborates our position on the failure of public policies that exist to protect the best interests of children in the event of bullying.

## VI. Conclusions

Bullying is a complex phenomenon that initially manifests itself in a person's or group's aggressive behavior in a school bullying setting that harms the dignity of the injured person (a minor in this case) who suffered the physical and/or psychological aggressions. Repeated aggression is assessed to define the degree of damage to the injured.

In the Mexican legal system, the interpretation of the *pro persona* principles and the best interest of children, protected by the Federal Constitution according to the parameters established in international treaties, such as the Convention on the Rights of the Child, as well as the American Convention on Human Rights, that recognize legal mechanisms to punish the conduct of persons who bully or allow bullying.

The inconsistency in the special laws of the States in the study of bullying cases shows that the administrative solution is insufficient and limited to the actors of the damage without mentioning the protection of the victim. Therefore, it has been necessary to apply the conventionality principle in the judgments issued by the Mexican Supreme Court of Justice to establish fair compensation that manifests itself through comprehensive reparation of the damage in proportion to the effects.

For the reparation of moral damage, the legal good put at risk by negligent conduct; the degree of negligence and any aggravating factors; the social importance of the duties unfulfilled in the light of the type of activity performed by the party responsible, and other factors should be weighed.

Legal reparation mechanisms for bullying have made it possible to guarantee the best interests of children. This is because in the case study in Mexico, the obligation of educational establishments to protect the children's and adolescents' rights to dignity, integrity, education and non-discrimination has been established, regardless of whether the institution is public or private.

[75] The judgment states: the First Chamber cannot overlook the need for the competent authorities to create clearer and more specific policy instruments, on which public and private schools can design methods of prevention, intervention and combating bullying.

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# NOTES

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# DID NAFTA HELP MEXICO? AN UPDATE AFTER 23 YEARS

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Abstract: *This note compares the performance of the Mexican economy with that of the rest of the region over 23 years, since NAFTA took effect, based on the available economic and social indicators. Among the results, it finds that Mexico ranks 15th out of 20 Latin American countries in growth of real GDP per person, the most basic economic measure of living standards; Mexico's poverty rate in 2014 was higher than the poverty rate of 1994; and real wages (inflation-adjusted) were almost the same in 2014 as in 1994. It also notes that if NAFTA had been successful in restoring Mexico's pre-1980 growth rate —when developmentalist economic policies were the norm— Mexico today would be a high-income country, with income per person comparable to Western European countries. If not for Mexico's long-term economic failure, including the 23 years since NAFTA, it is unlikely that immigration from Mexico would have become a major political issue in the United States, since relatively few Mexicans would seek to cross the border.*

Keywords: *NAFTA, economic policy, income, growth, employment, poverty*.

Resumen: *Esta nota compara la actuación de la economía mexicana con las del resto de la región a lo largo de los 23 años en los que el TLCAN ha surtido efecto, tomando como base los indicadores sociales y económicos disponibles. Entre los resultados, se encontró que México tiene el puesto 15, de 20 naciones latinoamericanas, en el crecimiento real del PIB por persona, la medida económica más básica de la forma de vida; el porcentaje de pobreza en 2014 fue más alto que el porcentaje de pobreza en 1994; y los salarios reales (ajuste de inflación) fueron casi los mismos en 2014 como en 1994. También se muestra que, si el TLCAN hubiera sido exitoso en restablecer la taza de crecimiento de México previa a 1980 —cuando las políticas económicas del desarrollismo eran la norma—, México actualmente sería una nación de ingresos altos, con*

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*ingresos por persona comparables a los de los países de Europa occidental. Si no fuera por el fracaso económico de largo plazo de México, incluyendo 23 años del inicio del TLCAN, la migración desde México no sería un problema político relevante para los Estados Unidos, debido a que relativamente pocos mexicanos buscarían cruzar la frontera.*

Palabras clave: *TLCAN, políticas económicas, ingreso, crecimiento, empleo, pobreza*.

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## I. Introduction

It is now over 23 years since NAFTA went into effect, bringing Mexico into a new commercial agreement with the United States and Canada. At the time it was argued, and forecast, that the agreement would boost Mexico's growth and development.

This note compares the performance of the Mexican economy with that of the rest of the region since NAFTA, based on the available economic and social indicators, and with its own past economic performance. Among the results:

— Mexico ranks 15th among 20 Latin American countries in growth of real GDP per person from 1994 to 2016, the most basic economic measure of living standards.
— Mexico suffered a collapse of economic growth after 1980, with Latin American per capita GDP growing by just 9 percent, and Mexico by 13 percent, from 1980 to 2000.
— Mexico's per capita GDP growth of just 1 percent annually over the past 23 years is significantly lower than the rate of growth of 1.4 percent achieved by the rest of Latin America.
— If NAFTA had been successful in restoring Mexico's pre-1980 growth rate —when developmentalist economic policies were the norm— Mexico today would be a high income country, with income per person significantly higher than that of Portugal or Greece. It is unlikely

that immigration reform would have become a major political issue in the United States, since relatively few Mexicans would seek to cross the border.

— According to Mexican national statistics, Mexico's poverty rate of 55.1 percent in 2014 was higher than the poverty rate of 1994. As a result, there were about 20.5 million more Mexicans living below the poverty line as of 2014 (the latest data available) than in 1994.
— Elsewhere in Latin America there was a drop in poverty that was more than five times as much as that of Mexico: 21 percentage points (from 46 to 25 percent) for the rest of Latin America, versus 3.9 percentage points (from 45.1 to 41.2 percent) for Mexico.
— Real (inflation-adjusted) wages for Mexico were almost the same in 2014 as in 1994, up just 4.1 percent over 20 years, and barely above their level in 1980.
— Unemployment in Mexico is 3.8 percent today, as compared to an average of 3.1 percent for 1990–94, and a low of 2.2 percent in 2000; these numbers seriously understate the true lack of jobs, but they do not show an improvement in the labor market during the NAFTA years.
— NAFTA also had a severe impact on agricultural employment, as US subsidized corn and other products wiped out family farmers in Mexico. From 1991 to 2007, 4.9 million Mexican family farmers were displaced; while seasonal labor in agro-export industries increased by about 3 million. This meant a net loss of 1.9 million jobs.
— The very poor performance of the Mexican economy contributed to a surge in emigration to the United States. From 1994 to 2000, the annual number of Mexicans emigrating to the United States soared by 79 percent. The number of Mexican-born residents living in the United States more than doubled from 4.5 million in 1990 to 9.4 million in 2000 and peaked at 12.6 million in 2009.

NAFTA was just one variable among others that could account for Mexico's poor economic performance over the past 23 years. However, it appears to be related to other economic policy choices that have negatively affected the Mexican economy during this period. Mexico competes directly with China in the US market, where China accounts for 21 percent of US imports and Mexico accounts for 13.5 percent. This is a very tough competition for Mexico for a number of reasons. First, although there is no definitive wage data for China in the last few years, Mexico has had much higher wages than China for the vast majority of the post- NAFTA period. Second, China has generally had a commitment to a competitive exchange rate, in effect fixing this exchange rate against the dollar or (since 2005) a basket of currencies, at least until very recently. The Mexican Central Bank by contrast has, as the IMF notes, "a firm commitment to exchange rate flexibility." The Mexican Central Bank's form of rigid inflation targeting thus adds a large element of

unpredictability to the exchange rate, which has a negative impact on foreign direct investment; foreign investors will find it difficult to know how much their assets or output will be worth internationally in the future.

China has other advantages that make it a formidable competitor for Mexico in the US market: the Chinese government controls most of the banking system in China, and can therefore ensure that its most important exporting firms have sufficient access to credit. In Mexico, by contrast, 70 percent of the banking system is not only private, but foreign-owned. The Chinese government also has an active industrial policy that enables it to help its exporting firms in various ways, and it spends vastly more on research and development —both in absolute terms and as a percentage of its economy.

NAFTA also increasingly tied Mexico to the US economy, at a time when the US economy was becoming dependent on growth driven by asset bubbles. As a result, Mexico suffered a recession when the stock market bubble burst in 2000–2002, and was one of the hardest-hit countries in the region during the US Great Recession, with a drop of 6.7 percent of GDP. The Mexican economy was even harder hit by the peso crisis in 1994–1995, losing 9.5 percent of GDP during the downturn; the crisis was triggered by the US Federal Reserve raising interest rates in 1994.

The vulnerability to developments in US financial markets continues. In May of 2013, after the US Federal Reserve announced a future "tapering" of its quantitative easing program (QE3), there were fears of a repeat of the 1994 peso crisis, and gross foreign portfolio inflows came to a sudden stop. The Mexican economy took a hit, with growth of 1.4 percent for the year. This was mostly because, as the IMF noted, "Mexico's deep and liquid foreign exchange and domestic equity and sovereign bond markets can serve as an early port of call for global investors in episodes of financial turbulence and hence are susceptible to risks of contagion." This vulnerability is also a result of the policies that NAFTA was designed to facilitate. Moreover, the Mexican economy likely faces more risks as the Fed continues to raise US interest rates.

As was well known at the time of NAFTA's passage, the main purpose of NAFTA was to lock in a set of economic policies, some of which were already well under way in the decade prior. These included the liberalization of manufacturing, of foreign investment, and of ownership, and other changes.[1] The idea was that the continuation and expansion of these policies would allow Mexico to achieve efficiencies and economic progress that was not possible under the developmentalist, protectionist economic model that had prevailed in the decades before 1980. While some of the policy changes were undoubtedly necessary and/or positive, the final outcome has been decades of eco-

[1] Aaron Tornell & Gerardo Esquivel, *The Political Economy of Mexico's Entry into NAFTA*, in REGIONALISM VERSUS MULTILATERAL TRADE AGREEMENTS 25,56 (Rakatoshi Ito & Anne O. Krueger, 1997).

nomic failure by almost any economic or social indicator. This is true whether we compare Mexico to its developmentalist past, or even if the comparison is to the rest of Latin America since NAFTA. After 23 years, these results should provoke more public discussion as to what went wrong.

## II. Income and Growth

The North American Free Trade Agreement (NAFTA) went into effect in January 1994, bringing Mexico into a new commercial agreement with the United States and Canada. At the time it was argued, and forecast,[2] that the agreement would boost Mexico's growth and development. After 10 years of the agreement, the World Bank published a paper with an econometric analysis purporting to show that NAFTA had increased Mexico's growth rate, at least relative to that of the United States.[3] However, it turned out that this result was dependent on a data error.[4]

It is difficult to demonstrate unequivocally whether Mexico would have done worse in the absence of NAFTA, because many elements of the counterfactual are unknowable. However, one can compare the performance of the Mexican economy with that of the rest of the region since 1994 on the available economic and social indicators, and with its own past economic performance. Such a comparison follows, along with some analysis of possible explanations for Mexico's poor performance.

Figure 1 shows the growth of income per capita in Mexico. This is the most basic measure of economic progress. As can be seen, per capita GDP has grown by just 28.7 percent, cumulatively, from 1994 through 2016. This is an average annual growth rate of just 1.2 percent, which is quite low compared with other countries in the region during this period.

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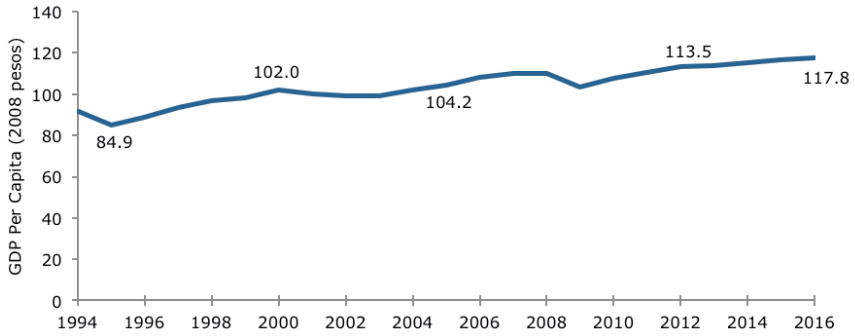
[2] Jim Stanford, *Economic Models and Economic Reality: North American Free Trade and the Predictions of Economists*, 33(3) International Journal of Political Economy 28, 49 (2003).

[3] Daniel Lederman, William F. Maloney & Luis Servén, Lessons from NAFTA for Latin America and the Caribbean Countries (World Bank and Stanford University Press, 2004). https://openknowledge.worldbank.org/handle/10986/14457

[4] Mark Weisbrot & Rebecca Ray, *The Scorecard on Development, 1960–2010: Closing the Gap?* Center for Economic and Policy Research (2011), http://www.cepr.net/index.php/publications/reports/the-scorecard-on-development-1960-2010-closing-the-gap

The authors of the study, and the World Bank, never acknowledged the error, and did not address it either in their correspondence on the subject. For a complete timeline with documents, including revisions to the WB paper and correspondence, see http://cepr.net/press-center/press-releases/holding-the-world-bank-accountable-for-its-research-the-case-of-nafta.

FIGURE 1
MEXICO: REAL GDP PER CAPITA IN THOUSANDS




SOURCE: n.a., *World Economic Outlook, October 2016*, INTERNATIONAL MONETARY FUND, (2016), https://www.imf.org/external/pubs/ft/weo/2016/02/weodata/index.aspx

Table 1 shows Mexico's annual per capita GDP growth rate compared to the rest of Latin America (South America and Central America). Mexico's growth ranks 15th of 20 countries. From these numbers, and in the absence of any natural disaster or war in Mexico during the past decades that could account for such poor economic performance, it would be difficult to argue that Mexico would have done much worse in the absence of NAFTA.

TABLE 1
LATIN AMERICA: AVERAGE ANNUAL GROWTH
PER CAPITA 1994–2016

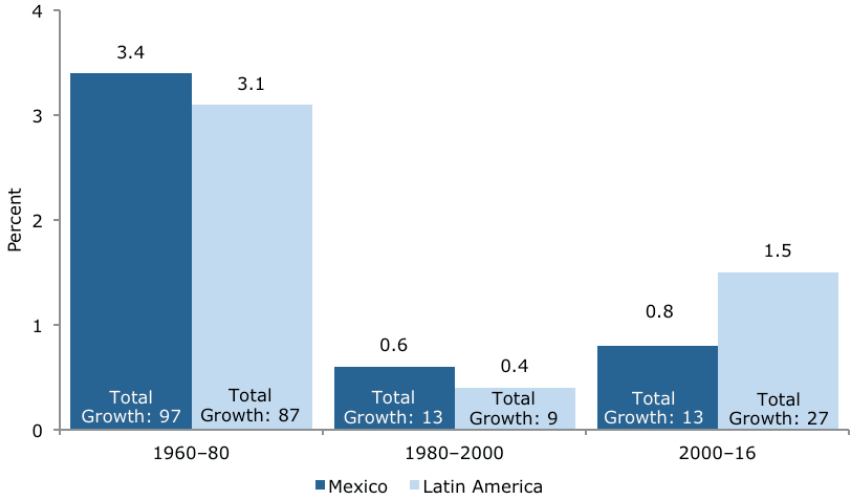
| | | |
|---|---|---|
| 1 | Panama | 4.0% |
| 2 | Peru | 3.2% |
| 3 | Chile | 3.0% |
| 4 | Guyana | 2.8% |
| 5 | Suriname | 2.6% |
| 6 | Costa Rica | 2.5% |
| 7 | Nicaragua | 2.5% |
| 8 | Bolivia | 2.3% |
| 9 | Uruguay | 2.3% |
| 10 | Colombia | 2.1% |

| | | |
|---|---|---|
| 11 | El Salvador | 1.9% |
| 12 | Honduras | 1.9% |
| 13 | Paraguay | 1.4% |
| 14 | Ecuador | 1.4% |
| 15 | Mexico | 1.2% |
| 16 | Brazil | 1.1% |
| 17 | Argentina | 1.1% |
| 18 | Guatemala | 1.1% |
| 19 | Belize | 1.0% |
| 20 | Venezuela | -0.4% |

Source: n.a., *World Economic Outlook, October 2016*, International Monetary Fund, (2016), *https://www.imf.org/external/pubs/ft/weo/2016/02/weodata/index.aspx.*

It is worth comparing Mexico's growth rate since NAFTA to that of its past, again in the context of the rest of the region. This can be seen in Figure 2A. From 1960 to 1980, Mexico almost doubled its income per person, a growth rate that was higher than that of Latin America as a whole. If this growth had continued, Mexico would be a high-income country today. However, both Mexico and the region suffered a sharp slowdown in the growth of income per capita over the following 20 years, 1980–2000, a period that coincided with first a badly handled debt crisis in the early 1980s and then a number of neoliberal policy changes. Regional growth of GDP per capita dropped from 87 percent for the prior two decades, to just 9 percent for 1980–2000, or just 0.4 percent annually. Mexico's per capita growth fell from 97 percent to 13 percent, or 0.6 percent annually.

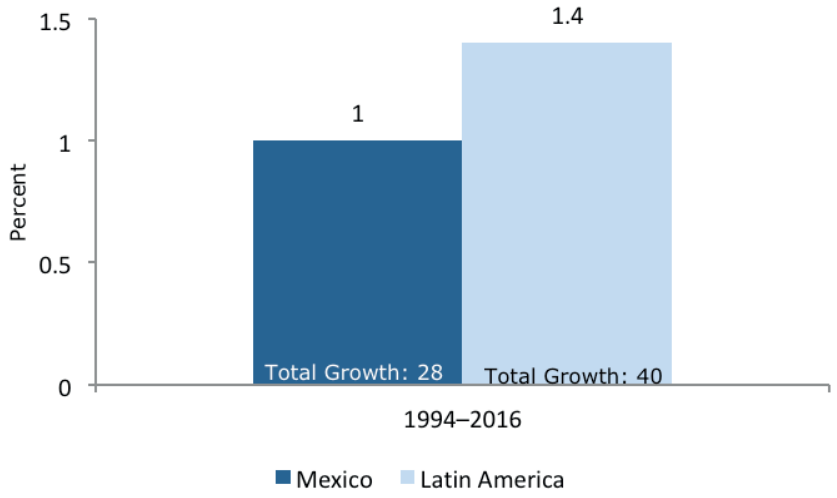
FIGURE 2A
MEXICO AND LATIN AMERICA: AVERAGE ANNUAL REAL PER-CAPITA GDP GROWTH, 1960–2016




SOURCE AND NOTES: Latin America region includes Argentina, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, and Venezuela. Authors' calculations based on Robert C. Feenstra, Robert Inklaar & Marcel P. Timmer, *The Next Generation of the Penn World Table*, 105(10) AMERICAN ECONOMIC REVIEW. 3150, 3812 (2015). *www.ggdc.net/pwt* and n.a., *World Economic Outlook, October 2016*, INTERNATIONAL MONETARY FUND, (2016), *https://www.imf.org/external/pubs/ft/weo/2016/02/weodata/index.aspx.*

In the twenty-first century, there was something of a rebound in the region, with per capita GDP growth averaging 1.5 percent annually for 2000–16, despite two recessions and a slowdown since 2011. Looking just at the years since NAFTA, Mexico did not do as well as the whole region, averaging 1 percent in per capita GDP growth for these years. This is shown in Figure 2B.

FIGURE 2B
MEXICO AND LATIN AMERICA: AVERAGE ANNUAL REAL PER-CAPITA GDP GROWTH, 1994–2016.

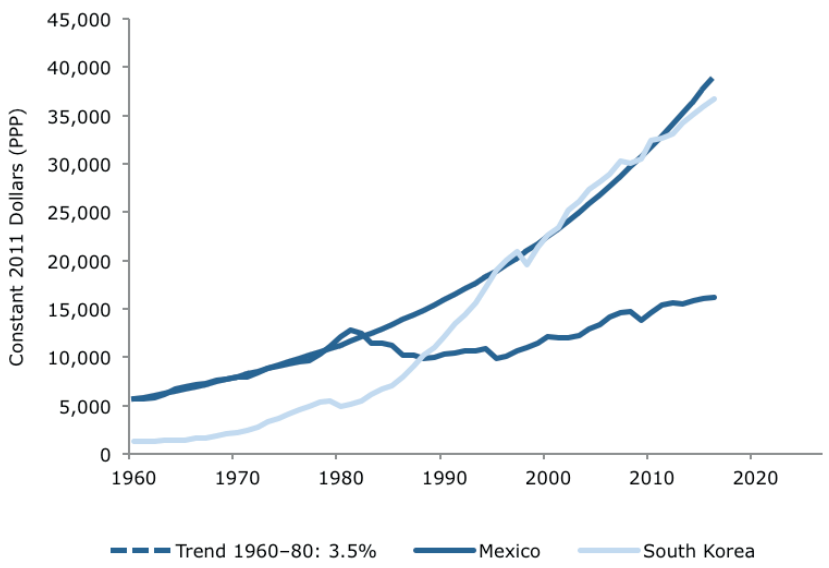



SOURCE AND NOTES: Authors' calculations based on Robert C. Feenstra, Robert Inklaar & Marcel P. Timmer, *The Next Generation of the Penn World Table*, 105(10) AMERICAN ECONOMIC REVIEW. 3150, 3812 (2015). *www.ggdc.net/pwt* and n.a., *World Economic Outlook, October 2016*, INTERNATIONAL MONETARY FUND, (2016), *https://www.imf.org/external/pubs/ft/weo/2016/02/weodata/index.aspx.*

It is also worth examining where Mexico would be today if its income per person had continued to grow at the rate that it did over the two decades prior to 1980. This is shown in Figure 3. This result was not impossible, as can be seen by the comparison with South Korea, which grew rapidly (although from a much lower starting point than Mexico) from 1960 to 1980, and did not suffer from Mexico's growth collapse thereafter. Mexico in 2016 would have an income per person of more than $39,000 in 2011 international purchasing power parity dollars,[5] which would make its living standards comparable to, or even above, several Western European countries. For comparison, Figure 3 includes the actual trajectory of South Korea, which is today a high-income country; its per capita GDP is about $37,000 in 2011 international purchasing parity dollars.

[5] A purchasing power parity (PPP) estimate of per capita GDP attempts to adjust for the difference in prices between different countries, so that the same PPP dollar amount represents the same purchasing power in the compared countries.

FIGURE 3
MEXICO AND SOUTH KOREA: REAL GDP PER CAPITA, 1960–2013




SOURCE AND NOTES: Authors' calculations based on Robert C. Feenstra, Robert Inklaar & Marcel P. Timmer, *The Next Generation of the Penn World Table*, 105(10) AMERICAN ECONOMIC REVIEW. 3150, 3812 (2015). *www.ggdc.net/pwt* and n.a., *World Economic Outlook, October 2016*, INTERNATIONAL MONETARY FUND, (2016), *https://www.imf.org/external/pubs/ft/weo/2016/02/weodata/index.aspx*.

NAFTA was an integral part of a "reform" process that began with major trade liberalization reforms in the 1980s, and was designed to expand upon, and lock in, a set of policies that would put the economy on an irreversible path that was very different from that defined by the developmentalist state and protectionist policies of the pre-1980 period.[6] However, even if we look at just the 23 years since NAFTA, and we ask what Mexico would look like today if NAFTA had restored Mexico's 1960–80 growth rate —after more than a decade of failure— it would still be a reasonably high-income country. Per capita GDP would be significantly more than that of Portugal or Greece.

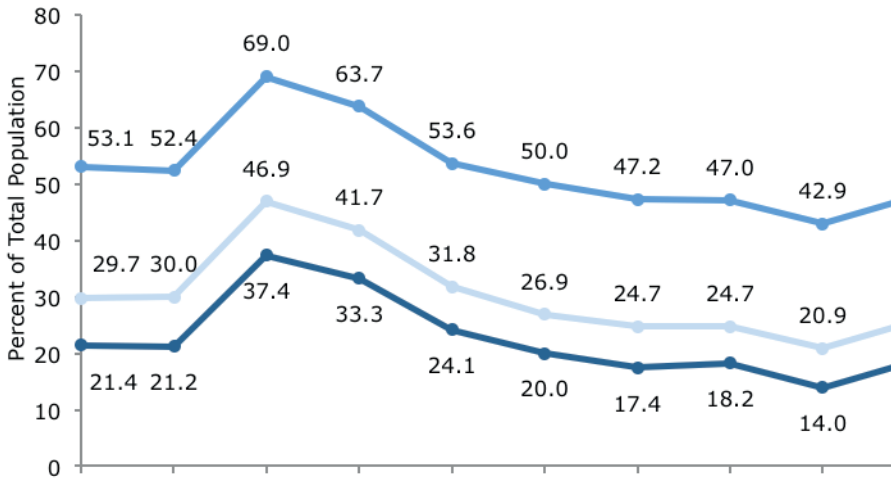
As would be expected during such a period of very little economic growth, the poverty rate was not reduced in Mexico; in fact, it increased. Figure 4 shows Mexico's national poverty rate.[7] In 2014, it was 55.1 percent, compared to the 52.4 percent rate in 1994. As a result, there were about 20.5 million

[6] For a review of this history, see Tornell & Esquivel, *supra* note 1.

[7] In 2008, CONEVAL changed its methodology on poverty lines; however, a 2015 report by the National Autonomous University of Mexico updates the calculations based on CONEVAL's original methodology. See Rolando Cordera Campos & Enrique Provencio

more Mexicans living below the poverty line as of 2014 than in 1994. Measures of more extreme poverty —"unable to afford health care, education and food," and "unable to afford food" (as categorized by Mexico's Consejo Nacional de Evaluación de la Política de Desarrollo Social) improved very little since 1994, falling by just 0.6 and 0.9 percentage points, respectively.

FIGURE 4
MEXICO: POVERTY LEVELS BASED ON CONSUMPTION BASKETS
(CONEVAL ESTIMATE)

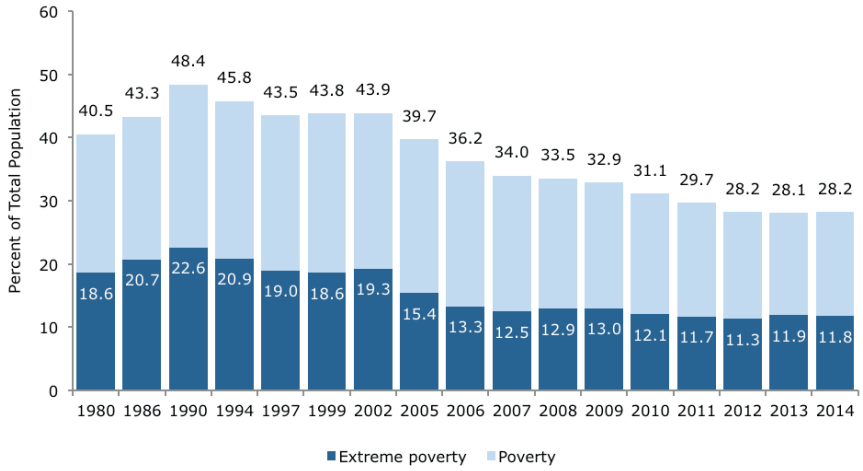



SOURCE: n.a., *Evolución de pobreza por la dimensión de ingreso en Mexico 1992–2012*, CONSEJO NACIONAL DE EVALUACIÓN DE LA POLÍTICA DE DESARROLLO SOCIAL, 2014, *http://www.coneval.gob.mx/Informes/Pobreza/Estatal2012/Evolucion_dimensiones_pobreza_1990-2012/AE_Indicadores_Pobreza_1990-2012.zip*; Rolando Cordera Campos & Enrique Provencio Durazo, *Informe del Desarrollo en México 2015*, UNIVERSIDAD NACIONAL AUTÓNOMA DE MÉXICO, (2016), http://www.pued.unam.mx/publicaciones/26/Informe_Desarrollo_2015.pdf

We can also compare what happened to poverty in Mexico with the region as a whole. This can be seen in Figure 5. For the region as a whole, there was no progress in reducing the poverty rate for more than two decades, from 1980 to 2002. As seen in Figure 5, the poverty rate for the region then fell substantially, from 43.9 percent in 2002 to 28.2 percent in 2014.

Durazo, *Informe del Desarrollo en México 2015*, UNIVERSIDAD NACIONAL AUTÓNOMA DE MÉXICO, (2016), *http://www.pued.unam.mx/publicaciones/26/Informe_Desarrollo_2015.pdf.*

FIGURE 5
LATIN AMERICA: POVERTY AND EXTREME POVERTY
(ECLAC ESTIMATE)

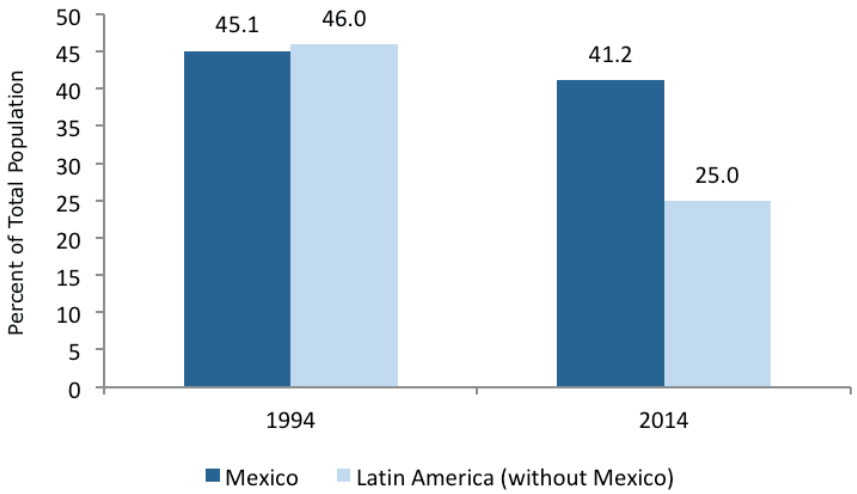



Source: n.a., *Population living below the extreme poverty and poverty lines, by geographical location,* ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN (ECLAC), (2016c), *http://interwp.cepal.org/sisgen/ConsultaIntegrada.asp?idIndicador=182&idioma=e.*

However, these poverty rates, from the UN Economic Commission on Latin America (ECLAC), are computed from national surveys somewhat differently than those of Mexico's national poverty statistics. For a comparison between Mexico and the rest of the region, it therefore makes sense to compare ECLAC's computation of the poverty rate for Mexico with its computation for the rest of the region, excluding Mexico.[8] This is shown in Figure 6. By ECLAC's measure, Mexico's poverty rate fell from 45.1 percent in 1994 to 41.2 percent in 2014 (3.9 percentage points). However, excluding Mexico, poverty in the region fell more than five times as much, from 46 percent to 25 (21 percentage points).

[8] Latin America region includes Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.

FIGURE 6
MEXICO AND LATIN AMERICA: POVERTY, 1994 AND 2014
(ECLAC ESTIMATE)



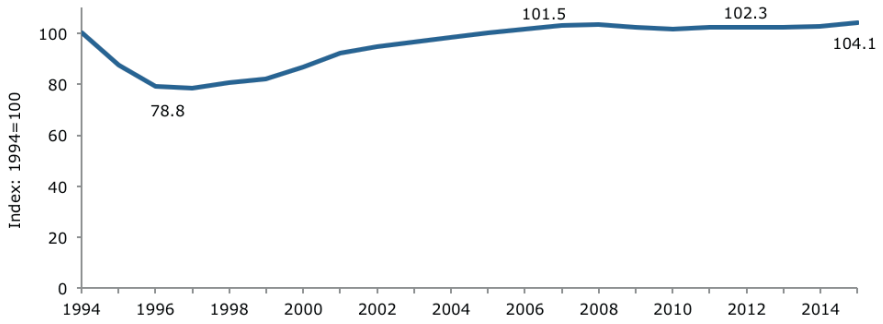

SOURCE AND NOTES: Author's calculations using n.a., *Population living below the extreme poverty and poverty lines, by geographical location*, ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN (ECLAC), (2016c), *http://interwp.cepal.org/sisgen/ConsultaIntegrada.asp?idIndicador=182&idioma=e.*

Figure 7 shows the path of real (inflation-adjusted) wages in Mexico from 1994 to 2014.[9] There is a fall in real wages of 21.2 percent from 1994–96, associated with the peso crisis and recession. Wages did not recover to their pre-crisis (1994) level until 2006, 11 years later. By 2014, they were only 4.1 percent above the 1994 level, and barely above their level of 1980. The minimum wage, adjusted for inflation, fared even worse. From 1994 to 2015, it fell by 19.3 percent.[10]

[9] These are wages of formal sector workers contributing to the Mexican Social Security Institute (Instituto Mexicano del Seguro Social).

[10] Economic Commission for Latin America and the Caribbean ECLAC), *Real minimum wage*, (2016d), *http://interwp.cepal.org/sisgen/ConsultaIntegrada.asp?idIndicador=340&idioma=e.*

FIGURE 7
MEXICO: REAL AVERAGE WAGES




SOURCE AND NOTES: 1994=100 n.a., *Annual real average wages*, ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN (ECLAC), (2016a) *http://interwp.cepal.org/sisgen/ConsultaIntegrada.asp?idIndicador=341&idioma=e* and n.a., *Annual real average wages*, ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN (ECLAC), (2014) *http://interwp.cepal.org/sisgen/ConsultaIntegrada.asp?idIndicador=341&idioma=ehttp://interwp.cepal.org/sisgen/ConsultaIntegrada.asp?idIndicador=341&idioma=e.*

Figure 8 shows Mexico's unemployment and underemployment rate. (Unemployment is shown since 1994; data on underemployment are only available since 2005.) Although the unemployment rate jumped during the peso crisis and then fell steadily until 2000, it then increased again until 2014. Unemployment has averaged 4.0 percent during NAFTA (1994–2016), compared to an average of 3.1 percent for 1990–94 and a low of 2.2 percent in 2000. These numbers are small in absolute terms, because the official unemployment rate does not capture the full extent of unemployment in Mexico. In order to be counted as unemployed, a worker has to have not worked even one hour in paid activity during the reference period in which the survey was taken, and he or she must have been actively looking for work. But there are many people who would not be counted as unemployed in this data, despite not being employed.

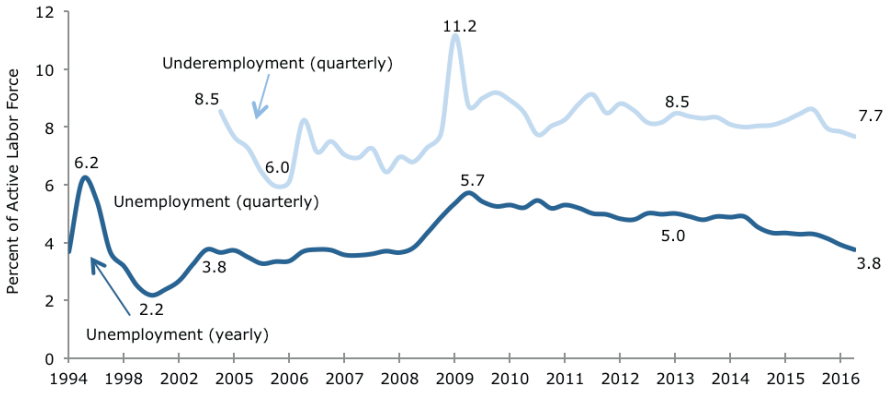
This is partly because Mexico has very little social safety net and no unemployment insurance outside of Mexico City. For this reason, heads of household especially will generally engage in some kind of economic activity in order to survive.[11] There is a very high level of informal labor; about 40 percent of all employed workers are in units of less than five employees.[12] For these

[11] For more data and analysis of unemployment in Mexico, see Carlos Salas, *Labour, Income and Social Programmes in Contemporary Mexico*, in SOCIAL PROTECTION, GROWTH AND EMPLOYMENT: EVIDENCE FROM INDIA, KENYA, MALAWI, MEXICO AND TAJIKISTAN 201,234 (United Nations Development Program, 2013)

[12] Instituto Nacional de Estadística y Geografía (Inegi), *Población ocupada, subocupada y desocupada (resultados trimestrales de la ENOE, 15 años y más*, Ocupación, empleo y remuneraciones (2017a), http://www.inegi.org.mx/sistemas/bie/

and other reasons, movements in the official rate should be seen as an indicator of the proportionate deterioration (and recovery) of the labor market, and not as a measure of the actual level of unemployment.

FIGURE 8
MEXICO: UNEMPLOYMENT AND UNDEREMPLOYMENT,
SEASONALLY ADJUSTED

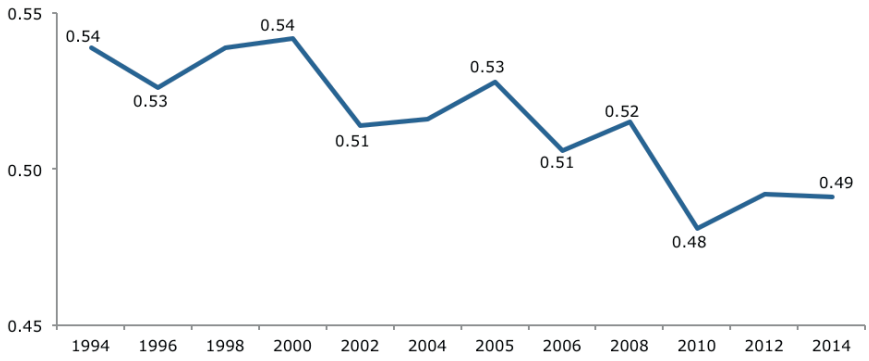



SOURCE: INEGI (2017). n.a., *Empleo y Desempleo en Mexico: 1994–2004*, CENTRO DE ESTUDIOS SOCIALES Y DE OPINIÓN PÚBLICA (CESOP), (2005), *http://201.147.98.14/camara/content/down load/22822/110347/file/DAHC0004%20Empleo%20y%20desempleo%201994-2004.pdf.*

A somewhat better measure of the state of the labor market is underemployment, also shown in Figure 8, but data only begin in 2005. This includes workers who have a demonstrated need and ability to work more hours but were not able to do so due to labor market conditions. This was 8 percent for 2015, as compared to an annual average of 7.2 percent for the pre-crisis years 2005–07. In any case, it would be difficult to make the case from the available data that NAFTA had succeeded in reducing either unemployment or underemployment.

At first glance, Mexico appears to have made significant progress in reducing inequality in the post-NAFTA period. Figure 9 shows the Gini coefficient for household income for the years 1994–2014. It shows a decline from 0.54 to 0.49.

FIGURE 9
MEXICO: GINI COEFFICIENT




SOURCE: n.a., *Gini coefficient*, ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN (ECLAC), (2016b) *http://interwp.cepal.org/sisgen/ConsultaIntegrada.asp?idIndicador=250&idioma=e.*

The decline in inequality is something of a mystery, during a period in which real wages stagnated, unemployment and underemployment did not improve, income growth was very slow, and the national poverty rate was higher in 2014 than in 1994. One possible explanation may be in the data. In general, in the kind of survey data on which these statistics are based, a large part of the income of the wealthiest households is not reported. For example, in the United States from 1976 to 2006, the Gini coefficient using income tax data and including capital gains showed an increase of 10.8 points, more than twice the increase in the standard Gini coefficient using survey (CPS) data.[13] And in Mexico, enormous fortunes were accumulated during the post-NAFTA era. For example, Mexico's richest billionaire, Carlos Slim Helú, reportedly increased his net worth by $66.4 billion (from $6.6 billion in 1994 to $73 billion in 2014). The combined net worth of 15 Mexican billionaires in Forbes' World's Billionaires list was almost $150 billion in 2015. It is possible that the incomes of these billionaires and others in the top 1 percent, depending on how much was not reported in the household surveys, could make a significant difference in the Gini coefficient.

Efforts to decompose the sources of the decline in inequality shown in the Gini coefficient from household survey data in Mexico, from 1996 to 2006, have indicated that most of it can be attributed to labor income per person.[14]

[13] See Anthony B. Atkinson, Thomas Piketty & Emmanuel Saez, *Top Incomes in the Long Run of History*, 49.1 *JOURNAL OF ECONOMIC LITERATURE*. 3, 71 (2011).

[14] For analysis and discussion of the sources of the decrease in inequality from 1996 to 2006, see Gerardo Esquivel, Nora Lustig & John Scott, *Mexico: A Decade of Falling Inequality: Market Forces or State Action?* in DECLINING INEQUALITY IN LATIN AMERICA: A DECADE OF PROGRESS? 175,217 (Luis F. López-Calva & Nora Lustig ed., 2010)

In other words, there was a reduction in the inequality within labor income. However, with overall real wages almost stagnant from 1994 to 2015, the living standards of the vast majority of workers cannot have increased very much.

In any case, even if the redistribution had taken place as it appears in the Gini data, it was not enough to reduce the national poverty rate.

## III. Agriculture and Employment

NAFTA removed tariffs (but not subsidies) on agricultural goods, with a transition period in which there was a steadily increasing import quota for certain commodities. The transition period was longest for corn, the most important crop for Mexican producers, only ending in 2008. Not surprisingly, US production, which is not only subsidized but had higher average productivity levels than that of Mexico, displaced millions of Mexican farmers. Table 2 shows agricultural employment in Mexico in 1991 and 2007, according to census data.

Table 2
Mexico: Employment in Agricultural and Forestry
from Agrarian Census 1991, 2007

| | *1991* | *2007* | *Percent Change* |
|---|---|---|---|
| Family* | 8,370,879 | 3,510,394 | -58% |
| Remunerated Total | 2,305,432 | 5,139,793 | 123% |
| Permanent (more than 6 months) | 427,337 | 420,989 | -1% |
| Seasonal (less than 6 months) | 1,878,095 | 4,718,804 | 151% |
| Total | 10,676,311 | 8,650,187 | -19% |

Source and notes: Adapted from Table 10a (p.25) in John Scott, *The Incidence of Agricultural Subsidies in Mexico*, Centro de Investigación y Docencia Económicas (Dec. 2009), http://cide.edu/repec/economia/pdf/DTE473.pdf

* Family and other workers who are not paid in cash are sometimes listed as "non-remunerated."

As can be seen, there was a 19 percent drop in agricultural employment, or about 2 million jobs. The loss was in family labor employed in the family farm sector. Seasonal (less than six months employment) gained about 3 million jobs, but it was not nearly enough to compensate for the 4.9 million jobs lost in the family farm sector.

Proponents of NAFTA of course knew that family farms in Mexico would not be able to compete with subsidized US production but argued that displaced workers would shift to higher productivity agriculture (mainly vegetables and fruits for export), as well as industrial jobs. Although vegetable and fruit production did expand considerably (from 17.3 million tons in 1994 to 28.2 million in 2012), and presumably accounted for many of the 3 million seasonal jobs created, it was clearly not enough in terms of employment.

TABLE 3
ANNUAL IMMIGRATION FROM MEXICO TO US: 1991–2010
(IN THOUSANDS)

| | |
|---|---|
| 2010 | 140 |
| 2009 | 150 |
| 2008 | 250 |
| 2007 | 280 |
| 2006 | 390 |
| 2005 | 550 |
| 2004 | 670 |
| 2003 | 570 |
| 2002 | 580 |
| 2001 | 580 |
| 2000 | 770 |
| 1999 | 700 |
| 1998 | 600 |
| 1997 | 470 |
| 1996 | 490 |
| 1995 | 570 |
| 1994 | 430 |
| 1993 | 370 |
| 1992 | 400 |
| 1991 | 370 |

SOURCE: Jeffrey Passel, D'Vera Cohn & Ana González-Barrera, *Net Migration from Mexico Falls to Zero — and Perhaps Less*, PEW HISPANIC CENTER (Apr. 2012), http://www.pewhispanic.org/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less/ and Renee Stepler & Anna Brown, *Statistical Portrait of Hispanics in the United States*, PEW HISPANIC CENTER (Apr. 2016), *http://www.pewhispanic.org/2016/04/19/statistical-portrait-of-hispanics-in-the-united-states-about-the-data/*.

TABLE 4
MEXICAN-BORN POPULATION IN THE US: 1980–2011
(IN THOUSANDS)

| | |
|---|---|
| 2013 | 11.502 |
| 2012 | 11.489 |
| 2011 | 11.987 |
| 2010 | 12.323 |
| 2009 | 12.565 |
| 2008 | 12.551 |
| 2007 | 12.558 |
| 2006 | 12.043 |
| 2005 | 11.653 |
| 2004 | 11.356 |
| 2003 | 10.661 |
| 2002 | 10.426 |
| 2001 | 9.734 |
| 2000 | 9.444 |
| 1990 | 4.500 |
| 1980 | 2.199 |

SOURCE: Jeffrey Passel, D'Vera Cohn & Ana González-Barrera, *Net Migration from Mexico Falls to Zero — and Perhaps Less*, PEW HISPANIC CENTER (Apr. 2012), *http://www.pewhispanic.org/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less/* and Renee Stepler & Anna Brown, *Statistical Portrait of Hispanics in the United States*, PEW HISPANIC CENTER (Apr. 2016), *http://www.pewhispanic.org/2016/04/19/statistical-portrait-of-hispanics-in-the-united-states-about-the-data/*.

From 1994 to 2000, the estimated annual number of immigrants from Mexico to the United States soared by 79 percent. This can be seen in Table 3, with the annual flow of migrants rising from 430,000 in 1994 to 770,000 in 2000.

The initial post-NAFTA increase in immigration from Mexico can also be seen in Table 4, which shows the number of Mexican-born residents living in the United States. This more than doubled from 4.5 million in 1990 to 9.4 million in 2000, and peaked at 12.6 million in 2009.

After 2000, the flow of migrants from Mexico to the US slowed, with several contributing factors: increased border security after the 9/11 attacks; the

US recession of 2001 and the prolonged weakness in job creation in the years that followed, and the increased costs and danger of crossing the border.[15]

Migration from the US to Mexico also increased in the 2000s, so that between 2005 and 2010 the net flow to the US was negative by some measures.[16] (The figures in Tables 3 and 4 are for emigration from Mexico to the US, not net flows.)

It was noted previously that if the Mexican economy had continued growing at its 1960–80 rate, Mexico would be a high-income country today; and that it would also have become a high-income country even if its pre-1980 growth rate had been restored after NAFTA. There would still be a significant income and wage differential between Mexico and the United States, but the incentive to emigrate to the United States would have been tiny as compared with what actually materialized. It is questionable whether immigration would have become a political issue in the United States, as it did especially in the 2016 election and now under the Trump administration, if not for the poor performance of the Mexican economy in the post-NAFTA years.

## IV. Economic Policy and Mexican Integration with the United States Economy

As noted above, NAFTA was just one variable among others that could account for Mexico's poor economic performance since 1994. However, it appears to be related to other economic policy choices that have negatively affected the Mexican economy during this period.

The IMF noted in 2013: "Mexico competes directly with China in the US market."[17] Today, China accounts for 21 percent of US imports and Mexico accounts for 13.5 percent (see Figure 11). This is a very tough competition for Mexico for a number of reasons. First, Mexico has been throughout the vast majority of the post-NAFTA period a much higher-wage country than China, although the gap has narrowed and there is no definitive data for China in recent years. In 1996, labor compensation costs in Mexico, in US dollars, were $3.05 per hour, which rose to $5.59 by 2002.[18] For China in 2002, hourly compensation costs in US dollars were $0.73 per hour.[19] Although these

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[15] Jeffrey Passel, D'Vera Cohn & Ana González-Barrera, *Net Migration from Mexico Falls to Zero — and Perhaps Less*, Pew Hispanic Center (Apr. 2012), http://www.pewhispanic.org/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less/

[16] *Id.*

[17] n.a., *Mexico: Staff Report for the 2013 Article IV Consultation*, IMF Country Report No. 13/334, International Monetary Fund (Nov. 2013), http://www.imf.org/external/pubs/cat/longres.aspx?sk=41070.0

[18] n.a., *International Comparisons of Hourly Compensation Costs in Manufacturing Industries, 2012*, US Bureau of Labor Statistics (2013), https://www.bls.gov/fls/ichccindustryreport.htm

[19] *Id.*

data are not exactly comparable because of differences in their construction, they indicate a huge gap in dollar terms—which is what matters for export or import-competing industries. By 2009, the gap was still very large: $1.74 for China, versus $6.36 for Mexico.[20] So it was difficult to compete on the basis of wages. Second, China maintained a commitment to a competitive exchange rate throughout the 2000s, in effect fixing this exchange rate against the dollar or (since 2005) a basket of currencies. The Mexican Central Bank by contrast has had, as the IMF notes, "a firm commitment to exchange rate flexibility."[21] In other words, the Mexican Central Bank would typically raise or lower interest rates as necessary to reach its target inflation rate (3 percent) and let the exchange rate go where it may. This means that Mexico's exchange rate was for most of the past two decades unlikely to be competitive with China's, which further worsens Mexico's cost disadvantage. The Mexican Central Bank's form of rigid inflation targeting also adds a large element of unpredictability to the exchange rate, which has a negative impact on foreign direct investment; foreign investors will find it difficult to know how much their assets or output will be worth internationally in the future.

In the past few years, the Mexican peso has significantly depreciated against the US dollar, while China's currency has seen an overall slight appreciation since 2007. This is shown (in nominal terms) in Figure 10. The combination of a rapidly depreciating peso (with relatively little wage growth) in Mexico and rising labor costs in China has narrowed the gap in labor costs between the two countries. (More recent wage data for China are not available at the moment.) However, it is not yet clear how much difference these changes will make going forward in the competition between Mexico and China in US markets. The Mexican peso is difficult to predict, since its value depends on monetary policy decisions by the Mexican Central Bank that are unrelated to exchange rate policy; and on decisions by the US Federal Reserve, as well as on speculation related to international markets, as noted above.

The depreciation of the Mexican peso has made manufacturing wages in Mexico somewhat more competitive, bringing them back down to under $4 per hour (USD).[22]

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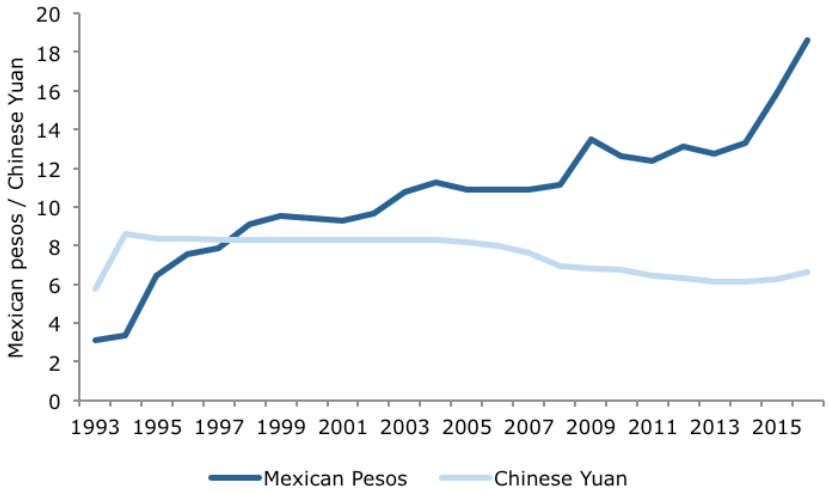
[20] *Id*. Again, the numbers are not exactly comparable, but still indicate a large gap in labor costs.

[21] n.a., *Mexico: Staff Report for the 2013 Article IV Consultation*, IMF Country Report No. 13/334, International Monetary Fund (Nov. 2013), http://www.imf.org/external/pubs/cat/longres.aspx?sk=41070.0

[22] n.a., *Remuneraciones,* Instituto Nacional de Estadística y Geografía (2017), *http://www3.inegi.org.mx/sistemas/temas/default.aspx?s=est&c=25433&t=1.*

FIGURE 10
EXCHANGE RATE TO ONE US DOLLAR, ANNUAL,
NOT SEASONALLY ADJUSTED




SOURCE: n.a., *Foreign Exchange Rates – H.10*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (2017), *https://www.federalreserve.gov/releases/h10/hist/*.

China has other advantages that make it a formidable competitor for Mexico in the US market: the Chinese government controls most of the banking system in China, and can therefore ensure that its most important exporting firms have sufficient access to credit. In Mexico, by contrast, the banking system is not only private, but 70 percent of it is foreign owned.[23] The Chinese government also has an active industrial policy that enables it to help its exporting firms in various ways.[24] China also spends over 2 percent of its 10-times-larger GDP on research and development, as compared to Mexico's 0.54 percent.[25]

For all these reasons, it is an uphill battle for Mexico to compete with China in the US market. Although Mexico has done better than other countries in the US market in terms of this competition since China joined the World Trade Organization and achieved "permanent normal trade relations" with

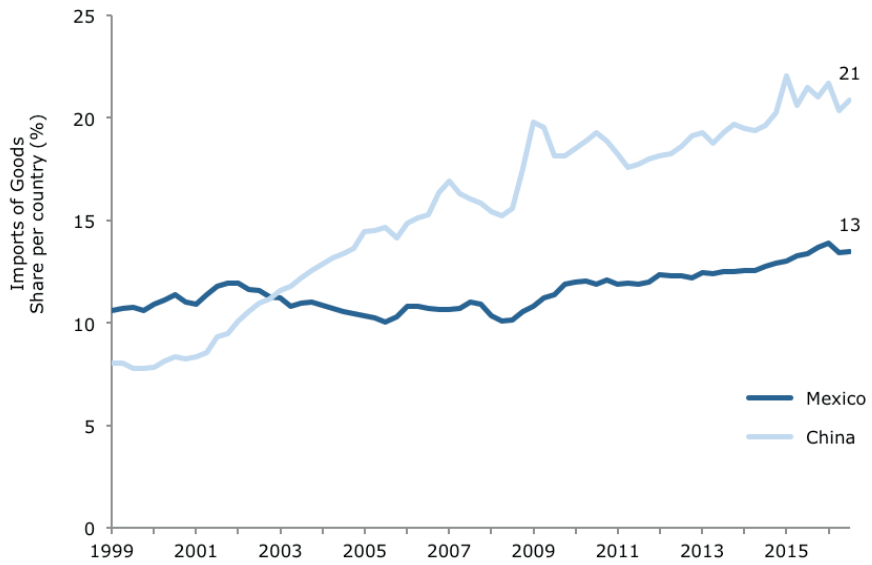
[23] N.a., *Mexico: Staff Report for the 2013 Article IV Consultation*, IMF Country Report No. 13/334, INTERNATIONAL MONETARY FUND (Nov. 2013) *http://www.imf.org/external/pubs/cat/longres.aspx?sk=41070.0*.

[24] Mark Weisbrot & Rebecca Ray, *The Scorecard on Development, 1960–2010: Closing the Gap?* CENTER FOR ECONOMIC AND POLICY RESEARCH (2011), *http://www.cepr.net/index.php/publications/reports/the-scorecard-on-development-1960-2010-closing-the-gap*.

[25] N.a., *Research and development expenditure (% of GDP)*, World Development Indicators, WORLD BANK (2017), *http://data.worldbank.org/indicator/GB.XPD.RSDV.GD.ZS*.

the US in 2001,[261] its share of US imports is still only about half that of China's (see Figure 11).

FIGURE 11
UNITED STATES: IMPORTS FROM MEXICO AND CHINA

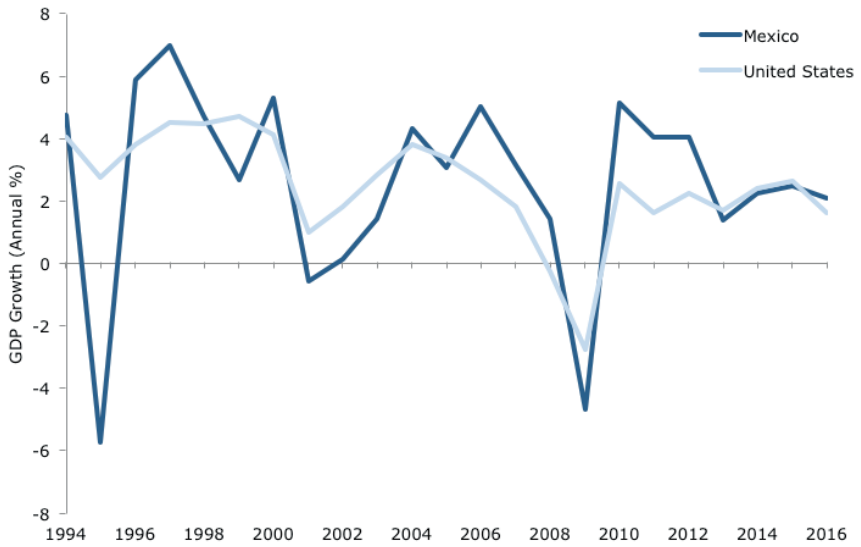



Source: n.a., *Table 2.2. U.S. International Trade in Goods by Area and Country, Seasonally Adjusted Detail [Millions of dollars]*, US BUREAU OF ECONOMIC ANALYSIS (2016), *https://bea.gov/iTable/iTable.cfm?ReqID=62&step=1#reqid=62&step=1&isuri=1*.

NAFTA also increasingly tied Mexico to the US economy. Figure 12 shows how the Mexican economy has moved with the US economy over the past 23 years. Much of this synchronization is because over two-thirds of Mexico's exports now go to the United States. Unfortunately, 1994 was a particularly bad time for Mexico to hitch its wagon to the United States. First came the peso crisis, which was brought on by the US Federal Reserve's increases in US monetary policy rates beginning in 1994. Mexico lost 9.5 percent of GDP in two quarters during the resulting crisis and recession, which started in December 1994 and continued into the first half of 1995. The fall in the peso helped boost exports for a while, but the peso appreciated as capital flowed back into the country and the advantage of a competitive exchange rate was soon lost.

[26] Robert A. Blecker & Gerardo Esquivel, Trade and the Development Gap, in mexico and the united states: the politics of partnership 83,110 (Peter H. Smith & Andrew Selee ed., 2013).

FIGURE 12
MEXICO AND THE US: ANNUAL GDP GROWTH




SOURCE: n.a., *World Economic Outlook, October 2016*, INTERNATIONAL MONETARY FUND (2016), https://www.imf.org/external/pubs/ft/weo/2016/02/weodata/index.aspx.

Perhaps more importantly over the longer run, the US economy was just beginning a period in which its growth would be driven by enormous asset bubbles. First there was the stock market bubble, which burst in 2000–02, causing a recession in both the Unites States and Mexico. The stock market bubble was then immediately replaced by what later became the biggest asset bubble in world history, the United States' real estate bubble. This bubble burst in 2006–07, causing the Great Recession. Mexico's loss of output from the US Great Recession (and world recession) was the worst in Latin America, with a decline in real GDP of 6.7 percent from the second quarter of 2008, to the second quarter of 2009.[27]

In May 2013, after the US Federal Reserve announced a future "tapering" of its quantitative easing program (QE3), there were fears of a repeat of the 1994 peso crisis. Gross foreign portfolio inflows came to a sudden stop,[28] and

[27] N.a., *Producto interno bruto trimestral, base 2008*, INSTITUTO NACIONAL DE ESTADÍSTICA Y GEOGRAFÍA (2017), *http://www.inegi.org.mx/sistemas/bie/*.

[28] See Figure 5, n.a., *Mexico: Staff Report for the 2013 Article IV Consultation*, IMF Country Report No. 13/334, INTERNATIONAL MONETARY FUND (Nov. 2013), *http://www.imf.org/external/pubs/cat/longres.aspx?sk=41070.0*.

the Mexican economy took a hit, with growth at 1.36 percent for the year.[29] As the IMF noted in its 2013 Article IV consultation for Mexico:

> Based on a recent survey, the BIS reported that the Mexican peso is the most actively traded emerging market currency in the world, with a daily global trading volume of US$135 billion. This means that Mexico's deep and liquid foreign exchange and domestic equity and sovereign bond markets can serve as an early port of call for global investors in episodes of financial turbulence and hence are susceptible to risks of contagion.[30]

This is not a good situation for any developing country to be in: hedge funds and international portfolio managers seeking to reduce their overall exposure to emerging market assets, or hedge against currency depreciation in emerging markets because of trouble that may emerge from anywhere in the world, look first to sell off Mexican assets or bet against the peso. As the IMF also notes, "the Mexican peso is fully convertible and trades 24 hours daily." While the policy decisions that led to this situation were not all written into NAFTA, many were closely related in that they were part of a strategy of guaranteeing foreign investors the kinds of capital mobility that they wanted, in order to attract foreign investment (both portfolio investment and FDI).

## V. Conclusion

As was well known at the time of NAFTA's passage, the main purpose of NAFTA was to lock in a set of economic policies, some of which were already well underway in the previous decade, including the liberalization of manufacturing, of foreign investment and of ownership, and other changes.[31] The idea was that the continuation and expansion of these policies would allow Mexico to achieve efficiencies and economic progress that was not possible under the developmentalist, protectionist economic model that had prevailed in the decades before 1980. While some of the policy changes were undoubtedly necessary and/or positive, the end result has been decades of economic failure by almost any economic or social indicator. This is true whether we compare Mexico to its developmentalist past, or even if the comparison is to the rest of Latin America since NAFTA. After 23 years, these results should provoke more public discussion as to what went wrong.

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[29] N.a., *World Economic Outlook, October 2016*, international monetary fund (2016), *https://www.imf.org/external/pubs/ft/weo/2016/02/weodata/index.aspx*.

[30] N.a., *Mexico: Staff Report for the 2013 Article IV Consultation*, IMF Country Report No. 13/334, International Monetary Fund (Nov. 2013), *http://www.imf.org/external/pubs/cat/longres.aspx?sk=41070.0*.

[31] Aaron Tornell & Gerardo Esquivel, *The Political Economy of Mexico's Entry into NAFTA*, in Regionalism Versus Multilateral Trade Agreements 25,56 (Rakatoshi Ito & Anne O. Krueger, 1997)

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# COMMENT

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# EXECUTORY CONTRACTS IN MEXICAN INSOLVENCY LAW

Luis Manuel C. Méjan*

Abstract: *The Mexican Law Review published an article by Dr. Susana Dávalos entitled "The Rejection of Executory Contracts"*[1] *that addresses the comparison of three legal systems in Spain, Germany and the United States of America when dealing with contracts pending execution when a debtor is declared insolvent. From the analysis of these three systems, the author concludes, for the reasons given therein, that the Spanish regime is the most adequate to reach the objectives pursued by insolvency procedures. Motivated by the reading of this interesting work, the objective of this comment is to show how the regime Mexican legislation has adopted to deal with this issue.*

Key words: *Executory Contracts, Insolvency, Mexico*

Resumen: *La Revista de Derecho Mexicano ha publicado un artículo de la Dra. Susana Dávalos, titulado "Rechazo de contratos pendientes de ejecución", que trata de la comparación de tres regímenes jurídicos: España, Alemania y los Estados Unidos de América sobre el tratamiento dado al fenómeno de los contratos pendientes de ejecución cuando un deudor es declarado insolvente. Del análisis de estos tres sistemas, la autora concluye, por las razones allí expuestas, que el régimen español es el más adecuado para el logro de los objetivos perseguidos por los regímenes de insolvencia. Motivado por la lectura de esta interesante obra, el propósito que anima el presente trabajo es mostrar cuál es el régimen adoptado por la legislación mexicana sobre el tema.*

Palabras clave: *Contratos, ejecución, pendientes, concurso, insolvencia, México.*

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[1] Susana Dávalos, *The Rejection of Executory Contracts: A Comparative Economic Analysisv*, Vol. 1, núm. 1, Mexican Law Review, IIJ-UNAM, 69, 101, (2017).

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## I. What is an Executory Contract?

"Executory contracts" refer to binding agreements that have been entered into by a debtor, who becomes subject to a bankruptcy procedure, with several third parties and which at the time of being declared bankrupt is pending full compliance.

Some definitions put forward by various theorists read as follows:

> Executory contract: A contract in which some or all of the obligations of each party have not yet been completed. The debtor-in-possession (or trustee) is allowed to reject unilaterally certain executory contracts.[2]
>
> Pre-existing legal relationships - "Those that bankruptcy finds celebrated - between a bankrupt debtor and third parties - but are not yet completed or consummated at the time of filing for bankruptcy." [3]

French law makes a difference between contracts *"en cours de existence"* and contracts "*en cours d'execution*". In the first ones, the obligations have not yet been borne, in the latter the obligations have been borne, but their execution is pending. For the purposes of this comment, the situation is the same since both types of contracts pose the same problem: what to do with them once one of the parties is involved in insolvency proceedings?

These are contracts entered into before insolvency is declared and whose compliance is in process or pending, either because the contracts are of a successive nature or because they are subject to a term or condition. Contracts concluded after the commencement of insolvency proceedings are treated

[2] Bankruptcy Data. *Executory contract*, *https://www.bankruptcydata.com/p/glossary-of-bankruptcy-terms.*

[3] José A. Ramírez, José A. La Quiebra Derecho Concursal Español. 1255 tomo II, (Bosch Casa Editorial. Barcelona. Segunda edición 1998) (1959)

as part of an ongoing concern and should normally be treated as ordinary expenses in the business operation[4]

It should be clarified, as Spanish law does, that there are various cases. One is when one of the parties has completely fulfilled its obligations and the other party has not. Apparently in a case like this, the debtor must add the assets or obligations due that he may have in that case to his balance sheet. Another situation is when there are reciprocal obligations on both sides. This seems to be the case with regard to the issue of executory contracts. [5]

## II. Significance of the matter

This issue is important because of its weight in insolvency proceedings and the complexity in dealing with it. These procedures (called "*insolvenz*" in German law, "bankruptcy" in Anglo-Saxon law, "*faillite* or *redressement*" in French law, " *fallimento* " in Italian law, "*falencia*" in Portuguese, "*quiebra*" in various Latin countries, "*concurso*" in Spanish, Colombian, Chilean and Mexican law) are concerned with broaching the universality of legal relationships in which the debtor has incurred in order to make a global decision, either to effect a restructuring that allows him to continue operating, or to liquidate and conclude the operation completely.

For a debtor in insolvency proceedings, any existing contractual situation means that rights and obligations derive from it; or to put it in financial terms: assets and liabilities appear in the balance sheet. If these relationships are primarily liabilities, the best way to resolve insolvency is to eliminate them as soon as possible. If, on the other hand, they constitute an asset, it is necessary to make the most of its value. The decision made regarding assets and liabilities can make a difference in both the choice of reorganization or liquidation and, in both cases, the final result.

The paradigmatic approach that all insolvency regimes have experienced since the last decade of the twentieth century is that it must tend to maximize the value of the insolvent company and its assets for the benefit of the debtor himself, his creditors, his employees, its shareholders, the State, society, and in general all its stakeholders. Part of this approach covers the problem of how pending contracts should be addressed.

The insolvency regime should address the subject by considering that the designed system can create either healthy or perverse incentives in the con-

[4] Ley de Concursos Mercantiles [L.C.M.] (Business Reorganization Act) as amended Diario Oficial de la Federación [D.O.] 10 de Mayo de 2000 (Mex) *Artículo 75.- Cuando el Comerciante continúe con la administración de su empresa, efectuará las operaciones ordinarias incluyendo los gastos indispensables para ellas y el conciliador vigilará la contabilidad y todas las operaciones que realice el Comerciante...*

[5] See: Rafael, Bonardell Lenzano, Régimen de los contratos sinalagmáticos en el concurso 44, (Tirant monografías, Tirant Lo Blanch, Valencia), (2006).

duct of the debtor, his creditors and the suppliers of goods and services, in the aim of adequately managing the insolvency situation.

Susana Dávalos' analysis of "The Rejection of executory contracts", published in the Mexican Law Review[6], starts from two basic questions: 1) Who is involved in the decision to reject contracts pending execution? And, 2) How should the damages resulting from the annulment of the contract be dealt with? A quick summary of the analysis of the referred article is as follows:

— In the US system, it is the trustee, along with the sitting judge, who decides the rejection. Damages are treated as common credit.
— In the German system, the trustee is solely responsible for making the decision and damages are treated as common credit.
— In the Spanish system, the Insolvency Administrator together with the judge who sits in on the proceeding decides and damages are treated as expenses of the insolvency mass.

Dávalos sets out the advantages and disadvantages of the systems adopted in those three jurisdictions. However, the summary of the positions and variants of treatment adopted by different jurisdictions as presented in the "UNCITRAL Legislative Guide on Insolvency Law" should not be omitted in a comparative analysis.[7]

## III. The Mexican Bankruptcy Law (*Ley de Concursos Mercantiles)* (LCM) System Regarding Contracts Concluded before the Bankruptcy Judgment

The Mexican Insolvency Law (LCM) establishes a series of basic rules that apply to the agreements entered by the debtor. The basis is a general principle: the provisions regarding obligations and contracts and the stipulations of the parties will continue to apply (Article 86). Even then, the bankruptcy law itself establishes some exceptions. This is a principle that enjoys widespread acceptance in most insolvency regimes throughout the world.[8]

These exceptions consist in changing the terms of the law and the will of the parties under the terms of the general purposes of insolvency law, which is precisely a law of exception. Some rules (Articles 87 to 90) modify

[6] Dávalos, *supra* note 1.

[7] UNCITRAL Legislative Guide on Insolvency Law. Paragraphs 120 to 136, pages 123 to 129. *http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf.*

[8] *"Il est en général considéré que l'ouverture de la procédure d'insolvabilité est sans effet sur les contrats en cours. Tel est le cas en France, au Maroc, aux Pays Bas, en Roumanie et au Sénégal*", Jean Luc Vallens, Giulio Cesare Giorgini, Étude comparative des procedures d'insolvabilité 57 (Société de Législation Comparée, Paris, 2015)

the established contracted terms, which proves that insolvency law is not a merely procedural law, but rather a substantive one, since it defines the extension of rights and obligations of the legal situations in which the debtor has incurred.

These specific rules are:

1st rule: Nullity (the law states that it should be understood as not written) of those clauses that by merely filing a claim for insolvency proceedings aggravate the terms of the contract (Article 87).

2nd rule: In the case of credits payable by the debtor, that is to say, those obligations that imply a credit for which the debtor is responsible as may be the case of financial transactions or debts to term, become due, the period in which they may be met, whether in favor of the creditor, the debtor or both parties, is fulfilled.

3rd rule: In the case of obligations subject to condition, if it is a suspensive condition, it is assumed that the condition was not performed while if it is a resolutory condition, it is implied that the condition was fulfilled. In other words, all considerations related to a term inherent to a condition are terminated. The purpose is to conclude the state of uncertainty that arises between the contraction of the obligation and the realization or not of the condition, concluding, as a result, the existence of the obligations.

4th rule. All those credits that imply periodic or successive benefits are brought to their present value including the generation of the corresponding accruing interest.

5th rule: Credits whose value is not yet determined or non-pecuniary obligations should be valued. If this is not possible, will be credits that will not be recognized in the insolvency proceeding.

6th rule: Handling financial interests and accessories. These accessories are suspended and cease to accrue in those credits that are not guaranteed. In the case of secured credits, interests will continue to be generated until the value of the guarantee is equalized with the value of the credit.

7th rule: Indexing. In order to maintain the value of credits, even foreign currency debts, they must be converted to Mexican Peso-denominated Investment Units (UDIS).

8th rule: Offsetting regime. Unlike the rules stipulated in the civil code to this respect, only credits and obligations that come from the same operation, as in the case of derivative transactions, can be offset.

## IV. The Treatment of Executory Contracts in the Mexican Insolvency Law

The LCM dedicates a series of articles to the subject; the core is Article 92 that reads:

> Article 92. Any preliminary or final contracts pending enforcement must be fulfilled with by the Merchant, unless the conciliator objects to such fulfillment on the grounds that such objection is in the best interests of the Estate.
>
> Anyone who executed a contract with the Merchant shall be entitled that the conciliator declares if he will object to the contract fulfillment. If the conciliator declares that he will not object, the Merchant must fulfill or guarantee fulfillment of the contract. If the conciliator declares that he will object, or does not provide an answer within twenty days, the party that executed the contract with the Merchant may at any time rescind the contract and so notify the conciliator.
>
> If the conciliator has assumed the management or authorized the Merchant to enforce any outstanding contracts, he may avoid the setting aside of the goods or else demand their delivery, upon payment of their price.

The first principle, which consists of the general treatment of contracts entered into by the debtor, is that contracts must be complied with in their terms.[9]

The exception is when the conciliator (the insolvency practitioner brought in during the reorganization period with the aim of reaching an agreement with creditors so that the company can continue to operate) decides to reject the contract because he is not satisfied that the performance of the contract suits the interests of the mass, regardless of the restrictions stipulated therein.

The power to decide whether an executory contract must be complied with under its terms or the power to reject it therefore lies in the hands of the insolvency professional. Whether the debtor is in possession of his business or not, creditors do not have the power to decide.

The concept of "estate" in Mexican law *"Masa"* is somewhat different from the concept used by other legislations, especially those of common law. In other systems, the concept of "estate" indicates a complete amalgamation of assets and liabilities and even as a legal entity independent of the debtor.[10] In the case of the Mexican law, *"masa"* refers only to the debtor's assets upon which a restructuring can be constructed, or, in the case of liquidation (which the Mexican system calls bankruptcy), is used to pay off debts.[11] The Spanish legislation follows a similar principle although it differentiates the active "masa"[12] from

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[9] See supranote 4.

[10] "*In the bankruptcy context, the estate is the legal entity created by the filing of the petition, which succeeds to the debtor´s property rights.*", Brian A. Blum, Bankruptcy and Debtor/Creditor. 586 Fifth edition, (Wolters Kluwer. New York 2010) (1993).

[11] Ley de Concursos Mercantiles [L.C.M.] (Business Reorganization Act) as amended Diario Oficial de la Federación [D.O.] 10 de Mayo de 2000 (Mex) "*Artículo 4º. Para los efectos de esta ley se entenderá por... V. Masa, a la porción del patrimonio del Comerciante declarado en concurso mercantil integrada por sus bienes y derechos, con excepción de los expresamente excluidos en términos de esta Ley, sobre la cual los Acreedores Reconocidos y los demás que tengan derecho, pueden hacer efectivos sus créditos, y*".

[12] Ley 22/2003, de 9 de julio, concursal. "*Artículo 76: Constituyen la masa activa del concurso los bienes y derechos integrados en el patrimonio del deudora la fecha de la declaración de concurso, los que se*

the passive "masa".[13] The concept of "estate" in German law refers more to the same concept used by the Mexican legislator in Articles 224 and 225 of the Mexican Bankruptcy Law (Ley de Concursos Mercantiles).[14]

Thus, the criterion to be followed to reject executory contracts is that such breach is in the interests of the "masa". There are no other interests than that of the estate, as provided by the definition that the law gives the "masa", which is to take care of the possibility that recognized creditors recover their credits.

That is, if the rejection enhances the possibilities of recovery for the creditors, then it is correct to decide not to execute. If, on the other hand, keeping the contract alive and providing for its execution increases the possibility of return, then, the contract must be kept alive. Another view is that the contract may itself be an asset whose value may give it negotiability, in which case its sale or assignment could give liquidity to the "masa"; or it may be a liability in which case it is better to get rid of it.

An intermediate possibility, especially in complex contracts, could be its partial rejection and the acceptance of the execution by the other party that would remain in force.

Legislation does not mention whether the conciliator's decision to execute a contract or not affects the possibility of restructuring (conciliation in Mexican lexicon). To give an example: a supply contract according to which a supplier is obliged to deliver raw material supplies to the debtor so that he can manufacture his products. The conciliator may think that if the contract is suspended, the debtor will not be able to continue manufacturing and remain in operation and therefore, the hope of reaching a suitable settlement would disappear so he decides to keep the contract in operation. However, creditors may claim that if the business has proven to be bad, trying to keep it afloat by making new payments to the supplier under the contract, the only result will be the reduction of the "masa" and, therefore, a lesser recovery.

Subsequently, the law devotes Articles 93 to 111 to the regulation of managing several contracts in particular, such as: the sale of goods in which the debtor is the buyer, loan, deposit, commission, mandate, current account, repurchase, securities lending, derivatives, futures, real estate leasing, service provision, price work, insurance, partnerships of persons, as well as the contracts in which the debtor has acted as the seller of real estate or furniture.

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*reintegren al mismo o adquiera hasta la conclusión del procedimiento."* Ley Concursal, 123 (Lefebvre El Derecho, SA, 2015).

[13] "La delimitación de las masas constituye uno de los aspectos más importantes del concurso, con ella se pretende conocer exactamente que acreedores existen y con qué bienes cuenta el deudor para satisfacerles, bien mediante la liquidación de ese patrimonio, bien llegando a un convenio con ellos". María Enciso Alonso-Muñumer, Memento Práctico Lefebvre 366. (Francis Lefebvre. Lefebvre El Derecho,SA. Madrid, 2016).

[14] See Insolvenzordung § 55: Eberhard Braun, Commentary on the German Insolvency Code. 154 Editor: himself, Düsseldorf, (2006), (ISBN 10:3-8021 – 1237-7).

For these contracts, the law stipulates a series of possible ways to deal with them, in some cases, giving options to the parties, for example, to maintain a contract if the payment is concluded or if guarantees are granted.

One question to be discussed is: What happens if the conciliator insists on rejecting the executory contract even though the law gives a different treatment, what should prevail, the conciliator's criterion or the rule of law? Is possible to waive the rule of law?

For example, Article 97 begins with the words "if the performance of the contract is to be decided..." with reference to a contract of sale in which the good has not yet been delivered. Does this mean that it can be decided otherwise (interpretation *a contrario sensu)*? For example, can the conciliator decide that he should not surrender the goods because he does not consider it useful for the mass, or that the payment should be made because the debtor is de-capitalized?

Article 105 states that in the case of derivative financial transactions, repurchase agreements, futures and securities lending under the framework of a regulatory or specific contract, the rules of early termination and set-off shall be applied without applying the powers given by Article 92. This express exclusion does not appear in other contracts to which the law gives specific treatment.

From the foregoing, it may be concluded that, except for the express exclusion made in Article 105 on the conciliator's power to decide whether to execute a pending contract, this power operates in all other cases.

This conclusion is congruent with the spirit embodied throughout the Insolvency Law: to seek to maximize the value of the enterprise (either to achieve its reorganization and subsistence, or to liquidate and pay creditors). Therefore, when there is some doubt in the interpretation of the legal provisions, that principle should serve as the guideline.

The procedure for deciding what to do with a pending contract is simple: the obligation to take the decision lies with the conciliator. If he does not make any decision, the general basic rule mentioned above applies: contracts must be fulfilled in their terms.

The foregoing means that the conciliator must necessarily take a decision on whether or not the executor contracts must be executed although the decision can be communicated tacitly as stated in the legal text. The last paragraph of Article 92 reinforces this interpretation, as it states that if the conciliator is in charge of the administration or if the debtor is in possession and has received the authorization to execute, it may prevent the separation of assets, or, in its case, demand their delivery, paying its price.

A term is not established during which the conciliator must exercise his power to reject a contract. Logic indicates that it should be during the time that he has to prepare the recognition of credits because of his decision will depend on the existence of a credit that must be recognized to the contractor whose contract has been rejected.

The third party that has contracted with the debtor is authorized to question the conciliator as to whether it will object to the performance of the contract. In case the response is that it will not oppose, then the contract will follow its course of execution. In the event that it rejects the execution or simply does not respond (the law assigns this procedure a period of 20 days), the party that has contracted with the debtor will be free to terminate the contract.[15]

This is a peculiar power: Can the co-contractor terminate the contract simply because its counterpart is in insolvency proceedings? Is being involved in insolvency proceedings a cause for the termination of contracts? The text of the law seems to indicate so. The rationale seems to be that either the conciliator has expressed his opposition to the execution or his silence must be interpreted as a fictitious refusal to continue the contract.

What the law does not prescribe is the term that the counterparty has to exercise the right to terminate the contract. It is not possible to let time elapse to see when it is convenient for him to do so since it leaves the fulfillment of the contracts at the arbitrariness of one of the parties and produces legal insecurity for the debtor who lives under the sword of Damocles. The only rule of supplementary terms of the Insolvency Law (LCM) is Article 58 on the obligations of insolvency representatives (so called "specialists": inspector, conciliator, receiver) that allocates 30 days, which a judge can extend for up to 30 days more. This analogy might be an indicator, but it can only be used as a guide. The reasonable option is to ask the judge to rule an extension via an ancillary proceeding like those used to resolve any controversy borne in insolvency proceedings and do not have a prescribed treatment.

What say do the merchant (debtor) and the creditors have in this? Both can have reasons that lead them to think differently than the conciliator does. Basically it is about their rights: the merchant is the owner of the mass and any decision that influences its value will undoubtedly affect him; the same can be said of the recognized creditors. After all, the concept of mass, as has been seen, represents the source of repayment of the credits owed to them.

In some places, the law gives auditors the power to express opinions on some of the decisions made by insolvency representatives, as in the case of contracting of credits after the commencement of the proceedings.

It is precisely the provision that gives this power (Article 75, second paragraph) that the work of the conciliator is mentioned: *"The conciliator shall decide on the rescission of outstanding contracts and shall approve, on the basis of the auditors' prior opinion, if any, the contracting of new credits, the creation or replacement of collateral and the disposal of assets not related to the regular operations of the Merchant's enterprise. The conciliator shall report these activities to the judge."* In turn, Article 76 states: "*For the purposes of the opinion referred to in the second paragraph of the foregoing article, the*

[15] Aldo Casasa, et al., Ley de Concursos Mercantiles Comentada, 158, Editorial Porrúa. Segunda Edición. México (2015).

*conciliator shall inform the auditors of the characteristics of the transaction in question, in the formats issued by the Institute for such purposes."*

It seems that the prior opinion of the auditors (*interventores*) only applies to requesting a new loan since the request for an opinion only concerns that. In addition, the IFECOM (LCS-2/76 H) format only includes the options contained in the last part of the paragraph: new loans, constitution of guarantee, substitution of guarantee and disposal of assets.[16]

The situation is a marked change in the *Pacta sunt servanda* and legal certainty principles. The conclusion of a contract is the construction of a specific legal framework to govern the conduct of the parties involved and to lose the possibility of executing it is a breach of that legal framework. It is not an unusual case; legislation is already familiar with the theory of unpredictability, the existence of unfair terms, abusive clauses and the notorious inequality of agreed benefits that force alterations in said legal framework.

In the case in point, a circumstance of the same force as the exceptions mentioned above occurs: insolvency proceedings entail an extraordinary legal situation in which all the legal relations of the insolvent trader are reviewed and must be redefined

47. One point remains: Can the termination of contracts give rise to compensation? If so, how does such credit add to claims against the debtor? This is a subject to which Mexican legislation makes no reference, so it is necessary to resort to the system of law in general and the insolvency law in particular, in order to arrive at a conclusion.

It can certainly not be said, as in the case of Spain, that the costs of early termination of a contract are part of the administrative costs against the estate (Article 224) since it is not a matter of expenses to administrate the mass or to safeguard the assets, reparation, conservation and administration. When drafting the law, legislature would need to have referred to them expressly, as it does in the case of the fees of representatives of insolvency – inspector, conciliator and trustee - (*visitador, conciliador y síndico) Articles* 333 and 75).[17]

In accordance with the principle that states that the accessory must be treated as the main issue, it can be concluded that damages arising from the non-execution of a contract must follow the general principle of the credits in favor of the counterparty of the contract which becomes a creditor that must be recognized either as a common creditor or a guaranteed one in the event that the contract had a mortgage or collateral security in its favor. A penalty clause regulating that amount in the event of insolvency proceedings could be useful.

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[16] Formatos, *http://www.ifecom.cjf.gob.mx/*.

[17] Another reference can be given: Uruguay follows Spain's path: "*Créditos contra la masa… en el segundo grupo se ubica la indemnización por daños y perjuicios que cause la resolución por el síndico o el deudor (con autorización del interventor) de contratos pendientes de ejecución (arts. 98.3 y 170).* Zamira Ayul, *Los Créditos contra la Masa en el Régimen Concursal Uruguayo*, in Libro Homenaje al Profesor Emilio Beltrán. 891 (Instituto Iberoamericano de Derecho Concursal. Bogotá, 2014).

## V. The Incentives this System Produces

It is necessary to ask whether the system adopted by Mexican law regarding executory contracts prompts good decision-making in the course of insolvency proceedings.

First, the one who is empowered to make the decision is the insolvency representative, with the power of the third party with whom he has contracted to bring about the decision. This is left in the hands of the person who is deciding the fate of the debtor and, therefore, of the entire bankruptcy procedure, which reasserts his authority and the objective sought.

In effect, the conciliator's first objective is to reach an agreement with the creditors in such a way that the business can be kept operational and it is not necessary to reach the point of liquidation.[18] In order to do so, it is essential to consider whether executory contracts should be carried out or rejected.

Failure to give other parties (the counterpart, the creditors or the court *ex officio*) the initiative in this regard, without limiting the possibility of being heard, facilitates diligence in the process of resolving the insolvency situation.

Second: Failure to address the issue of how damages resulting from non-compliance will be covered produces a positive stimulus for the conciliator. He must make the decision with no other parameter than that of making an adequate assessment of the situation: Does leaving the contract alive, or rejecting it assuming the cost, help maximize the value of the mass and the company's operations? A well-taken decision in this regard will reduce the possibilities of challenges and will give the judge, the person presiding over the procedure, the elements to ratify, if necessary, the decision taken.

[18] Ley de Concursos Mercantiles [L.C.M.] (Business Reorganization Act) as amended Diario Oficial de la Federación [D.O.] 10 de Mayo de 2000 (Mex) Article 3. *The conciliation stage is aimed at preserving the Merchant's enterprise through the agreement signed with his Recognized Creditors.*

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