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## ARTICLES

## NOTES

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Mexican Law Review
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# DONALD TRUMP'S BORDER WALL AND TREATY INFRINGEMENT

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ABSTRACT: *Historically, the relationship between Mexico and the United States was one of respect, understanding, and cooperation. Geographic proximity demands that the two nations exist in harmony and collaborate to maintain a safe border and sustainable water consumption. However, with increasing frequency, the Department of Homeland Security challenges bi-lateral treaties entered into by Mexico and the United States. These treaties continue to face infringement as U.S. Presidents, past and present, build larger, longer southern border walls. This article explores the federal laws supporting this border construction and further discusses the sparse caselaw examining constitutional challenges raised against the Department of Homeland Security regarding the Secretary's waiver authority. Following this exploration, this study probes into the powers of treaty law as strong legal authority used to challenge and prevent future wall construction.*

KEYWORDS: *1970 Boundary Treaty, 1944 Water Treaty, Executive Order 13767, IIRIRA, REAL ID Act.*

RESUMEN: *Históricamente la relación entre México y los Estados Unidos ha sido de respeto, entendimiento y cooperación. La cercanía geográfica exige a ambas naciones existir en armonía y colaborar para mantener una frontera segura y un consumo sustentable de agua. Sin embargo, con mayor frecuencia, el Departamento de Seguridad Nacional pone en tela de juicio los tratados bilaterales, firmados por México y Estados Unidos. Estos tratados continúan siendo*

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*vulnerados en tanto que los presidentes, pasados y presentes de Estados Unidos construyen muros cada vez más grandes y largos. Este artículo explora las leyes federales que apoyan la construcción de muros y analiza la escasa jurisprudencia examinando disputas constitucionales contra el Departamento de Seguridad Nacional con respecto a la facultad de exención del Secretario. Enseguida de esta exploración, este análisis indaga la capacidad del tratado internacional como una fuerte y legal autoridad utilizada para cuestionar y prevenir la futura construcción de muros.*

Palabras Clave: *Tratado de límites de 1970, Tratado de Aguas de 1944, Órden ejecutiva 13767, Ley de Reforma de Inmigración Ilegal y Responsabilidad del Inmigrante, Ley de Real ID.*

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## I. Introduction

> *The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.*
>
> James Madison

In the wake of September 11th, executive strategy sustained a paradigm shift, from unfettered international cooperation and partnership to a robust "my country first" policy. Living in a post-September 11th world, many Ameri-

cans, regardless of repercussions, demand heightened border security despite that "…the actual existence of a terror threat is, from the perspective of border fortification, only marginally relevant. We—as the citizenry and policymakers—create meaning and ascribe importance to the border through our political and cultural interaction."[1] Consequently, select U.S. leaders, to assuage these fears and anxieties, maintain goals of constructing a more imposing and insurmountable border wall between Mexico and the United States. Notwithstanding that, border fences pose minimal deterrence to illegal immigration,[2] instigated by the fear of terrorism, the southern border fence has expanded. And today, whether the emotion be fear or something more sinister, this fence faces expansion and fortification under the Trump administration.

Among the most troubling controversies of border construction are the supporting federal laws that provide the Secretary of the Department of Homeland Security with a catbird seat in which the Secretary may waive innumerable laws in the pursuit of border wall construction. This waiver includes the power to dismiss environmental laws and acts such as the Federal Safe Drinking Water Act, the Administrative Procedure Act,[3] and the Noise Control Act.[4] Because of this power to effectively ignore laws governing environmental impacts, the border fence is often blamed for "flooding, erosion, rechannelization of water, and the scouring out of the fence foundation itself."[5]

Despite constitutional challenges to the federal laws allowing for this expansive waiver, courts maintain that the waiver is constitutional.[6] While the courts arguably err in their respective reading of the broad scope of this waiver in finding that an intelligible principle exists, the judiciary cannot so easily ignore the law governing treaties and how an extended border wall flagrantly disregards present treaty agreements between Mexico and the United States. Treaty law power finds its foundation under Article VI of the United States

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[1] Pratheepan Gulasekaran, *Symposium Issue: Persistent Puzzles in Immigration Law*: *Why a Wall?,* 2 U.C. Irvine L. Rev. 147, 165-66 (2012) (citing Michiel Baud & Willem van Schendel, *Toward a Comparative History of Borderlands*, 8 J. World Hist. 211, 211 (1997); David Spiro, *Criminalizing Immigration: The Social Construction of Borders and National Security*, Int'l Stud. Ass'n Working Papers, Feb. 20, 2010, at 17).

[2] Tiffany N. Tisler, *Federal Environmental Law Waivers and Homeland Security: Assessing Waiver Application in Homeland Security Settings at the Southern Border in Comparison to National Security Settings Involving the Military*, 42 U. Tol. L. Rev. 777, 795 (2011).

[3] Jenny Neeley, *Over the Line: Homeland Security's Unconstitutional Authority to Waive All Legal Requirements for the Purpose of Building Border Infrastructure*, 1(2) Ariz. J. Envtl. L. & Pol'y 140, 141 (2011). Note: Administrative Procedure Act is "a law governing the actions of all federal agencies…".

[4] *Id*.

[5] Tisler, *supra* note 2, at 778.

[6] *See* Save Our Heritage Org. v. Gonzalez, 533 F. Supp. 2d 58 (D.D.C. 2008); County of El Paso v. Chertoff, EP-08-CA-196-FM, 2008 U.S. Dist. LEXIS 83045 *1 (W.D. Tex. Aug. 29, 2008); Defenders of Wildlife v. Chertoff, 527 F. Supp. 2d 119 (D.D.C. 2007).

Constitution, which dictates that treaties are "the supreme law of the land." The United States and Mexico, as indelible friends and allies, entered into multiple bi-lateral treaties, whose terms (*i.e.* water rights and border agreements) have already been infringed upon and continue to be threatened by the present fence and plans of a future wall. Thus, the future of the border wall rests in the hands of the judiciary. Following an examination of a timeline of amendments to the Illegal Immigration Reform and Immigrant Responsibility Act and then an analysis of the historic judicial deference paid to this Act, this study will show that two specific treaties, namely, the Treaty Relating to Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande Between the United States and Mexico (hereinafter 1944 Water Treaty) and the Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary (hereinafter 1970 Boundary Treaty), as self-executing treaties, both of which possess strong legal standing against further border wall construction and, if rightly enforced in court, will provide the strongest legal argument to counter a future border wall founded upon "the broadest waiver in American history."[7]

## II. Federal Law History

On August 1, 2017, the Department of Homeland Security (hereinafter DHS), pursuant to Executive Order 13767,[8] announced its intent to waive dozens of laws[9] "to ensure the expeditious construction of barriers in the

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[7] Tisler, *supra* note 2, at 777.

[8] Exec. Order No. 13767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (Jan. 30, 2017).

[9] *See* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, *as amended*, 82 Fed. Reg. 35984 (proposed Aug. 2, 2017) *available at https://www.federalregister.gov/documents/2017/08/02/2017-16260/determination-pursuant-to-section-102-of-the-illegal-immigration-reform-and-immigrant-responsibility, see also* Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, *as amended*, 82 Fed. Reg. 42829 (proposed Sept. 12, 2017), *available at https://www.federalregister.gov/documents/2017/09/12/2017-19234/determination-pursuant-to-section-102-of-the-illegal-immigration-reform-and-immigrant-responsibility*.

The following represents the laws waived pursuant to Section 102 waiver authority:

The National Environmental Policy Act (Pub. L. 91-190, 83 Stat. 852 (Jan. 1, 1970) (42 U.S.C. 4321 *et seq.*)), the Endangered Species Act (Pub. L. 93-205, 87 Stat. 884 (Dec. 28, 1973) (16 U.S.C. 1531 *et seq.*)), the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act (33 U.S.C. 1251 *et seq.*)), the National Historic Preservation Act (Pub. L. 89-665, 80 Stat. 915 (Oct. 15, 1966), *as amended*, repealed, or replaced by Pub. L. 113-287 (Dec. 19, 2014) (formerly codified at 16 U.S.C. 470 *et seq.,* now codified at 54 U.S.C. 100101 note and 54 U.S.C. 300101 *et seq.*)), the Migratory Bird Treaty Act (16 U.S.C. 703 *et seq.*), the Migratory Bird Conservation Act (16 U.S.C. 715 *et seq.*), the Clean Air Act (42 U.S.C. 7401 *et seq.*), the Archeological Resources Protection Act (Pub. L. 96-95 (16 U.S.C. 470aa *et seq.*)), the Paleonto-

vicinity of the international border near Calexico, California."[10] Manifest in this list is the expansive power bestowed upon the DHS in the "federal initiative to 'secure the southern border of the United States through immediate construction of a physical wall on the southern border,' covering roughly 2000 miles."[11] The following section explores where this unprecedented legal power originated and cultivated.

Nearly twenty years prior to September 11th, concerns of drug smuggling instigated the federal government of the United States to "beg[i]n building walls for the purpose of separating people…starting with a single fence at the border south of San Diego."[12] This concern instigated President Clinton to sign the "Illegal Immigration Reform and Immigrant Responsibility Act of 1996"

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logical Resources Preservation Act (16 U.S.C. 470aaa *et seq.*), the Federal Cave Resources Protection Act of 1988 (16 U.S.C. 4301 *et seq.*), the National Trails System Act (16 U.S.C. 1241 *et seq.*), the Safe Drinking Water Act (42 U.S.C. 300f *et seq.*), the Noise Control Act (42 U.S.C. 4901 *et seq.*), the Solid Waste Disposal Act, *as amended* by the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 *et seq.*), the Archaeological and Historic Preservation Act (Pub. L. 86-523, *as amended*, repealed, or replaced by Pub. L. 113-287 (Dec. 19, 2014) (formerly codified at 16 U.S.C. 469 *et seq.,* now codified at 54 U.S.C. 312502 *et seq.*)), the Antiquities Act (formerly codified at 16 U.S.C. 431 *et seq.,* now codified 54 U.S.C. 320301 *et seq.*), the Historic Sites, Buildings, and Antiquities Act (formerly codified at 16 U.S.C. 461 *et seq.,* now codified at 54 U.S.C. 3201-320303 & 320101-320106), the Wild and Scenic Rivers Act (Pub. L. 90-542 (16 U.S.C. 1281 *et seq.*)), the Farmland Protection Policy Act (7 U.S.C. 4201 *et seq.*), the Coastal Zone Management Act (Pub. L. 92-583 (16 U.S.C. 1451 *et seq.*)), the Wilderness Act (Pub. L. 88-577 (16 U.S.C. 1131*et seq.*)), the Federal Land Policy and Management Act (Pub. L. 94-579 (43 U.S.C. 1701 *et seq.*)), the National Wildlife Refuge System Administration Act (Pub. L. 89-669 (16 U.S.C. 668dd-668ee)), the National Wildlife Refuge System Improvement Act of 1997 (Pub. L. 105-57), National Fish and Wildlife Act of 1956 (Pub. L. 84-1024 (16 U.S.C. 742a, *et seq.*)), the Fish and Wildlife Coordination Act (Pub. L. 73-121 (16 U.S.C. 661 *et seq.*)), the Wild Horse and Burro Act (16 U.S.C. 1331 *et seq.*), an Act of Oct. 30, 2000, Pub. L. 106-398, 1, 114 Stat. 1654 (enacting into law § 2848 of Part II of Subtitle D of Title XXVIII of Division B of H.R. 5408 (114 Stat. 1654A-426), as introduced on Oct. 6, 2000), the Administrative Procedure Act (5 U.S.C. 551 *et seq.*), the Otay Mountain Wilderness Act of 1999 (Pub. L. 106-145), sections 102(29) and 103 of Title I of the California Desert Protection Act (Pub. L. 103-433), the Rivers and Harbors Act of 1899 (33 U.S.C. 403), the Eagle Protection Act (16 U.S.C. 668 *et seq.*), the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 *et seq.*), the American Indian Religious Freedom Act (42 U.S.C. 1996), and the Religious Freedom Restoration Act (42 U.S.C. 2000bb).

[10] *See supra* note 9. Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, *as amended*, 82 Fed. Reg. 42829 (proposed Sept. 12, 2017).

[11] Marshal Garbus, *Comment: Environmental Impact of Border Security Infrastructure: How Department of Homeland Security's Waiver of Environmental Regulations Threatens Environmental Interests Along the U.S.-Mexico Border*, 31 Tul. Envtl. L.J. 327, 328 (2018) (citing Exec. Order No. 13767, Border Security and Immigration Enforcement Improvements, 82 Fed. Reg. 8793 (Jan. 30, 2017)).

[12] Dinah Bear, Esq., *Border Wall: Broadest Waiver of Law in American History*, Center for Env. Law, 1 (2009), *available at http://www.ciel.org/Publications/BorderWall_8Feb09.pdf*.

(hereinafter IIRIRA).[13] Relevantly, the original language of the 1996 IIRIRA, relating to today's proposed border wall includes:

> Sec. 102. Improvement of Barriers at Border.
>
> (a) In General.—The Attorney General, in consultation with the Commissioner of Immigration and Naturalization, shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.
>
> (b) Construction of Fencing and Road Improvements in the Border Area Near San Diego, California.—
>
> (1) In General.—In carrying out subsection (a), the Attorney General *shall provide for the construction along the 14 miles of the international land border of the United States*, starting at the Pacific Ocean and extending eastward, of second and third fences, in addition to the existing reinforced fence, and for roads between the fences.
>
> (2) Prompt Acquisition of Necessary Easements.—The Attorney General, acting under the authority conferred in section 103(b) of the Immigration and Nationality Act (as inserted by subsection (d)), shall promptly acquire such easements as may be necessary to carry out this subsection and shall commence construction of fences immediately following such acquisition (or conclusion of portions thereof). 8 USC 1103 note. 110 STAT. 3009–555 Public Law 104–208—Sept. 30, 1996.
>
> (3) Safety Features.—The Attorney General, while constructing the additional fencing under this subsection, shall incorporate such safety features into the design of the fence system as are necessary to ensure the well-being of border patrol agents deployed within or in near proximity to the system.
>
> (4) Authorization Of Appropriations.—There are authorized to be appropriated to carry out this subsection not to exceed $12,000,000. Amounts appropriated under this paragraph are authorized to remain available until expended.
>
> (c) Waiver.—*The provisions of the Endangered Species Act of 1973 and the National Environmental Policy Act of 1969 are waived to the extent the Attorney General determines necessary to ensure expeditious construction of the barriers and roads under this section.*[14]

This Act expressly ordered the construction of barriers along the border to prevent illegal immigration[15] and while President Clinton hesitated over

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[13] *Id.* at 2.

[14] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009 (codified *as amended* in scattered sections of 8 U.S.C. and 18 U.S.C.) (emphasis added).

[15] Michael John Garcia, Cong. Research Serv., R43975, Barriers Along the U.S. Borders: Key Authorities and Requirements 5 (Jan. 27, 2017).

the express "waive[r] 'to the extent…necessary to ensure expeditious construction of the barriers and roads under this section' [of] provisions of the Endangered Species Act and the National Environmental Policy Act," he felt certain that the Attorney General shared his parallel commitment to environmental protection.[16] President Clinton based his confidence that environmental laws would be respected upon the Immigration Naturalization Service's memo stating its intent not to utilize the Attorney General's waiver and to abide by environment-friendly policies.[17] Clinton similarly felt assured by the limited language of the Act prescribing the specific location of the fence and expressly dictating any waivable laws. Following initial controversy and dissent by the American collective, as time passed, public voice seemingly lost interest in this controversial waiver. However, in California, where the border wall was to be constructed, local antagonism continued and eventually stalled the project.[18]

Following the arrest of the building campaign, public attention paid to President Clinton's environmental law waiver quieted for the next several years. However, successive to September 11th and the passage of the Homeland Security Act of 2002, the government's strategy to augment national security led to the transference of border security control to the DHS (effectively dismantling the Immigration and Naturalization Service).[19] Subsequently, in furtherance of the administration's goals to suppress terrorist threats, in 2005, the IIRIRA waiver authority

> was expanded by the REAL ID Act to encompass not just the San Diego fence, but all barriers and roads that may be constructed pursuant to IIRI[R]A. It was also expanded to apply not just to NEPA and the ESA, but to 'all legal requirements [the DHS] Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads[.]'[20]

Notably, while the REAL ID Act sought to quiet concern regarding illegal immigration from Latin America,[21] the act also passed under the color of September 11, 2001. The irony of this amendment is that the terrorists responsible for the September 11th tragedy "entered the United States through legal ports of entry," and therefore, the reasoning, at least in part, that sup-

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[16] Bear, *supra* note 12, at 2.

[17] *Id.* at 3.

[18] *Id.*

[19] *Id.*

[20] Neeley, *supra* note 3, at 144.

[21] David Fisher, *The U.S. – Mexico Border Wall and the Case for "Environmental Rights"*, 50 Tex. Int'l L.J. 145, 146 (2015).

ported this expansion of power did not correlate to the purported problem.[22] In fact, according to Assistant Professor Gulasekaran,

> [p]rior to 9/11, the creation of walls and fences was not popular amongst lawmakers, and other than a cosmetic fourteen-mile fence, the border was not physically fortified. The events of 9/11 drastically altered the immigration debate, and inexplicably focused attention on the southern border of the United States as a potential entry point for terrorist threats. The empirical dubiousness of the terrorism/immigration association aside, the focus of the southern border meant that migrants from Mexico and Central America would be constructed in the American imagination as threats to the nation's rule-of-law ideals, its economic security, and its national security.[23]

Clear from Assistant Professor Gulasekaran, the notion that a secured southern border wall will prevent further tragedies like September 11th is nothing more than a social construction by policymakers to manipulate the American public into focusing their fears on a specific thing and group of people. Further troubling is that this sweeping authority, camouflaged as an "amendment attached to must-pass appropriation measures funding the Iraq war and Indonesian tsunami relief…was passed without any consideration by the appropriate committees."[24] Unfortunately, by passing such an expansive law as an amendment, it is probable that this legislation failed to receive the proper attention and debate it was due.

Succeeding this amendment, the IIRIRA faced amendment and expansion twice more: once in 2006, with the passage of the Secure Fence Act and again in 2008 with the Consolidated Appropriations Act. The impact of these three amendments on the IIRIRA was extensive and is evident in the language of the IIRIRA in its present form:

> (a) In General.—The Secretary of Homeland Security shall take such actions as may be necessary to install additional physical barriers and roads (including the removal of obstacles to detection of illegal entrants) in the vicinity of the United States border to deter illegal crossings in areas of high illegal entry into the United States.
>
> (b) Construction of Fencing and Road Improvements Along the Border.—
>
> (1) Additional fencing along southwest border.—

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[22] Tisler, *supra* note 2, at 795.

[23] Gulasekaran, *supra* note 1, at 163-64.

[24] Neeley, *supra* note 3, at 144 (citing Tana Sanchez, *Waiving Good-bye to Environmental Laws Along the Arizona Borderlands*, 16 Mo. Envtl. L & Pol'y Rev. 281, 289 (2009); Andrea C. Sancho, Note, *Environmental Concerns Created by Current U.S. Border Policy: Challenging the Extreme Waiver Authority Granted to the Secretary of the Department of Homeland Security under the Real ID Act of 2005*, 16 S.E. Envtl. L.J. 421, 426 (2008)).

(A) Reinforced fencing.—In carrying out subsection (a), the Secretary of Homeland Security *shall construct reinforced fencing along not less than 700 miles* of the southwest border where fencing would be most practical and effective and provide for the installation of additional physical barriers, roads, lighting, cameras, and sensors to gain operational control of the southwest border.

(B) Priority areas.—In carrying out this section [amending this section], the Secretary of Homeland Security shall—

(i) identify the 370 miles, or other mileage determined by the Secretary, whose authority to determine other mileage shall expire on December 31, 2008, along the southwest border where fencing would be most practical and effective in deterring smugglers and aliens attempting to gain illegal entry into the United States; and

(ii) not later than December 31, 2008, complete construction of reinforced fencing along the miles identified under clause (i).

(C) Consultation.—

(i) In general.—In carrying out this section, the Secretary of Homeland Security shall consult with the Secretary of the Interior, the Secretary of Agriculture, States, local governments, Indian tribes,[25] and property owners in the United States to minimize the impact on the environment, culture, commerce, and quality of life for the communities and residents located near the sites at which such fencing is to be constructed.

(ii) Savings provision.—Nothing in this subparagraph may be construed to—

(I) create or negate any right of action for a State, local government, or other person or entity affected by this subsection; or

(II) affect the eminent domain laws of the United States or of any State.

(D) Limitation on requirements.—Notwithstanding subparagraph (A), nothing in this paragraph shall require the Secretary of Homeland Security to install fencing, physical barriers, roads, lighting, cameras, and sensors in a particular location along an international border of the United States, if the Secretary determines that the use or placement of such resources is not the most appropriate means to achieve and maintain operational control over the international border at such location.

(2) Prompt acquisition of necessary easements.—The Attorney General, acting under the authority conferred in section 103(b) of the Immigration and Nationality Act [8 U.S.C. 1103(b)] (as inserted by subsection (d)), shall promptly acquire such easements as may be necessary to carry out this subsection and shall commence construction of fences immediately following such acquisition (or conclusion of portions thereof).

(3) Safety features.—The Attorney General, while constructing the additional fencing under this subsection, shall incorporate such safety features into the design of the fence system as are necessary to ensure the well-being of border patrol agents deployed within or in near proximity to the system.

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[25] *But see*, *supra* note 9, discussing DHS' recent Waiver of laws including those pertaining to Indian Tribes (*e.g.* the Native American Graves Protection and Repatriation Act (25 U.S.C. 3001 *et seq.*), the American Indian Religious Freedom Act (42 U.S.C. 1996), and the Religious Freedom Restoration Act (42 U.S.C. 2000bb).

(4) Authorization of appropriations.—There are authorized to be appropriated such sums as may be necessary to carry out this subsection. Amounts appropriated under this paragraph are authorized to remain available until expended.

(c) Waiver.—

(1) In general.—Notwithstanding any other provision of law, the Secretary of Homeland Security *shall have the authority to waive all legal requirements such Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section* [amending this section]. Any such decision by the Secretary shall be effective upon being published in the Federal Register.

(2) Federal court review.—

(A) In general.—*The district courts of the United States shall have exclusive jurisdiction* to hear all causes or claims arising from any action undertaken, or any decision made, by the Secretary of Homeland Security pursuant to paragraph (1). *A cause of action or claim may only be brought alleging a violation of the Constitution of the United States.* The court shall not have jurisdiction to hear any claim not specified in this subparagraph.

(B) Time for filing of complaint.—Any cause or claim brought pursuant to subparagraph (A) shall be *filed not later than 60 days after the date of the action or decision made by the Secretary of Homeland Security.* A claim shall be barred unless it is filed within the time specified.

(C) Ability to seek appellate review.—An *interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.*[26]

The power and authority of this act cannot be understated. First, in Section 102(a), the Secretary "shall take such actions as may be necessary" to assure that a border wall is constructed, to deter illegal immigrants in the "vicinity of the United States." The Secretary, therefore, has the "discretion to determine the appropriate amount of 'additional' barriers to deploy, as well as the most appropriate locations to install such barriers…."[27] This is clearly a greater delegation of power than any previously given to the Attorney General under the 1996 IIRIRA, as the Act then required consultation with the Commissioner of Immigration and Naturalization when making border decisions.[28] Next, Section 102(b), originally limiting the border wall to the San Diego area, now permits a border wall *at least* 700 miles long and in the areas

[26] 8 U.S.C., 2016 Edition Title 8 - Aliens and Nationality Chapter 12 - Immigration and Nationality Subchapter I - General Parovisions Sec. 1103 - Powers and duties of the Secretary, the Under Secretary, and the Attorney General Pub. L. 104–208, div. C, title I, §102(a)–(c), Sept. 30, 1996, 110 Stat. 3009–554, 3009–555, *as amended* by Pub. L. 109–13, div. B, title I, §102, May 11, 2005, 119 Stat. 306; Pub. L. 109–367, §3, Oct. 26, 2006, 120 Stat. 2638; Pub. L. 110–161, div. E, title V, §564(a), Dec. 26, 2007, 121 Stat. 2090 (emphasis added).

[27] Garcia, *supra* note 15, at 5.

[28] *See supra* note 13, § 102(a).

dictated solely by the Secretary.[29] Also notable in Section 102(b) is the apparent freedom the Secretary enjoys when choosing both fence type and height when building the wall.[30] The repercussions of this autonomy, when coupled with the ability to waive an indeterminable number of laws, are an unsettling scenario without any clear balance of power. Third, relating to the balance of power, Section 102(c) now limits judicial review of waiver decisions of solely constitutional claims to only District Courts and appellate review is singly available in the Supreme Court of the United States. "The removal of access to justice by removing the ability to challenge the DHS waivers except on constitutional grounds removes a critical tool in efforts to hold agencies accountable."[31] This limitation on judicial review is arguably the most controversial aspect of this Act and is ripe for constitutional criticism.

In sum, the evolution of the 1996 IIRIRA through the 2005, 2006, and 2008 amendments, evidences a trend veering away from concern of environmental laws and citizens' rights, towards the greater interest of securing a border wall. Notwithstanding the copious power reserved to the Secretary regarding border wall construction, the following section illustrates the judicial deference courts show in support of this congressional delegation of power.

## III. Caselaw

Caselaw confronting the expansive power under the IIRIRA is both startling and dispiriting. This discussion looks at 1) *Defenders of Wildlife*, 2) *Save Our Heritage Organization*, and 3) *County of El Paso*.[32] These cases reflect how District Courts tackle the constitutionality of the Secretary's waiver authority under Section 102. Following an examination into how the courts tackled these cases, this study explores the errors in the analyses these holdings propound.

Following the expansion of the 1996 IIRIRA, the courts began to encounter petitions founded upon constitutional claims rallied against the Secretary's waivers. Notably, the number of these cases is few, as the amended IIRIRA made bringing claims exceedingly difficult.

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[29] Garcia, *supra* note 15, at 10.

[30] *Id*. at 13-14. *See also* Annecoos Wiersema, *Unseen Harms: The U.S.–Mexico Border Wall and Its Lessons for Wildlife and Biodiversity Advocates*, 95 Denv. L. Rev. Online 88, 93 (2018) ("The IIRIRA's removal of required formal consultation and environmental impact assessment significantly limits the ability of scientists and policy makers to ensure that border wall construction will not harm wildlife.")

[31] Wiersema, *supra* note 30, at 93.

[32] Save Our Heritage Org. v. Gonzalez, 533 F. Supp. 2d 58 (D.D.C. 2008); County of El Paso v. Chertoff, EP-08-CA-196-FM, 2008 U.S. Dist. LEXIS 83045 *1 (W.D. Tex. Aug. 29, 2008); Defenders of Wildlife v. Chertoff, 527 F. Supp. 2d 119 (D.D.C. 2007).

1. *Defenders of Wildlife v. Chertoff*

The primary case evincing rebellion against the powers bestowed upon the Secretary of the DHS under the IIRIRA is *Defenders of Wildlife v. Chertoff*.*33* In *Defenders*, the plaintiffs challenged the constitutionality of the Secretary's waiver of federal laws, as permitted under Section 102 of the REAL ID Act.[34] Here, the plaintiffs initially alleged that the wall construction infringed upon "'a unique and invaluable environmental resource' and 'one of the most biologically diverse areas of the United States.'"[35] Due to the possible irreparable harm that a fence could cause, the plaintiffs sought and received emergency injunctive relief to delay construction of the fence.[36] However, approximately two weeks following the court's injunctive relief, Secretary Chertoff "published a notice in the Federal Register waiving NEPA, the Arizona-Idaho Conservation Act, and eighteen other laws with respect to the construction of the…fence under the authority granted to him by Section 102 of the REAL ID Act of 2005."[37] Subsequent to the Secretary's waiver, the plaintiffs amended their complaint to argue that the waiver authority of the REAL ID Act violated Articles I and II of the Constitution "because it impermissibly delegates legislative powers to the DHS Secretary, a politically-appointed Executive Branch official."[38]

Consequently, the sole issue the court tackled was "whether the Secretary's waiver under the REAL ID Act [was] constitutional."[39] Here, the plaintiffs, in reliance upon *Clinton v. City of New York*,[40] argued that the waiver provision "provides the DHS Secretary with roving commission to repeal, in his sole discretion, any law in all 50 titles of the United States Code that he concludes might impede construction of a border wall."[41] The Court, in *Clinton*, "struck down the Line Item Veto Act of 1996…because the Court found that the Act –'[i]n both legal [and] practical effect'– allowed the President to amend Acts of Congress by repealing portions of them."[42] The plaintiffs in *Defenders* paralleled *Clinton* to their case because "[t]he power granted by Section 102 of the REAL ID Act to the Secretary of DHS to 'waive' the applicability of any law that would otherwise apply to border wall and fence construction projects is

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[33] *Defenders of Wildlife*, 527 F. Supp. 2d at 119.

[34] *Id*. at 120-21.

[35] *Id*. at 121 (citing Pls.' Mem. In Sup. of Mot. for Temporary Restraining Order ["TRO Mo."] at 1, 4-5).

[36] *Id*. at 121.

[37] *Id*. at 121-22.

[38] *Id*. at 123 (citing Am. Compl. Paras. 36-38).

[39] *Id*. at 123.

[40] Clinton v. City of New York, 524 U.S. 417 (1998).

[41] *Defenders of Wildlife*, 527 F. Supp. 2d at 123 (citing Pls.' Opp'n at 3-4 (emphasis omitted)).

[42] *Id*. (citing *Clinton*, 524 U.S. at 438).

unmistakably the power partially to repeal or amend such laws."[43] This power, the plaintiffs argued, was therefore an "impermissible exercise of legislative authority."[44]

While the plaintiffs' argument was strong, the *Defenders* court summarily dismissed the parallel to the *Clinton* line item veto case. The court stated that the REAL ID Act's waiver differed from the *Clinton* case because here, the "Secretary has no authority to alter the text of any statute, repeal any law, or cancel any statutory provision, in whole or in part."[45] Further, the court rejected the general argument propounded by the plaintiffs that the waiver authority violated the separation of powers principle because the court found that Congress acted well-within its duties to delegate its legislative power with sufficient guidance and that this guidance was made clear with the language of "necessary to ensure expeditious construction of the barriers and roads under [Section 102 of IIRIRA]."[46] Finally, the court refused to entertain the plaintiffs' last argument proposing that this waiver was unprecedented and too broad in effect:

> [t]he Court concludes that it lacks the power to invalidate the waiver provision merely because of the unlimited number of statutes that could potentially be encompassed by the Secretary's exercise of his waiver power. Rather, under the nondelegation doctrine, the relevant inquiry is whether the Legislative Branch has laid down an intelligible principle to guide the Executive Branch, not the scope of the waiver power. Therefore, based on controlling Supreme Court precedent, the Court finds that the REAL ID Act's waiver provision is a valid delegation of authority.[47]

Here, the court noted the deference judges usually bestow to both the executive and legislative branches when the subject matter involves foreign affairs, immigration control, and border concerns: "the [e]xecutive has 'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.'"[48] Further,

when Congress legislates on foreign affairs or immigration control, "it is not dealing alone with a legislative power. It is implementing an inherent executive power…. [b]ecause these powers are 'also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise [them]. . . .'"[49] This purported deference to the other

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[43] *Id.* (citing Pls. Opp'n at 9-10 (internal quotes omitted)).

[44] *Id.* (citing Pls. Surreply at 1, 2).

[45] *Id.* at 123.

[46] *Id.* 126-27 (citing 8 U.S.C. section 1103 note).

[47] *Id.* at 129.

[48] *Id.* (citing *Clinton,* 524 U.S. at 445 (quoting *Curtiss-Wright Export Corp.*, 299 U.S. at 320, 57 S.Ct. 216)) (internal quotations omitted).

[49] *Id.* (citing Knauff v. Shaughnessy, 338 U.S. 537, 542-43 (1950)).

government branches was the 'nail in the coffin' for the petitioners' argument and the District Court resolved the case by dismissing it with prejudice.[50] Finally, as the IIRIRA limits appellate jurisdiction to the Supreme Court, petitioners had one final chance and filed a Petition for Certiorari. However, the Court denied the petition and the case remained 'dead in the water.'

2. *Save Our Heritage Organization v. Gonzalez*

The next case to challenge the constitutional delegation of power to DHS Secretary Chertoff, was *Save Our Heritage Org*.[51] Here, petitioners, citing two separate barriers, one in San Diego, California and the other, near Yuma, Arizona, argued that the "Government neglected to comply with several statutes and that DHS Secretary Michael Chertoff's waiver of those statutory requirements [was] unconstitutional."[52] The District Court, in tackling the constitutionality of Congress' delegation of authority, noted that the court must look to whether the "statute in question sets forth an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform."[53] Noting the broad power Congress has in this delegation and the usual judicial deference bestowed upon this delegation, the court added that "a statute need only 'clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'"[54]

The District Court harkened back to *Defenders of Wildlife* in finding the waiver power constitutional.[55] In *Defenders*, the judge not only found the directive of "installing additional barriers and roads" (general policy) to be "clearly delineated," but also that the "boundaries" were clearly defined "by Congress' requirement that the Secretary may waive only those laws that he determines 'necessary to ensure expeditious construction.'"[56] This court found *Defenders* persuasive and noted the significant authority of the executive branch in the area of foreign affairs and immigration even before Congress made this legislative delegation and held the barriers in San Diego and Yuma to be well within this "independent constitutional authority."[57] In sum, the court, persuaded by *Defenders*, found the waiver power to be constitutional.[58]

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[50] *Id.*

[51] Save Our Heritage Org. v. Gonzalez, 533 F. Supp. 2d 58 (D.D.C. 2008).

[52] *Id.* at 60 (citations omitted).

[53] *Id.* at 62 (internal quotations and citations omitted).

[54] *Id.* (internal quotations and citations omitted).

[55] *Id.* at 63.

[56] *Id.* (citing IIRIRA § 102).

[57] *Id.* at 63 (citations omitted).

[58] *Id.* at 64.

3. *County of El Paso v. Chertoff*

Third and last, the holding of *County of El Paso*[59] suffered a similar fate to *Defenders* and *Save Our Heritage*. In *County of El Paso*, the plaintiffs challenged two waivers under the REAL ID Act following two waivers by Secretary Chertoff, nulling dozens of federal laws covering over 500 miles of the U.S. border with Mexico.[60] The plaintiffs argued three specific constitutional issues against the "Waiver Legislation: (1) a nondelegation challenge pursuant to Article I, Section I, of the Constitution, (2) a Presentment Clause challenge pursuant to Article I, Section 7, of the Constitution, and (3) a federalism challenge pursuant to the Constitution's Tenth Amendment."[61] The District Court unsurprisingly rejected all three arguments: (1) regarding the nondelegation challenge, the court stated that Congress properly delegated its authority and provided the Secretary with an intelligible principle that directed his waivers for the purpose of expeditious "construction of physical barriers and roads of the nation's borders;"[62] (2) concerning the Presentment Clause, the court found no violations because, unlike the relevant laws in Clinton's line item veto in *Clinton v. New York*, here, the laws waived under Section 102 still applied outside the Secretary's waiver;[63] and finally, (3) relating to a violation of the Tenth Amendment, the District Court found no issue because of Section 102's clear intent to preempt state and local laws "which would interfere with Congress's objective to expeditiously construct [a] border fence."[64] Thus, the court found the actions of Secretary Chertoff to be constitutionally sound and further, that the Congressional delegation survived constitutional challenge. Following this case, the plaintiffs petitioned the Supreme Court for review, but again, the Court declined the petition.[65]

4. *Discussion*

Clearly, the judiciary defers to Congress' delegation authority, particularly in matters concerning foreign affairs and immigration. Well recognized is the idea that "Congress would be guilty of delegating the legislative power only if it gave something approaching blank-check legislative rulemaking author-

[59] County of El Paso v. Chertoff, EP-08-CA-196-FM, 2008 U.S. Dist. LEXIS 83045 *1 (W.D. Tex. Aug. 29, 2008).

[60] Kate R. Bowers, *Saying What the Law Isn't: Legislative Delegations of Waiver Authority in Environmental Laws*, 34 Harv. Envtl L. Rev. 257, 282 (2010) (citation omitted).

[61] Petition for a Writ of Certiorari at Appendix 53a, *County of El Paso v. Napolitano*, No. 08-751.

[62] *Id.* (citations omitted).

[63] *Id.* at 54a (citations omitted).

[64] *Id.* (citations omitted).

[65] Bowers, *supra* note 60, at 283.

ity to an agency. As long as an agency's discretion is somewhat confined… then there has been no delegation of 'legislative power.'"[66] This deference walks a fine line between constitutional and unconstitutional delegation of power. To illustrate, *Defenders* established strong precedent when it tackled the constitutionality of the waiver power. However, this note argues that the court erred when it did not find the petitioners' comparison with Clinton's line item veto to be relevant. The court dismissed the Presentment Clause argument because the waiver did not equate to a partial repeal.[67] Notwithstanding the court's findings, the Secretary's actions, in effect, void any law, without limit, and bypass all constitutional "requirements for enacting and repealing laws."[68] On its face, this delegation violates the Constitution. Further, this waiver, while it supposedly has an intelligible principle, the phrase "necessary to ensure expeditious construction of the barriers and roads…" in Section 102 is hardly intelligible and allows the Secretary, in his or her sole capacity as an appointed-executive official, to waive infinite laws, any time and for any perceived obstruction. This power is a far cry from the original intent of the 1996 IIRIRA that specifically expressed the area where the border fence was to be constructed and what laws could be waived in this specific pursuit. Neeley, a licensed attorney and conservation policy director for Sky Island Alliance, astutely notes that while the *Defenders* opinion ignores the unprecedented scope of the waiver and argues it had no legal right to strike this delegation of authority, this was (and is) precisely the kind of delegation that a court may strike.[69]

In addition to this broad waiver, limits on judicial review are arguably contrary to the nondelegation doctrine as they interfere with impartial review and thus it remains "impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed."[70] Because Section 102(c) limits petitions to constitutional challenges in District Court, the number of possible claims is severely limited to aggrieved parties. Further, appellate constraint challenges the constitutionality of Section 102 because the Supreme Court has discretion to hear a case and has, thus far, rejected cases challenging waiver authority, leaving parties effectively without appellate recourse. In sum, this caselaw discussion evidences the troubling trend in judicial deference regarding the REAL ID Act's expansive delegation of power to the DHS Secretary. Consequently, to successfully prevent further southern border wall construction, a different legal track must be employed. This legal track finds its place

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[66] Thomas W. Merrill, *Rethinking Article 1, Section 1: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097, 2099 (2004).

[67] Neeley, *supra* note 3, at 151.

[68] *Id.* at 150.

[69] *Id.* at 156.

[70] *Id.* at 158 (citations omitted).

under Article VI of the Constitution regarding treaties and their authority as "supreme law of the land."

## IV. Treaty Law

Clear thus far, under both federal law and caselaw, the DHS Secretary has expansive authority over the construction of the southern border wall. However, largely ignored in the discussion of the legality of President Trump's proposed border wall construction is treaty law. Presently, there are treaties governing boundary and water passage between the United States and Mexico that currently face infringement from unilateral border construction. The following sections delve into the history of treaties, their respective influence in the United States, and glimpses into the 1944 Water Treaty and the 1970 Boundary Treaty to conclude that notwithstanding the great power bestowed upon the Secretary under Section 102 of the amended IIRIRA, treaty law demands that the DHS must, at a bare minimum, consult with Mexico prior to any significant border wall construction.

### 1. *U.S. Treaty Authority, its Relationship to Federal Law, and the Power of the Vienna Convention*

From the founding of the United States, international treaties have shaped the laws of the country. To illustrate, following the American Revolution, the United States entered into the 1783 Treaty of Peace with Great Britain.[71] Unfortunately, this treaty faced much difficulty as the states refused to honor the obligations outlined and in fact, abjectly opposed the terms.[72] However, the following language, dictated in the Supremacy Clause of Article VI, Clause 2 of the United States Constitution, made treaties supreme over state law, required judges to enforce a treaty's terms, and effectively remedied state-led obstruction:[73]

> [t]his Constitution, and the laws of the United States which 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; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

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[71] Leonie W. Huang, *Which Treaties Reign Supreme? The Dormant Supremacy Clause Effect of Implemented Non-Self-Executing Treaties*, 79 Fordham L. Rev. 2210, 2217 (2011).

[72] *Id.* at 2218.

[73] *Id.* at 2219.

Notably absent from this language is an express clarification of which U.S. law, federal or treaty, reigns supreme. However, the Supreme Court explained, "[b]ecause they enjoy the same constitutional dignity as statutes, treaties will even displace earlier inconsistent federal statutes, although the reverse is also true under the "later-in-time-rule."[74] This authority is critical when balancing the power between federal statutes and treaties because it evidences the strength of treaty law. Applicable to this discussion, the original IIRIRA established in 1996 obviously came after the 1944 and 1970 treaties. However, as originally dictated, the terms between the IIRIRA and the treaties were not overtly inconsistent (although, it may be argued that, even then, the San Diego wall influenced the rights of Mexico under the treaties).

Conversely, today, because the amended IIRIRA gives unfettered control to the DHS Secretary and because, to date, the Secretary used this power to waive countless laws without regard to current treaties, there is undoubtedly a conflict between the treaties' terms and the federal law. Harkening to the Supreme Court's words weighing the authority of inconsistent language between an older law and new legislation, it may still be argued that the intent behind the IIRIRA, as originally drafted and amended, was not to supersede the treaties. Because breaking treaties is not often advisable absent material breach or extenuating circumstances and because Mexico and the United States have a longstanding symbiotic relationship, it cannot be rationally deduced that the treaties were so easily broken over a border wall. Further, per the Vienna Convention (discussed *infra*), for a party to withdraw or terminate treaty obligations, specific steps must be followed, including notification to other parties to the treaty.[75] Thus, as will be shown, reneging obligation under the 1944 and 1970 treaties is not an easy feat.

Under U.S. treaty law, there are two kinds of treaties: self-executing treaties and non-self-executing treaties.[76] Arguably, the supremacy provision in the Constitution applies to both forms of treaties. However, for this note, we need not be overly concerned with this academic debate as both the 1944 and 1970 treaties are self-executing[77] and undoubtedly possess power as the "supreme law of the land." Though, when discussing treaty law, it is helpful

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[74] Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 Cornell L. Rev. 892, 920 (2004) (*quoting Reid v. Covert* 354 U.S. 1, 18 (1957)).

[75] John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37(1) Harv. Int'l L.J. 139, 191-92 (1996) (citing Vienna Convention on the Law of Treaties art. 65(1) May 23, 2969, U.N. Doc. A/Conf. 39/17 at 289 (1969), 1155 U.N.T.S. 331).

[76] For discussion of the differences between self-executing treaties and non-self-executing treaties *see* John T. Parry, *Congress, The Supremacy Clause, and the Implementation of Treaties*, 32 Fordham Int'l L.J. 1209, 1329 (2009) ("[f]irst, some treaties are self-executing, which means they vest power directly in the President or are enforceable in court without legislation…[non-self-executing treaties] require implementing legislation to have domestic effect.").

[77] *See infra*, for further discussion of self-executing treaties.

to acknowledge the means used to differentiate self-executing from non-self-executing treaties:

> [f]irst, a treaty may be held to be non-self-executing if a court finds that was the 'intent' of the treaty makers as expressed in the treaty itself [*i.e.* language such as 'shall be ratified and confirmed', under caselaw, indicates intent for future action] …Second, the treaty may contemplate an obligation that constitutionally requires legislation to take effect, for example if the treaty purports to criminalize behavior or provide appropriations. Third, treaties may be incapable of or incapable of our inappropriate for judicial action…Finally, treaties have been held to be non-self-executing because they fail to provide a right of private action.[78]

Applying this standard to the two relevant treaties, both the 1944 and 1970 treaties are clearly self-executing because at the beginning of both treaties, the language expressly states that two-thirds of the Senate ratified the treaty along with the President.[79] There is no language of intent to act in the future to ratify the document, the documents are not vague, and there is no language indicating that legislative action must be completed for the treaty to be fulfilled. Summarily, the 1944 and 1970 treaties are self-executing. Of final note, and critical to the labeling of the two treaties as self-executing, in the context of opposing President Trump's border wall, "[a]lthough foreign affairs considerations may require respect for the reasonable interpretative views of the executive branch, the Supreme Court has declared itself the final arbiter of the meaning of self-executing treaties."[80] Thus, "[b]ecause self-executing treaties fall within the judicial power of Article III, federal courts… have the final authority over their interpretation and application."[81] Consequently, when investigating the terms and objectives of the treaties, courts must uphold the bi-lateral treaties should the International Boundary and Water Commission fail to resolve disputes between Mexico and the United States.

Before looking into the 1944 and 1970 treaties, a discussion of treaty law would be remiss without mention of the 1969 Vienna Convention.[82] The Vienna Convention represents a "formal expression of customary international

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[78] Huang, *supra* note 71, at 2229-31. (Note: Fourth prong, is likely not a correct standard, as all treaties do not confer private right of action).

[79] *See* Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary, U.S.-Mex., Nov. 23, 1970, 80 Stat. 271, 23 U.S.T. 371; Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande Treaty, U.S.-Mex., Feb. 3, 1944, 59 Stat. 1219, 3 U.N.T.S. 313.

[80] Van Alstine, *supra* note 74, at 947.

[81] *Id.* at 946.

[82] *See* the Vienna Convention, *supra* note 75.

law anent to the obligations of States in honoring treaty obligations."[83] For members of this convention, international agreements between countries carry great weight in the international community and while the United States did not ratify the Vienna Convention, it is a signatory of the document.[84] Similarly, Mexico signed, but ratified the Convention, arguably making the Vienna Convention an authority for both nations to look to when adhering to (or disregarding) treaties.[85]

In their article, Mumme, a Political Science Professor, and Ibáñez, a Professor of Public Administration, note that several articles of the Vienna Convention apply to the treaties between Mexico and the United States: "[f]irst, article 4 indicates that 'the Convention applies only to treaties and agreements which are concluded by States after the Convention enters into force with regard to such States.'"[86] Thus, while neither the 1970 Boundary Treaty nor the 1944 Water Treaty is officially sheltered by the Vienna Convention, customary international law expresses that the Convention applies to these treaties.[87] However, the United States could argue that because the two treaties entered into force following signature, the Convention fails to cover either treaty. Further, the United States may reason that "the Vienna Convention limits the circumstances that justify any unilateral exclusion from the obligation of a treaty to which a State is a party."[88] Relating to the ability for the United States to avoid obligations of a treaty controlled by the Vienna Convention,

> Article 62, section 1 stipulates: A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of the treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. Article 62, section 2 states: A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty

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[83] Stephen P. Mumme & Oscar Ibáñez, *U.S.-Mexico Environmental Treaty Impediments to Tactical Security Infrastructure Along the International Boundary*, 49 Nat. Res. J. 801, 805 (2009).

[84] *Id.* at 805; *see also* Setear, *supra* note 75, at 148 n.35 ("[a]lthough the United States is not a party to the Convention, the U.S. Department of State has recognized the Vienna Convention as the 'authoritative guide to current treaty law and practice.'"). S. EXEC. DOC. L., 92d Cong., 1st Sess., at 1 (1971). The relevant *Restatement* "accepts the Vienna Convention as presumptively codifying the customary international law governing international agreements…" Restatement (Third) of Foreign Relations Law of the United States pt. III, intro. n.2 (Tentative Draft No. 6, 1985)").

[85] Mumme & Ibáñez, *supra* note 83, at 805.

[86] *Id.*

[87] *Id.*

[88] *Id.* at 806; *see also* the Vienna Convention, *supra* note 75, arts. 46 & 60.

> establishes a boundary; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty. The combined effect of the provisions of articles 60 and 62 is to set a very high penalty and a very high bar to any party's unilateral non-compliance with treaty obligations, even when the circumstances surrounding its application may have changed.[89]

This section perhaps applies to both treaties and may dramatically limit the United States' ability to renege from its obligations to maintain the boundary and adhere to water allowances. Thus, the United States shall not, even for a "fundamental change of circumstance[]", ignore or abandon these agreements by unilaterally building a wall that interferes with boundary delineation and water flow. Further, even if the United States claims that national security concerns undermine the international treaties' obligations, Article 46 stipulates that, "[a] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance."[90]

Here, "the United States has no basis for asserting a national security imperative for disregarding extant environmental and boundary treaty obligations to Mexico" and further, it does not appear that the United States claims "a fundamental change of circumstance with regard to any of the agreements under discussion."[91]

In sum, treaties executed between Mexico and the United States, per the Vienna Convention and the Constitution of the United States, hold great weight and authority. This power cannot be easily ignored in the construction of a larger, more imposing border wall. Thus, courts must exercise great caution when balancing power between the amended IIRIRA and international treaty obligations and must soberly weigh the supposed goals of an untested border wall with the international community's trust in the United States and its respective treaty commitments.

### 2. *1944 Water Treaty*

The 1944 Water Treaty is an international agreement between the United States and Mexico. The treaty "allocates the waters of the two major international rivers between the two countries, stipulates the order of priorities for the use of these waters, provides for the construction of dams and other water infrastructure on the treaty rivers, and establishes a bi-national commission

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[89] *See* Mumme & Ibáñez, *supra* note 83, at 806-07 (citing the Vienna Convention, *supra* note 75, arts. 62.1 & 62.2).

[90] *Id.* at 806 (citing the Vienna Convention, *supra* note 75, art. 46).

[91] *Id.* at 807.

comprised of two national sections to oversee the Treaty's application."[92] The treaty primarily focuses on the allocation of the Rio Grande and the Colorado Rivers:

- "For the Colorado River basin, the United States is to provide Mexico annually with 1.5 million acre-feet (AF) of water.
- For the Rio Grande basin below Fort Quitman, TX: Mexico has the rights to two-thirds of the flows that feed into the Rio Grande from the six major tributaries that enter from Mexico: the Conchos, San Diego, San Rodrigo, Escondido, and Salado Rivers and the Las Vacas Arroyo (stream).
- [T]he United States receives all flows from Rio Grande tributaries in the United States and one-third of flows from the six Mexican tributaries.
- Mexico's water delivery from these six tributaries must average at least 350,000 AF per year, measured in five-year cycles.
- If Mexico fails to meet its minimum flow obligations for a five-year cycle because of "extraordinary drought"—a term not defined in the 1944 Water Treaty or in any minute—it must make up the deficiency during the next five-year cycle with water from the Mexican tributaries. Minute 234 established that Mexico may repay a water debt using three sources of water: (1) excess water from its tributaries; (2) a portion of its allotment from its tributaries; or (3) a transfer of its stored water in international reservoirs, such as the Falcon Dam and Amistad Dam, located on the Rio Grande on the border of Texas and Mexico."[93]

In addition to annual water allocation, the treaty exempts water delivery given "extraordinary drought or serious accident."[94] Thus, if Mexico was unable to deliver to the United States its defined allocation, the agreement instructs how the nation may make up its water debt "at the end of one five-year cycle in the next five-year cycle."[95]

Since the ratification of the treaty, there have been various amendments and agreements tackling issues such as "operation and maintenance of cross-border sanitation plants, water conveyance during droughts, construction of dams, and water salinity problems."[96] The Secretary of State usually adopts these amendments and agreements without Congressional or Senate action because these actions are "agreed to by the executive branch pursuant to the authority of the 1944 Water Treaty…" and "are considered binding agree-

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[92] *Id*. at 811.

[93] Nicole T. Carter Et. Al, Cong. Research Serv., R43312, U.S.-Mexican Water Sharing: Background and Recent Developments 7-8 (2017).

[94] *See* 1944 Water Treaty, *supra* note 79, Art. 4(B)(c).

[95] Allie Alexis Umoff, *An Analysis of the 1944 U.S.-Mexico Water Treaty: Its Past, Present, and Future*, 32(1) U.C. Davis L. Rev. 69, 75 (2008).

[96] Carter Et. Al, *supra* note 93, at 6.

ments between the United States and Mexico...."[97] To illustrate, in Fall 2017, Minute 319, facing expiration, was extended and renamed Minute 323, and "requires the United States to invest millions of dollars in water conservation projects in Mexico...and allows Mexico, which has no significant reservoirs in the Colorado basin, to store some of its water north of the border. In return, the U.S. will receive a portion of the Colorado River water to which Mexico has historically been entitled."[98]

Minute 323 also includes agreements of water allocation, pulse flows, and investments, all geared towards water conservation.[99] Because this minute is incorporated into the treaty, upon action by any U.S. president to pursue a southern border wall, should said wall interfere with this agreement, Mexico may petition the International Border and Water Commission (hereinafter IBWC).

Under the 1944 Water Treaty, the IBWC implements and enforces the agreement's terms. The IBWC "is an international body consisting of U.S. and Mexican Sections, each led by a commissioner, two principal engineers, a legal adviser, and a foreign affairs secretary."[100] The United States commission, the USIBWC, located in El Paso, Texas, "is a federal agency that operates under the foreign policy guidance of the Department of State" and whose commissioner is presidentially appointed.[101] When the two nations enter into dispute, the dispute is referred to the IBWC and if the commission is unable to resolve the disagreement, "the dispute is to be settled through diplomatic channels between the United States and Mexico. Article 24 also provides that the countries may seek recourse in any 'general or special agreements which the two Governments have concluded for the settlement of controversies.'"[102] While this recourse has not been historically accessed, should U.S. courts continue to rely on the DHS Secretary's waiver power in finding the Secretary's actions to be constitutional, it is likely that this treaty will be infringed upon and Mexico will petition the IBWC.

The 1944 Treaty organizes the use of water into a hierarchy: first, domestic and municipal use; second, agricultural and stock-raising; third, electric power; fourth, other industrial uses; fifth, navigation; sixth, fishing and hunting; and last, any other beneficial uses, as determined by the Commission.[103] Notably absent from this list is water quality. However, as the first-ranked use is for domestic and municipal purposes, a rational reading would indicate that delivered water must be fit for human consumption. Nonetheless,

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[97] *Id.* at 6-7.

[98] Alastair Bland, *Environment is Big Winner in U.S.-Mexico Colorado River Agreement*, NEWSDEEPLY: WATER DEEPLY (Oct. 5, 2017), *available at https://www.newsdeeply.com/water/articles/2017/10/05/environment-is-big-winner-in-u-s-mexico-colorado-river-agreement*.

[99] *Id.*

[100] CARTER ET. AL, *supra* note 93, at 5.

[101] *Id.*

[102] *Id.* at 8.

[103] Umoff, *supra* note 95, at 76.

this omission led to a long-standing dispute between the nations and greatly challenged the resolution powers of the IBWC. To illustrate, in the 1960s, the United States delivered to Mexico, water with excessive salinity levels.[104] While the United States argued that Mexico should not complain about the quality of water because the nation received more water than dictated by the treaty, Mexico cited Article 3 of the 1944 Water Treaty, stating that Mexico's water purposes included domestic and agricultural use and therefore, the water delivered did not appropriately qualify under the treaty's terms.[105] Following several failures in both amendments and agreements, the IBWC resolved the salinity issues in 1973 and required that the United States maintain lower salinity levels, aid in rehabilitating the damaged Mexican lands, and build additional drainage channels.[106]

The salinity crisis and the long-fought final solution to this water quality issue should dissuade the United States from building a wall without environmental impact studies. Because "[t]he proposed wall could adversely affect three major rivers – the Rio Grande, Colorado, and Tijuana – and their tributaries that crisscross the border…", the potential long-term costs, not only to Mexico, but to the United States, could be astronomic.[107] In the salinity case, because the United States ignored the water quality problem for many years, the IBWC found the nation liable for the economic losses to Mexico and responsible for building new infrastructure. Finally, prior to considering additional border wall construction, the United States should remember the long-standing, expensive salinity dispute in light of Article 17, relating to channels and international rivers states. This article states that "[t]he use of the channels of the international rivers for the discharge of flood or other excess waters shall be free and not subject to limitation by either country…."[108] Clear from this article is the prohibition of any fence or wall built unilaterally that impairs water flow. Because the DHS Secretary is exempt from performing environmental studies, any construction absent from said study will impact relevant international treaty waters.

Prior to summarizing the legal arguments against further southern border wall construction, in light of treaty law, this note turns to the 1970 Boundary Treaty and examines this treaty in relation to the amended IIRIRA. By looking at the 1970 Boundary Treaty, in conjunction with the 1944 Water Treaty, any question left unanswered on the legality of the United States unilaterally building a border wall, absent consultation with Mexico, will be satisfied.

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[104] *Id*. at 78.

[105] *Id*. at 79.

[106] *Id*. at 80.

[107] Amena Saiyid, *Trump's Border Wall Could Trouble Waters with Mexico*, Blomberg BNA Env. & Energy Rep. (Jul. 24, 2017), *available at https://www.bna.com/trumps-border-wall-n73014462200/*.

[108] Mumme & Ibáñez, *supra* note 83, at 813.

3. *1970 Boundary Treaty*

The boundary between the United States and Mexico is dynamic and flowing. It is neither a straight line, nor is it solely on dry land. Rather, per the 1970 Boundary Treaty, the border, as agreed upon by the two countries, demarcates a boundary "that falls into the Rio Grande's riverbed."[109] Per Mumme, the border is established along a "complex place geographically [and] traverse[s] through numerous ecosystems."[110] This boundary line is not conducive for a solid wall. A fact made evident by fence construction under the Bush administration, performed in direct conflict with Mexico's wishes. Consequently, the present border fence is a constant reminder to the Mexican Government that the United States failed to comply with treaty agreements.[111] Here, tensions are already peaked and "[i]f the U.S. government goes for a major construction project at the border without consulting, then that would be taken as a slap in the face by the Mexican Government."[112]

Despite the 1970 Boundary Treaty being viewed as "one of the most important agreements between the United States and Mexico in the twentieth century," both past and present presidential administrations conveniently ignore(d) the terms of the treaty, which include qualifications on building security infrastructure along the U.S. boundary.[113] For example, Article IV of the Boundary Treaty expressly "restricts the parties from unilaterally developing, without consent, any works that would impede the drainage of water to the rivers or otherwise alter the locations of the boundary that follows the center of the rivers."[114] This article further demands that, "[i]f the Commission [IBWC] should determine that any of the works constructed by one of the two Contracting States in the channel of the river or within its territory causes such adverse effects on the territory of the other Contracting State, the Government of the Contracting State that constructed the works shall remove them or modify them and, by agreement of the Commission, shall repair or compensate for the damages sustained by the other Contracting State."[115] Should Mexico assert its rights with the Commission, the United States may face large economic repercussions, be forced to remove any constructed wall found to violate the treaty, and repair all damage done as a result of the construction.

Looking back to the 1944 Water Treaty and its terms on water allocation, the building of a border fence under President Bush and the future plans to

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[109] Saiyid, *supra* note 107.

[110] *Id.*

[111] *Id.*

[112] *Id.* (quoting Duncan Wood, director of the Wilson Center's Mexico Institute).

[113] Mumme & Ibáñez, *supra* note 83, at 808.

[114] *Id.*

[115] *Id.* at 809.

build a wall under President Trump violate, not just one, but two treaties. Notably, the 1970 Treaty allows for construction if the goal is to prevent erosion or to build channels to maintain the integrity of the "limitrophe channel."[116] However, this provision is limited in scope because the IBWC must approve of the assembly and further, any construction must be done on the respective nation's own land.[117] Clearly, the fence erected under President Bush failed to adhere to these requirements, for it was placed arbitrarily (where convenient), and the Commission was not consulted prior to said fence's construction. In fact, the "DHS's construction of barriers along the lower Rio Grande River as authorized by the 2006 Secure Fence Act prompted the U.S. section of the IBWC to issue a note to the DHS reminding it of these treaty obligations…."[118] Unfortunately, this note was largely ignored by the DHS and due to this precedent, a reasonable forecast of the border wall proposed under President Trump is the dubiousness that future construction will respect these treaty obligations. It is clear, prior to September 11, 2001, the 1970 Boundary Treaty did not face great challenge. Nonetheless, following the terrorist attack, once the U.S. Government concluded that security necessitated a larger and longer southern border wall, the DHS illegally set aside the terms of two international treaties and currently plans to continue this trend under the Trump administration's plans for a new border wall.

4. *Discussion*

In sum, under treaty law, President Trump's proposed border wall is not legally sound. Because the 1944 Water Treaty and the 1970 Boundary Treaty are self-executing, their terms undoubtedly reign supreme per the Supremacy Clause. Under the Supremacy Clause, no state law may interfere with the treaties' terms. Second, regarding the 1944 Water Treaty, both countries are obligated to deliver to the other, a clearly defined allocation of water. Absent drought or serious accident, water must be delivered and compatible with the hierarchy of water use. This obligation is not easily altered. Per Vienna Convention Articles 60 and 62, discussed *supra*, a country is severely limited in what justifies a failure to adhere to treaty obligations. The United States has yet to acknowledge the probable impacts a border wall may have upon water delivery to Mexico and further, has no justifiable reason to one-sidedly alter the treaty's terms through unilateral action. When combined with the newly signed Minute 323, what is clear is that relevant Mexican and American groups concerned with and most familiar with the 1944 Water Treaty's obligations, wish for the bi-lateral duties to continue and strengthen.

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[116] *Id.* at 808.

[117] *Id.* at 808-09.

[118] *Id.* at 809.

Notwithstanding this evident desire, President Trump, via Executive Order 13767 and the DHS Secretary, through numerous waivers of environmental laws, equally ignore this contractual international relationship.

Along a similar vein, the 1970 Boundary Treaty established a border between the two countries that includes a 'line' running through international waters. Unfortunately, the Bush administration established precedent for encroachment of this boundary by physical construction and a fair prediction is that the Trump administration and the DHS, will likely follow suit and run afoul with the Vienna Convention. Because the 1970 Boundary Treaty terms debatably fall under the control and terms of the Vienna Convention, the Convention's restrictions apply to any thought of treaty revocation and/or unilateral action. If the United States continues to disturb these treaties, not only will relations with Mexico sour, but the international community will hesitate to enter and trust treaty agreements with the United States. Finally, despite the IIRIRA being drafted and amended well after the 1944 Water Treaty and the 1970 Boundary Treaty were ratified and notwithstanding the language of the federal law impliedly conflicting with the treaties' obligations, the waiver of power bestowed upon the Secretary must not be interpreted as purposefully infiltrating and defeating the treaties' language. Nowhere in the IIRIRA's language, either originally written or subsequently amended, does it state that its purpose was to override the international treaties and therefore, the President cannot make such a leap to believe that, absent expressly clarifying such a break, that the IIRIRA intentionally interferes with treaty obligations.

## V. Conclusion

In sum, following an initial examination into the IIRIRA with its expansive amendments, shadowed by a briefing of court opinions and the disconcerting track judicial opinion maintains to favor unprecedented waiver of authority, and finally, exploring treaty law and its power under the United States Constitution, it is clear is that the purpose of Executive Order 13767, to "deploy all *lawful* means to secure the Nation's southern border…through immediate construction of a physical wall"[119] fails against legal challenge.

First, the IIRIRA, in its present form is antagonistic to separation of powers:

> [t]he waiver authority in § 102(c) is directly contrary to public policy. It delegates to a single executive official the sweeping authority to unilaterally and with unfettered discretion waive all legal requirements across up to 6000 miles of U.S. international border, potentially affecting millions of people who live in the U.S. borderlands, with no available recourse. That a single, unelected

[119] Exec. Order No. 13767, *supra* note 8, §§ 1-2.

> official with such sweeping power could be shielded from all accountability is simply abhorrent to the idea of separation of powers, an essential part of democracy.[120]

Section 102, with its unfettered waiver of power, led to countless laws being ignored in the construction of President Bush's border fence under the "statutory mandate to complete the 700 miles of authorized fencing" and, more recently, under President Trump's Executive Order 13767, to construct a "contiguous, physical wall or other similarly secure, contiguous, and impassable physical barrier."[121]

In addition to violating the separation of powers doctrine, caselaw illustrates other constitutional challenges lodged against Section 102, namely nondelegation doctrine intrusions, Presentment Clause violations, and impermissible judicial review limitations. However, as seen from *Defenders of Wildlife*, *Save Our Heritage Org.*, and *County of El Paso* cases, District Courts continue to summarily dismiss these arguments. One pervading reason behind judicial hesitation to tackle the constitutionality of the broad waiver is a "foreign-affairs rationalization."[122] When the judiciary encounters laws enforced by the executive relating to foreign affairs, courts historically defer to these laws and while this deference is often appropriate, here, because the courts refuse to employ a balancing test between the objectives of the border wall and the laws infringed upon by its construction, this deference upsets the delicate balance of power among the three branches.

Last, due to the judicial tendency to uphold as constitutional the DHS Secretary's waiver power, challengers of border wall construction should look to different laws in which to supplement their arguments. Petitioners should look to treaty law and the authority treaties enjoy under both the U.S. Constitution and the Vienna Convention. Important to note, despite treaties being acknowledged as the "supreme law of the land," "the proper place for treaties in our federal system has been contested since the founding" and therefore, the tension between federal statutes and treaty obligations is still ripe for debate.[123]

International treaties are unique in that their authority supersedes the majority of domestic legislation and "[f]ailure to abide by these agreements could prove costly to the United States in terms of its international prestige and complicate future efforts to move forward on matters related to environmental cooperation that affect U.S. citizens at the border and in the interior as well."[124] Should the United States continue to ignore the terms of the 1944 Water Treaty and the 1970 Boundary Treaty, due to rising "nationalism and

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120 Neeley, *supra* note 3, at 165

121 Exec. Order No. 13767, *supra* note 8, § 3.

122 Tisler, *supra* note 2, at 785.

123 Huang, *supra* note 71, at 2216.

124 Mumme & Ibáñez, *supra* note 83, at 804.

indignation about the United States fence/wall project," Mexico may well assert its treaty rights and pursue judicial redress.[125] Mexico will have a strong claim to counter border wall construction because the present border, per treaty terms, runs through rivers and thus, even if physically possible to build a wall in the exact outlines demarcation, the wall will drastically impact water flow and water quality. More likely, however, is that any constructed wall will not go across rivers, but, instead, will be arbitrarily located, in clear violation of the 1970 Boundary Treaty.

This nonchalance of ignoring treaty agreements reflects poorly upon the United States. Because "treaties obtain their legal force from the reciprocal international obligation of 'good faith' performance, and irrespective of their effect within the domestic law of the treaty partners,"[126] the United States' Government, "for all their sovereign justification" in a post September 11th world, "[is] not exempt from these international obligations."[127] Should the judiciary take the reins and hold the waiver power of the Secretary as contrary to treaty law, the executive branch may argue that the treaty power, as stipulated in Article II, allots them special control over treaties; however, "the inclusion of treaties in both the Supremacy Clause of Article VI and the judicial power of Article III makes clear that, where their substance so directs, the constitutional product of treaties is fundamentally the same as Article I legislation: judicially enforceable supreme federal law."[128]

In close, while the United States is clearly in a different social, cultural and political conviction post-September 11, 2001, there is "little justification for exempting itself from its…treaty commitments, notwithstanding its legitimate national security interests."[129] Treaty law compels the United States to maintain its obligations to respect the border of the 1970 Boundary Treaty and continue to allow water to flow per the 1944 Water Treaty. These treaties, already threatened under President Bush's border fence will indubitably be violated to greater extent with further construction. The United States judiciary, already tested under the new administration's policies, must continue to question the President's Executive Orders and find that the waiver authority of Section 102 of amended IIRIRA is contrary to treaty laws and to the authority bestowed to them under the U.S. Constitution.

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[125] John Burnett, *Mexico Worries That a New Border Wall will Worsen Flooding*, NPR (April 25, 2017), *available at http://www.npr.org/2017/04/25/525383494/trump-s-proposed-u-s-mexico-border-wall-may-violate-1970-treaty*.

[126] Van Alstine, *supra* note 74, at 904.

[127] Mumme & Ibáñez, *supra* note 83, at 804.

[128] Van Alstine, *supra* note 74, at 953.

[129] Mumme & Ibáñez, *supra* note 83, at 824.

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# DIFFICULTIES IN IDENTIFYING UNACCOMPANIED REFUGEE CHILDREN IN MIXED MIGRATION FLOWS: THE CASE OF MEXICO AND CENTRAL AMERICA

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Abstract: *This article aims to study and analyses the different problems, realities and challenges faced by children and adolescents that require international protection in the case of Mexico and Central America. This is due to the fact that the phenomenon of human mobility from a human rights perspective has not been a priority in the Americas region. On the contrary, this phenomenon is seen from a national security perspective, which causes that children and adolescents who require international protection are unnoticed as a result their human rights are easily attacked making them vulnerable. Due to international laws on refugees, this article proposes to find possible solutions to protect their human rights and rights recognized by refugee law. Firstly, the identification of unaccompanied refugee children and adolescents within the mixed migratory flows in the case of Mexico and Central America. Secondly, it also aims to find possible solutions to give them access to the asylum procedure as a result to protect their rights such as non-refoulement and the best interests of the child. Rights not only recognized by international refugee laws, but also by international human rights law, which are mandatory and part of the international obligations on those countries of study.*

Keywords: *Refugee children, invisibility of childhood, vulnerability, refugee law, and rights of children.*

Resumen: *Este artículo tiene la finalidad de estudiar y analizar los diferentes problemas, realidades y desafíos que enfrentan los niños, niñas y adolescentes que requieren protección internacional en México y en Centroamérica. Lo anterior, debido a que el fenómeno de la movilidad humana desde una perspectiva de derechos humanos no ha sido una prioridad en la región de Las Américas. Al*

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*contrario, este fenómeno es visto desde una perspectiva de seguridad nacional, la cual provoca que las personas menores de edad que requieren protección internacional pasen desapercibidas y sean agredidos sus derechos humanos haciéndolos vulnerables. Debido a la normas internacionales en materia de refugiados, este artículo propone encontrar posibles soluciones para proteger los derechos humanos de este grupo poblacional. Por una parte, la identificación de niños, niñas y adolescentes refugiados no acompañados dentro de los flujos migratorios mixtos en el caso de México y América Central. Asimismo, se tiene la finalidad de encontrar posibles soluciones para brindarles acceso al procedimiento de asilo y así proteger sus derechos como el de la no devolución y el interés superior del niño. Derechos no sólo reconocidos por el derecho internacional de los refugiados, sino también por el derecho internacional de los derechos humanos, los cuales son obligatorios en los países de estudio.*

Palabras Clave: *niños, niñas y adolescentes refugiados, invisibilidad de la niñez, situación de vulnerabilidad, derecho de los refugiados y derechos de los niños.*

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## I. Introduction

In recent years mixed migration flows have occurred in numerous countries. Those who decide to migrate do so for different reasons: because of extreme poverty, to improve their working conditions or their quality of life, for family

reunification purposes, as a result of persecution or because of a combination of these and other reasons. The diversity of migrant populations and the enormous challenges represented by their need to migrate means that mixed migration flows have become a highly complex phenomenon.

Amongst such populations, refugees represent an important group because of their unique status under international law. The right to seek asylum is enshrined in the UN Convention relating to the Status of Refugee and the 1967 Protocol, and in other universal and regional instruments. Despite this one of the most vulnerable population groups travels among refugees: unaccompanied children, who also utilize mixed migration flows to escape and find international protection. There are many reasons for children and adolescents to flee from their country of origin without the support of an adult. Those can include persecution, international conflicts and civil war, trafficking in various contexts and forms (including sale by parents), and the search for better economic opportunities.

This population has become more visible in the international arena since 2014, as there has been a notable increase in the number of unaccompanied children and adolescents arriving to the United States.[1] In addition, the United Nations High Commissioner for Refugees (UNHCR) has stated that children in need of international protection remain in a particularly vulnerable situation and without access to protection.[2] In the case of Mexico and Central America the matter has become more visible due to the difficulties and violations of their basic rights during their journey to their final destination, the United States and, to a lesser extent, to Canada.

This article aims, firstly, to delve into the complexity of mixed migration flows in Mexico and Central America. Secondly, it will identify why unaccompanied refugee children are one of the most vulnerable groups among mixed migration movements. And, finally, it will examine the role of international law in addressing these factors and in extending international protection to children among mixed migration movements.

## II. Mixed Migration Flows

The phenomenon of migration has occurred throughout human history. It is often conceptualized as the movement of people from a certain point of origin to another across borders, or from their place of birth to a destination

[1] Katie Zezima and Ed O´Keefe, Obama calls wave of children across U.S.-Mexican border urgent humanitarian situation, The Washington Post, June 2, 2014, *available at http://www.washingtonpost.com/politics/obama-calls-wave-of-children-across-us-mexican-border-urgent-humanitarian-situation/2014/06/02/4d29df5e-ea8f-11e3-93d2-edd4be1f5d9e_story.html*.

[2] U.N. UNHCR, Regional Office for Mexico, Cuba and Central America, The International Protection of Unaccompanied or Separeted Children Along the Southern Border of Mexico (2008).

across international borders. In sum, migration is a complex phenomenon that involves two or more States as countries of origin, transit, and destination.

According to International Organization for Migration, mixed flows are defined as complex population movements. The complexity is due to the fact that these movements normally encompass a combination of refugees, asylum seekers, economic migrants, environmental migrants, victims of human trafficking, and others.[3] These complex movements are often realized through unconventional or irregular means that make the phenomenon much more difficult to identify, and makes the different motivations of migrants difficult to determine. For instance, in 2013, there were 232 million international migrants worldwide; in the Americas alone there were approximately 61,617,229 migrants.[4] According to UNHCR, as of late 2014 around 806,000 persons on the Americas were refugees or persons needing international protection. The main reason for the sharp increase in the number of asylum seekers is a combination of armed conflicts, deterioration of security or humanitarian situations, and human rights concerns in a number of countries.[5] In addition, the Americas continue to witness large-scale mixed movements originating from within and outside the region by land and sea, in addition to the trafficking of human beings. According to U.S. Customs and Border Protection, between October 2013 and September 2014, a total of 67,339 unaccompanied children and a further 68,445 family units were apprehended along the United States southern border.[6]

The greatest challenge in the region with regards to migration is the implementation of effective identification and referral mechanisms for vulnerable migrants and refugees both at borders and within national territories.[7] Thus, it is necessary to identify and/or develop appropriate tools for identifying people in need of international protection amongst mixed migration flows.

### 1. *Differences between Refugees and Migrants*

In any analysis of migration, a basic distinction between refugees and other migrants is essential. The criteria for distinction is based on the moti-

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[3] International Organization for Migration (IOM), International Migration Law: Glossary on Migration 42 (2004).

[4] U.N. Dep't of Int'l ECON. & SOC. Affairs, International Migration Report: Levels And Trends In International Migrantstock, U.N. Doc. ST/ESA/SER.A/346, New York (2013).

[5] UNHCR, UNHCR Asylum Trends, 2014: Levels and Trends in Industrialized Countries 7 (2015).

[6] U.S. Dep't of Homeland Security, Customs and Border Protection, Southwest Border Unaccompanied Alien Children (2015), *available at http://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children*.

[7] U.N. UNHCR, Refugee Protection and International Migration: Trends August 2013-JULY 2014, at 16 (2014).

vations for migrating from the country of origin to another country. Whilst those in the former category are forced to migrate, those in the latter choose to move voluntarily. In addition, if refugees return to their country of origin, they would be seriously threatened in their essential rights to life, security and freedom. The latter voluntarily leave their country in order to take up residence elsewhere, and migrants returning to their country of origin would not suffer persecution. They may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If they are moved exclusively by economic considerations, they are economic migrants and not refugees.[8] Although the differences between migrants and refugees may seem simplistic, the truth is that it has become increasingly difficult to accurately divide migrants into separate categories, given that the causes of displacement may be several, which are often interrelated or unclear.[9] Real factors can remain hidden as part of the complexity of migration movements, which is constantly influenced by changing migration trends, social and economic dynamics, transportation methods, transit routes and entry points.

To illustrate the importance of identifying potential refugees in the context of mixed migration movements and the risks of making simplistic distinctions, let's take poverty and inequality as key factors. At first appraisal, both could be easily deemed causes of economic-related migration. However, behind a country's economic standards, which affect a person's livelihood, there may also be discriminatory measures against persons because of nationality, race, religion, political opinion or because of membership in a particular group. The UNHCR has stated that persecution arises if discriminatory measures lead to consequences of a substantially prejudicial nature for the person concerned. In other words, if such measures endanger or destroy the economic, social or cultural existence of a particular group, e.g. by imposing serious restrictions on their right to earn a livelihood, their right to practice a religion, or their right to access public educational facilities.[10] In this light, poverty and inequality become relevant factors for granting refugee status because there are political elements involved in meeting the refugee definition. Making a correct appraisal of the migrant or refugee status requires a thorough examination of all circumstances, and characterization on a case-by-case basis.

Persecution, therefore, may also be determined by means of aggregating a number of lesser violations,[11] such as those of social, economic and cultural character within the scope of the rights defined by the 1966 Covenant on Economic, Social and Cultural Rights. The Covenant contemplates the pro-

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[8] U.N. UNHCR, Handbook and Guidelines On Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees 16 (2011).

[9] U.N. UNHCR, Sovereignty and Irregular Migration: The Dynamics of Irregular Movement Through Colombia and Ecuador 4 (2013).

[10] UNHCR, at 7, 14 [54].

[11] Oh v. Minister of Citizenship and Immigration (2009).

gressive implementation of said rights through various obligations levied on State Parties including an avoidance of the adoption of regressive measures, safeguarding the core elements of each right, and ensuring non-discrimination in the enjoyment of such rights.[12]

Restrictive or discriminatory measures must be assessed in the light of all circumstances of a particular case. With regards to children, these are important elements because they are essential rights that must not be limited. For example, birth registration is of utmost relevance to reduce statelessness, as well as to prevent exclusion from educational and health services,[13] each of these three essential rights on its own fulfills the definition of a refugee. In Central America and Mexico it has been reported that one of the main reasons for unaccompanied child migration is that children have experienced some sort of social exclusion including but not limited to deprivation of education, employment opportunities, medical services, and even food.[14]

Another example that explains the difficulties in the identification of refugees from other migrants is when a person is affected by a radical change of circumstances after leaving his or her country of origin. One example of this is when he or she has left for purely economic reasons, but then other circumstances occurring in his/her country of origin while traveling or during his/her absence makes him/her the target of persecution and, as a result, he/she qualifies for refugee status. This is what is called a refugee *sur place*, namely, a refugee who was not a refugee when he or she left his or her country, but became a refugee at a later date.[15]

As mentioned, distinguishing between a refugee and a migrant is becoming more difficult and complex. Although the traditional distinction criteria by which those who choose to move voluntarily are migrants and those who are compelled to do so are refugees, seems to be a fairly clear-cut one, there are a myriad of factual circumstances that can blur the line of distinction. Nonetheless, according to the Inter-American Court of Human Rights, States are compelled within their territorial jurisdictions to identify foreign people requiring international protection, either as refugees or otherwise, through an initial evaluation with guarantees of safety and confidentiality in order to provide them with adequate and individualized protection measures.[16] The establishment of procedures to clearly identify these people and

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[12] U.N. Commission on Human Rights, Note Verbal Dated 86/12/05 From the Permanent Mission of the Netherlands to the United Nations Office at Geneva Addressed to the Centre for Human Rights ("Limburg Principles"), 43rd sess, UN Doc E/CN.4/1987/17 at B.16 21-22 (1987).

[13] Committee on the Rights of the Child (CRC), General Comment No. 9: The Rights of Children with Disabilities, 43RD sess, UN Doc CRC/C/GC/9, 35-36 (2007).

[14] Centre for Gender & Refugee Studies, Childhood and Migration in Central and North America: Causes, Policies, Practices and Challenges 8 (2015).

[15] UNHCR, at 7, 19 [94].

[16] Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection (Advisory Opinion OC-21/14), Inter-Am Court HR, 34 [82] (2014).

process requests in a timely and effective manner for international protection constitutes a positive obligation of State agencies as well as Courts; failing to implement them effectively may constitute a lack of due diligence and eventually result in State liability.[17] In the Americas there is an international obligation for both transit and destination States to identify individuals in need of international protection from other migrants not in need of such protection, including with regards to unaccompanied children among mixed migration movements.

### 2. *Difficulties Facing Child Refugees and Asylum Seekers Among Mixed Migration Flows*

Within mixed migration movements, most of the refugees and asylum seekers, including children, move from one country to another in an irregular manner and in precarious conditions. These movements generally take place without legal documentation and frequently involve human smugglers and traffickers, migrants place their lives at risk as they are obligated to travel in inhumane conditions and as a result they may be exposed to abuse and exploitation. Generally, refugees and asylum seekers try to avoid screening processes by official authorities because they fear being detained and returned to their country of origin, from where they tend to be fleeing. Many of them may be escaping from persecution by state actors, resulting in heightened levels of trauma and fear. This results in severe distress and fear of being persecuted by the authorities of either the transit or the destination state. For these reasons, refugees and asylum seekers prefer travelling unnoticed, making their identification and classification difficult. The Inter-American Commission on Human Rights has argued that migrants in irregular situations, including refugees and asylum seekers, are the most vulnerable because they are in the greatest danger of being victims of rights abuses and violations.[18]

Despite the aforementioned difficulties, States must take all necessary measures to identify unaccompanied children requiring international protection at the earliest possible stage, including at the border.[19] To do this, it is neces-

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[17] Velásquez Rodríguez Case v. Honduras, 4 Inter-Am HR (Ser. C), 31-33 [164-177] (1988).

[18] In the Commission's view, migrants in an irregular situation face a structural vulnerability in which they are subject to arbitrary arrest and a lack of due process; collective deportation; discrimination in access to the public and social services to which foreign-born nationals of other states are entitled by law; inhumane detention conditions; unlawful harassment by police and immigration authorities; obstacles in accessing and getting justice for crimes committed against them and an inability to defend themselves when exploited by unscrupulous employers.

Inter-American Commission on Human Rights, Human Rights of Migrants and other Persons in the context of Human Mobility in Mexico, OAS Doc Ser L/V/VII 41 [82-83] (2013).

[19] CRC, General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 39th sess, UN Doc CRC/GC/2005/6, 7 (2005).

sary to interview all unaccompanied children in order to properly identify a child at risk and later to decide how to handle cases involving children based on information obtained in interviews. States must also consider factors such as child's maturity, age, and vulnerability. This is imperative because children may not be in a position to provide relevant information about their experiences to unknown persons, particularly regarding the traumatic situations that they may have suffered. As a result, they may not be able to provide accurate information with proper context, information on timing, and details of events the way adults can. Similarly, children may only have very limited knowledge of the conditions in their country of origin.[20] Often, adult individuals themselves may not be aware of the full reasons of the persecution they fear. It is not, however, up to immigration officers to delve into their cases to such an extent as to ascertain such reasons in detail.[21] Whether obtained from adults or children, all information gathered should be considered relevant to identify potential unaccompanied refugee children.

Another challenge is that in Mexico and the United States, unaccompanied children are routinely denied entry or are detained at the border by immigration officers. This means not only that they are denied access to asylum procedures; but also, points to a failure to provide counseling and information about their rights,[22] including the right to seek and receive asylum. This amounts to a limitation of their access to this right, especially considering most unaccompanied children likely lack such knowledge.

A further difficulty is that either at the starting point or while on route, criminal smuggling and trafficking is often the sole option to reach the destination, and thus, protection. Illegal activities can also represent obstacles to the proper and timely identification of refugees who are minors. Moreover, depending on the level of sophistication, control or disregard employed by perpetrators, victims may continue to experience fear or harm while travelling and even after reaching their destination. It is also possible that they could be blackmailed regarding their own situation in the destination country or by way of their relatives and families remaining in the country of origin. According to the Unaccompanied Children's Services Division of the US Department of Health and Human Services, human smuggling through criminal organizations has become especially troublesome due to the physical and psychological effects on children. Increasingly, children have become targets for physical and sexual abuse by traffickers during their journey to the United States. It is not uncommon for the Unaccompanied Children's Services Division to assist children that have arrived in the United States claim-

[20] U.N. UNHCR Guidelines on Determining the Best Interests of the Child 60 (2008).

[21] Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, above n 8, 16 [66].

[22] Centre for Gender & Refugee Studies, above n 14, 17-21.

ing special needs or requiring specialized professional services due to teenage pregnancy, acute mental illnesses or psychological trauma, severe depression, and otherwise.[23]

There are many other reasons unaccompanied children are particularly vulnerable to human trafficking. One is because they are unable to keep contact with either their families left behind or with the authorities of the country of asylum or transit. Further, specific profiles of children and adolescents contribute to the vulnerability of being trafficked e.g. victims may be targeted on the basis of their ethnicity, gender, age, social subsets, economic situation, and lack of education and opportunities, to name a few.

Finally, it is worth mentioning that not all children are victims or potential victims of trafficking, within the scope of the refugee definition.[24] However, belonging to such a group may be a factor contributing to double victimization. Despite the fact they cannot benefit from the 1951 Convention and the Cartagena Declaration; minors may be eligible for complimentary protections that guarantee the rights of children.[25]

## III. Refugee Children

According to the Committee on the Rights of the Child, enjoyment of the rights stipulated in the Convention on the Rights of the Child (CRC) is not limited to children who are citizens of a State Party. Such rights —if not explicitly stated otherwise in the Convention— must be available to all chil-

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[23] Chad C. Haddal, Unaccompanied Alien Children: Policies and Issues 19 (2007).

[24] UNHCR, Guidelines on International Protection No. 7: The Application of Article 1A(2) Of The 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked, UN Doc HCR/GIP/06/07, 3 (2006).

[25] Since the phrase 'complementary protection' is not a term defined in any international instrument, it seems prudent from the outset to understand the nature of the protection regimes that this study aims to examine. The term 'complementary protection' has emerged over the last decade as a description of the increasingly apparent phenomenon in industrialized countries of relief from removal being granted to asylum seekers who have failed in their claim for 1951 Convention refugee status. Complementary protection is a generic phrase, with the actual terminology used by states to describe such forms of protection in their territory, including any attached immigration status, varying enormously: 'subsidiary protection,' 'humanitarian protection' and 'temporary asylum' are just a few examples.

What all these initiatives have in common is their complementary relationship with the protection regime established for refugees under the 1951 Convention/1967 Protocol. They are intended to provide protection for persons who cannot benefit from the latter instruments even though they, like Convention refugees, may have sound reasons for not wishing to return to their home country.

UNHCR, Protection Mechanisms Outside of the 1951 Convention "Complementary Protection", UN Doc PPLA/2005/02, 2 (2005).

dren, including asylum seekers, refugee and migrant children, irrespective of their nationality, immigration status or statelessness.[26] There is an obligation for States, in all circumstances and without distinction of any kind, to respect all human rights of persons under their territorial jurisdiction. Therefore, when a child migrant is identified, that child must receive information about their rights including the right to seek and receive asylum and all necessary guidance as to the procedure to be followed[27] before a clearly identified authority.[28] This could be the first step in identifying children in need of international protection among mixed migration flows.

As already identified, children are one of the most vulnerable population groups at risk of persecution due to their condition and their physical and emotional development. Further, children are exposed to specific forms of persecution.[29] Indeed, children can become victims of recruitment into armed forces or armed groups such as gangs and organized crime organizations, or be forced into sexual exploitation, gender-based violence, child trafficking, abuse and several other forms of violence. Refugee children face the same forms of persecution as adults, but may experience them differently —most of the time, in an aggravated manner— when factors such as immaturity, vulnerability, undeveloped coping mechanisms, and social, economic, and emotional dependency are taken into account.

Although refugee children are entitled to access the same protection as adult refugees, in relation to substantive aspects of refugee law and related-procedures their special vulnerabilities require adopting an age-sensitive approach,[30] especially when special forms of persecution against them are clearly identified. Similarly, the Committee for the Rights of the Child of the Office of the United Nations High Commissioner for Human Rights has argued that States must implement age and gender sensitive asylum procedures, and that the interpretation of refugee status must be age and gender sensitive.[31]

Child-sensitive screening and referral procedures mean that asylum claims made by unaccompanied children should be processed on a priority basis and they will be entitled to special protection and consideration for their as-

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[26] General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, above n 19, 7.

[27] Executive of the United Nations High Commissioner for Refugees (ExCom), Determination of Refugee Status, 28 sess, 8, (1977), e (ii).

[28] *Ibid.* at (iii).

[29] *Ibid*. at b and x (viii).

[30] This argument is based on the importance of certain factors that should be taken into account regarding children such as their age, their level of maturity and development and their dependence on adults.

[31] General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, above n 19, 18.

sistance needs, for instance, those arising from physical and psychological abuses that they may have suffered while travelling.

Another feature of child-sensitive asylum procedures is that in the case of unaccompanied or separated children, tailored interventions in child protection are required, as are independent, qualified guardians,[32] who need to be appointed immediately.[33] Children are entitled to legal representation by guardians who are properly trained and capable of supporting them throughout the procedure.[34]

Before any action is taken, it is essential to conduct a best-interest assessment[35] for each individual child so as, to ensure sufficient focus on the child's well-being and the protection of their rights when choosing the most appropriate and durable solution; as well as determining the right timing for the adoption of said solution. The assessment must take into account a wide range of factors[36] and determine which of the available options is best suited to the child's specific circumstances in order to guarantee protection of his/her rights. This may require multiple reviews carried out by several qualified staff, agencies or relevant stakeholders.

Usually, the most appropriate and long lasting solution for unaccompanied children is tracking down their parents or relatives and promoting family reunification. However, in exceptional situations, children's rights experts might find a case where a regular solution is unavailable, unsuitable or even counterproductive, for instance, where returning the child to their parents or relatives might put the child at risk, as when an infant has been subjected to abuse or persecution by his/her parents or family members.[37] In the context of Mexico and Central America, the UNHCR has stated that a significant

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[32] "Guardian" here refers to an independent person with specialized skills who looks after the child's best interests and general wellbeing. Procedures for the appointment of a guardian must not be less favourable than the existing national administrative or judicial procedures used for appointing guardians for children who are nationals in the country. "Legal representative" refers to a lawyer or other person qualified to provide legal assistance to, and inform, the child in the asylum proceedings and in relation to contacts with the authorities on legal matters.

[33] ExCom, Children at risk, 58 sess, 107 (2007), g (viii).

[34] *Ibid.*

[35] A best interest determination describes the formal process designed to determine the child's best interests for particularly important decisions affecting the child that require stricter procedural safeguards. Such process should ensure adequate child participation without discrimination. It should also allow the views of the child to be given due weight in accordance with age and maturity. It involves decision-makers with relevant areas of expertise, and balances all relevant factors in order to assess the best option. *Ibid.* at 23.

[36] Information relating to conditions in countries of origin, motivations for movements, transportation means, transit routes and entry points. An international or regional organization may be well placed to offer support to this function.

UNHCR, Refugee Protection and Mixed Migration: a 10.point Plan of Action, at 2 (2011).

[37] UNHCR, Guidelines on Determining the Best Interests of the Child, above n 20, 36.

percentage of children have fled from their countries of origin because they have suffered from domestic violence by their caretakers.[38]

Considering these facts, in the case of harm inflicted or serious concerns related to potential domestic violence, temporary care should be provided until an appropriate and durable solution is found. This care must be provided by an appropriate care institution, capable of delivering the main necessities to children, without exposing them to risk.[39] In the case of Mexico, the Federal Protection Agency for Children and Adolescents, the institution in charge of child protection, must take into account important measures for the best interests of children.

However, there is also a negative interpretation of temporary care. One example of this is the situation of unaccompanied children in Mexico, as Mexican administrative immigration authorities restrict their freedom in the name of protecting their rights to safety and physical integrity.[40]

It is also important to note that adopting a child-sensitive approach on asylum policies and legislation does not necessarily mean that child asylum seekers are automatically entitled to refugee status.[41] Each child's case must be interpreted in accordance with the definition of refugee established in the 1951 Refugee Convention or in the Cartagena Declaration. Despite this, children who do not meet the universal definition or the broader definition of

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[38] U.N. UNHCR, Children on the run: Unaccompanied Children Leaving Central America and Mexico and the need for International Protection 7 (2014).

[39] Wider environmental risk factors include, but are not limited to: an insecure environment; lack of access to child-sensitive asylum procedures; situations of displacement, particularly protracted situations; statelessness; lack of sustainable solutions; poverty and families' lack of self-reliance opportunities; inadequate access to and use of services such as education and health care; disruption of family and community support structures; prevalence of traditional practices that are harmful to children; discrimination, intolerance, xenophobia, and gender inequality; lack of documentation of the parent-child relationship through birth registrations and issuance of birth certificates. There are also individual risk factors, including, but not limited to: unaccompanied and separated children, particularly those in child-headed households as well as those accompanied by abusive or exploitative adults; stateless children; adolescents, in particular underage mothers and their children; child victims of trafficking and sexual abuse, including pornography, pedophilia and prostitution; survivors of torture; survivors of violence, in particular sexual and gender-based violence and other forms of abuse and exploitation; children who are married under the age specified in national laws and/or children in forced marriages; children who are or have been associated with armed forces or groups; children in detention; children who suffer from discrimination; children with mental or physical disabilities; children living with or affected by HIV or AIDS; children suffering from other serious diseases; and children out of school. ExCom, above n 27, c.

[40] Comisión Nacional de Derechos Humanos, Informe sobre la problemática de niñas, niños y adolescentes centroamericanos en contexto de migración internacional no acompañados en su tránsito por México, y con necesidades de protección internacional, at 50 (2016).

[41] U.N. UNHCR, Guidelines on International Protection No. 8: Child Asylum Claims Under Articles 1(A) 2 And 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees, HCR/GIP/09/08, 3 (2009).

refugee, should be given other legal status during over the period required to protect their rights, safety and security. This could take the form of complimentary or subsidiary protection.

In accordance with the CRC, it is stipulated that children must be protected from any risk of irreparable harm. In the case of unaccompanied children the argument applies even more, for they are generally escaping violence perpetrated by armed criminal organizations, even if it is not the only reason.[42] Underscoring this idea, Goodwin-Gill and McAdman argue that children fleeing from generalized violence may have a right to protection arising from the CRC's requirement that a child's best interest be a primary consideration in all actions concerning them.[43]

## IV. Unaccompanied Refugee Children

According to the United Nations, unaccompanied children are children who have been separated from parents as well as other relatives, and who are not being cared for by an adult who, by law or custom, is responsible for doing so.[44] In turn, separated children are those who have been separated from both parents or from their previous legal or customary primary caregiver, but not necessarily from other relatives. The latter may, therefore, include children accompanied by other adult family members.[45]

The separation of children from their parents or caretakers may occur for a number of reasons. It could be because the child has witnessed or suffered violence, or experienced the disappearance or killing of their parents or another person on whom the child depends, or they may have a well-founded fear of persecution, even if they are not the direct target.[46] Under certain circumstances, the forced separation of a child from his or her parents is due to discriminatory custody laws or the detention of the child's parents, this could amount to persecution.[47] Therefore, it can be said that in some child asylum cases, the agent of persecution is frequently a non-state actor, can include her or his parents, caregivers or guardians. In Mexico and Central America some of the unaccompanied children have fled from their country of origin due to the consequences of domestic violence they have suffered in their homes.[48]

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[42] Children on the run: Unaccompanied Children Leaving Central America and Mexico and the need for International Protection, at 33, 46-51.

[43] Guy S. Goodwin-Gill and Jane McAdam, The Refugee in International Law 324 (OUP, 3ed. 2007).

[44] General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, at 19, [7].

[45] *Ibid*. at 8.

[46] Çiçek v. Turkey 67124/01 Eur Court HR [173-174] (2005).

[47] EM (Lebanon) v. Secretary of State for the Home Department, 5-6 UKHL 64 (2008).

[48] UNHCR, at 35, 6.

But also, it is not the only reason as mentioned above. Such harm has been recognized as potential basis for providing international protection, because of the child's vulnerability, dependency and, in many cases, the lack of ability to seek or be provided protection by the State.[49]

Another situation of vulnerability in which unaccompanied refugee children frequently find themselves in their journey is the absence of authorities from the State of origin or any other supporting adult. As a consequence, the vulnerability of the child increases, as they face obstacles against the full and effective protection of both their human rights and their rights as children.

On a different subject, although girls and boys face many of the same protection risks, they may also experience protection challenges related to their gender.[50] Taking into consideration gender and age factors, girls may suffer further vulnerability. This means there needs to be a clear understanding of the differences between sex and gender. According to the UNHCR, gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles, and responsibilities that are assigned to one sex or another; while sex is a biological determination.[51] Thus, a gendered approach should be considered in the identification of potential refugees so as to ensure equitable access to asylum procedures. This approach can help to clarify the specific forms of persecution most often feared by girls and women, for example: sexual and domestic violence; punishment, including accusations of adultery and discrimination for transgression of social mores; sexual orientation; female genital mutilation; and trafficking. Gender is not the only relevant factor for identifying types of persecution, age considerations are equally important in the identification of potential girl refugees amongst mixed migration flows. In sum, it is essential that the construction of the definition of refugee be inclusive enough to take into account both age and gender perspectives.[52]

## V. International Child Protection

There are a number of international instruments offering specific guidance regarding the rights and needs of children: the 1989 United Nations Convention on the Rights of the Child; the Optional Protocol to that Convention, on the sale of children, child prostitution and child pornography; the

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[49] *Ibid*. at 46.

[50] ExCom, at 30, fourth paragraph.

[51] UNHCR, Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1a(2) of the 1951 convention and/or its 1967 Protocol on the Status of Refugees, UN Doc HCR/GIP/02/01, 3 (2002).

[52] Alice Edwards, Age and gender dimensions in international refugee law´ Erika Feller, Volker Türk and Frances Nicholson (eds) Refugee Protection in International Law: UNHCR´s Global Consultations on International Protection 48 (Cambridge University Press, 2003).

1980 Hague Convention Number 28 on Civil Aspects of International Child Abduction; the Trafficking Protocol; and the International Labor Organization (ILO) Convention Number 182 on the Prohibition of the Worst Forms of Child Labor to name just a few. The 1951 Convention relating to Refugees makes no distinction between children and adults and thus applies to both. In turn, the Convention on the Rights of the Child establishes particular rights and principles applicable to all children, which supplements the meaning and scope of the 1951 Refugee Convention.

One example of this is the principle of child's best interests,[53]which entails priority consideration in the design of public policies and in drafting laws and regulations concerning childhood as well as in their implementation in all spheres that relate to the life of a child,[54] including when he or she demands international protection.

### 1. *The Convention on the Rights of the Child*

Since there are relevant principles and rights applicable to children, most of which are enshrined in the Convention on the Rights of the Child, a child sensitive understanding of refugee policies and actions is required. As to the former, there are four general principles, which must be of primary consideration in all actions affecting children, including unaccompanied refugee children. These principles are: the best interests of the child, no discrimination, the right to life ensuring to the extent possible the survival and development of the child, and the right to express their views freely. In their analysis of the best interests of the child, Jacqueline Bhabha and Wendy Young have said that this principle, as derived from Article 3 of the Convention on the Rights of the Child, operates as an interpretative aid to international refugee law, broadening and deepening the scope of protection, both in terms of substantive law and procedural mechanisms.[55]

The rights of the child include, but are not limited to: the right not to be separated from parents,[56] protection from all forms of physical and mental

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[53] Also, this principle describes the formal process with strict procedural safeguards designed to determine the child's best interest in particularly important decisions affecting the child. It should facilitate adequate child participation without discrimination, involve decision-makers with relevant areas of expertise, and balance all relevant factors in order to assess the best option. UNHCR Guidelines on Determining the Best Interests of the Child, above n 20, 8.

[54] Juridical Status and Human Rights of the Child, (Advisory Opinion OC-17/02), No 17, [28 August 2002], Inter-Am Court HR (Ser A), second operative paragraph.

[55] U.N. UNHCR, Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1a (2) of the 1951 convention and/or its 1967 protocol on the Status of Refugees, UN Doc HCR/GIP/02/01, 3 (2002).

[56] Article 9. (1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review deter-

violence, abuse, neglect, and exploitation,[57] protection from traditional practices prejudicial to the health of the child,[58] a standard of living adequate for child development,[59] the right not to be detained or imprisoned unless as a last resort measure,[60] and protection from under-age recruitment.[61] The Convention also recognizes the right of refugee children and children seeking refugee status to appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the Convention.[62]

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mine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

[57] Article 19. (1) States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

[58] Article 24. 1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (a) To diminish infant and child mortality; (b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care; (c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution; (d) To ensure appropriate pre-natal and post-natal health care for mothers; (e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents; (f) To develop preventive health care, guidance for parents and family planning education and services. 3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children. 4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

[59] Article 27 (1) States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

[60] Article 37. States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

[61] Article 38 (1) States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts, which are relevant to the child.

[62] Article 22. (1) States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable interna-

2. *The 1951 Convention and Refugee Status*

For international protection to be granted, an individual must satisfy the definition of refugee according to this international instrument. It is accorded to individuals when governments are unwilling or unable to protect their citizens, who suffer serious violations of their rights and thus are forced to leave their homes and families behind to seek safety in another country. It also requires that such a person has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

In Central America and Mexico, organized crime and domestic violence[63] represent two overarching patterns of harm related to potential requests for international protection. Although these are the most common justifications employed by potential candidates, they are far from being unique, and other possible factors could amount to persecution, which could also be derived from a combination of two or more of these factors.[64]

There might be children who do not meet the refugee definition of the 1951 Convention or the 1967 Protocol but, who nevertheless are in need of international protection due to the fact that they are unsafe and unable to receive state protection in their country of origin.[65] As a result, some of these children may fall within the broader definition enshrined in the Cartagena Declaration.

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tional or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.(2) For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention.

[63] Children on the run: Unaccompanied Children Leaving Central America and Mexico and the need for International Protection, above n33, 6.

[64] Usually there will be more than one element combined per person, *e.g.* a political opponent who belongs to a religious or national group, or both, and the combination of such reasons in his person may be relevant in evaluating his well-founded fear.

Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, above n 8, 15-16 [66-67].

[65] *Ibid*. at 8.

3. *Cartagena Declaration*

The Preamble and Conclusion 3 of the Cartagena Declaration underscore its character as a regional instrument complimenting the universal refugee system. The Declaration states that "the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order." [66]

In turn and bearing in mind the progressive development of international law, the Inter-American Court of Human Rights considers that the obligations under the right to seek and receive asylum are operative with respect to persons who meet aspects of the expanded definition of the Cartagena Declaration. Such asylum-related obligations respond not only to the dynamics of forced displacement, but also to the challenges of protection derived from other displacement patterns today. The Court, therefore, has argued that recent developments in refugee law have led States to grant international protection under refugee status to persons fleeing their country of origin due to generalized violence, foreign aggression, internal conflicts, massive violations of human rights, or other circumstances that have seriously disturbed the public order.[67] For the Court, such criteria reflect an increasing tendency in the region towards a more inclusive definition to be considered by States to grant refugee protection to persons whose need for international protection is evident.[68]

It is worth mentioning that although the Declaration is not legally binding, the practices of States in applying its principles in terms of domestic legislation and policies indicate that it has been accepted as a fundamental element of the refugee protection framework in Latin America.[69] Unfortunately, the United States and Canada have not adopted these principles within their domestic law.

As a result, both definitions and interpretation work harmoniously and complimentarily. It does not mean that a person must meet the elements of both definitions to be recognized as a refugee; it is sufficient that a person meets but one. If a person meets both definitions, however, their refugee status is indeed reinforced.

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[66] Cartagena Declaration. Definition of refugee.

[67] Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, above n 16, 32

[68] *Ibid.*

[69] UNHCR, above n 25, 15 [40].

## VI. Legal Implications

As of this writing, the Refugee Convention has been ratified by Canada and Mexico, though not by the United States;[70] and by all Central American countries.[71] Despite this significant achievement in the context of mixed migration flows, in our opinion, the mere existence of laws recognizing the rights of refugees is not be sufficient to ensure the protection of unaccompanied refugee children. This will require far greater administrative and judicial efforts, in conjunction with a human rights centered approach to immigration policies.

We can illustrate the above with an example: if a law exists, it requires effective implementation. This would require rapid identification of potential minor refugees coupled with allowing them to submit asylum claims, while providing them with protection and administrative assistance, including the appointment of guardians and the provision of gender and age-sensitive counseling. All of these efforts would need to be tracked, always being cognizant of the need for confidentiality and a supportive environment. Necessary measures would also include identifying unaccompanied and separated children; briefing and/or conducting information campaigns appropriate to the age, gender, and language of recipients, in a manner understandable to children.

The Inter-American Court of Human Rights has found that sovereign authority States are entitled to establish immigration policies as well as to put in place mechanisms to control entry and departure from their territory of persons who are not nationals. However, it has consistently underscored that such policies must be consistent with the human rights protection framework established in the American Convention,[72] which recognizes the right to seek and receive asylum. This argument of the Court does not only apply to said regional instrument, but also to other international instruments related to human rights, such as the International Covenant on Civil and Political Rights, the Convention of the Rights of the Child, and the 1951 Convention relating to Refugee Status.

As a supporting argument, international human rights law obliges States to respect relevant international obligations enshrined in humanitarian law and refugee law and, in the case of Latin America, from the Cartagena Declaration. Therefore, all such international instruments are interrelated and converge as a whole without being contradictory to each other.[73] An example

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[70] Signed by Canada on 4 June 1969, signed by México on 7 June 2000.

UNHCR, States Parties to the Convention and the Protocol, *available at http://www.unhcr.org/pages/49da0e466.html*.

[71] Signed by Honduras on 23 March 1992, signed by Belize on 27 June 1990, signed by Costa Rica on 28 March 1978, signed by Guatemala on 22 September 1983, signed by Panama on 2 August 1978, signed by El Salvador on 28 April 1983 and signed by Nicaragua on 28 March 1980.

[72] Vélez Loor v. Panamá, 218 Inter-Am Court HR (Ser C) 30 [97] (2010).

[73] United Nations High Commissioner for Human Rights, International Human Rights Law, *available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx*.

of how they are interconnected and complement each other is that although there is no internationally accepted definition of what constitutes persecution, international human rights law has played a significant role in clarifying different forms of persecution in order to understand and establish this concept on a case-by case basis.

1. *Non-Refoulement*

In affording proper treatment to unaccompanied refugee children, States must fully respect *non-refoulement74* obligations deriving from international human rights, humanitarian and refugee law and, in particular, they must respect the obligations set forth in Article 33[75] of the 1951 Refugee Convention.[76]

In accordance with the declarative nature of the determination of refugee status, the protection provided by the principle of non-refoulement applies to all (potential) refugees, even if they have not yet been deemed refugees by authorities based on the requirements of the definition of Article 1 of the 1951 Convention and its Protocol[77] or of the broader definition of refugee status. In other words, it also applies to child asylum seekers, whose status has not yet been determined and to unaccompanied refugee children who have not yet been officially recognized as such.[78]

The protection may also be invoked by those who wish to assert their right to seek and receive asylum and who are either at the border or have crossed it without being legally or officially admitted into the territory of the receiving country.[79] Otherwise, this right would become illusory and deprived of content, value and effect. This necessarily means that such persons should not be rejected at the border or expelled without undergoing an adequate and individualized analysis of their requests.[80] In addition, under international refugee law, the prohibition of refoulement to a risk of persecution is applicable

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[74] Prohibition on forcibly returning claimants to their country of origin.

[75] The 1951 Convention Relating to the Status of Refugee, opened for signature 28 July 1951, UNTS 150 (entered into force on 22 April 1954) article 33. 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

[76] General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, above n 19, 10.

[77] Pacheco Tineo Family v. Bolivia, 272 Inter-Am Court HR (Ser c) 48 [145] (2013).

[78] ExCom, Non-refoulment,) sess 27th, No 6 [c]. (1997).

[79] *Ibid.*

[80] Pacheco Tineo Family v. Bolivia, above n 70, 49 [153].

to any form of forced removal, including deportation, expulsion, extradition, informal transfer of renditions, and non-admission at the border in the circumstances described above.[81] When it comes to unaccompanied children, this general rule is important for identifying possible refugees among mixed migration movements for it gives them a chance to explain their reasons for not being returned and, therefore, allows authorities in the receiving state to determine whether there are risks threatening their life, freedom or security should they be returned to their country of origin. Simultaneously, during the assessment, non-refoulement helps States to determine the best interests of unaccompanied children, even if they do not meet the elements of the definition of being a refugee, they may require complimentary protection.

Although refugee law has been the pioneering branch of international law in adopting the principle of non-refoulement, there are also other international instruments[82] that have adopted it. One example is the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that States will not expel, return or extradite a person to another state where there are substantial grounds to believe that he or she would be in danger of being subjected to torture. Domestically, states must implement measures to respond to this international obligation, which aims at preventing and ensuring the non-repetition of torture.

It is important to note that non-refoulement is considered customary law,[83] which means that it is binding on all States, including those which have not yet become party to the 1951 Refugee Convention. Unaccompanied children should be granted a complimentary or subsidiary status as a consequence of their rights being endangered, even if they do not properly meet refugee definitions.

### 2. *Access to the Asylum Procedure*

Asylum seeking children and adolescents, including those who are unaccompanied, shall enjoy access to asylum procedures and other complimen-

[81] U.N. UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol 3 (2007).

[82] The Covenant on Civil and Political Rights, Inter-American Convention on Human Rights, the 1984 Convention Against Torture and other Cruel, Inhuman or Degradation Treatment or Punishment.

[83] For a rule to become part of customary international law, two elements are required: consistent State practice and opinio juris, that is, the understanding held by States that the practice at issue is obligatory due to the existence of a rule requiring it.

North Sea Continental Shelf, Judgment, (Germany v. Denmark; Germany v. Netherlands) ICJ Rep 1969, 3 [74] (1969).

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), (Jurisdiction) ICJ Rep1986, 392 [77] (1984).

tary mechanisms providing international protection, irrespective of their age. This right also allows children to request asylum in the country of asylum or at the border. Therefore, children may not be rejected at the border before there is an adequate and individualized analysis of his or her request with due guarantees according to the respective procedures.[84] It is necessary that States allow unaccompanied children access to their territory as a prerequisite to the initial assessment process,[85] independently, regardless of whether she or he has documents to enter or stay.[86]

In addition, in spite of the reasons for leaving the country of their habitual residence, the receiving State should implement a procedure for determining if a child requires international protection.[87] In the event that any authority of the country of asylum or transit learns about the presence of an unaccompanied child, that child should be processed under an asylum procedure, even if he or she does not appear to be a refugee. This referral to a process could be crucial to protect the child's rights during his or her temporary or permanent stay in the country of destination or transit, even if the child finally decides to transit to another country to receive international protection.

During such a process, relevant information about the child, such as personal history and physical and psychological health conditions, and the environment in which the migration took place, will be useful to identify potential candidates who qualify for international protection. This analysis will assist in determining specific situations of potential risk of violation of rights in the child's country of origin, or in the transit or recipient country. All of these elements need to be considered in order to warrant complimentary protection or for exposing other protection or humanitarian assistance requirements, such as those resulting from torture, domestic violence, trafficking, or trauma.[88]

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[84] Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, above n 16, 5 [20].

[85] General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin, above n 19, 20.

[86] The legislation of certain States imposes severe penalties on nationals who depart from the country in an unlawful manner or remain abroad without authorization. Where there is reason to believe that a person, due to his illegal departure or unauthorized stay abroad is liable to such severe penalties, his recognition as a refugee will be justified if it can be shown that his motives for leaving or remaining outside the country are related to the reasons enumerated in Article 1 A (2) of the 1951 Convention.

Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, above n 8, 15 [61].

[87] U.N UNHCR, Guidelines on Statelessness No 2: Procedures for Determining Whether an Individual is a Stateless Person, UN Doc HCR/GS/12/02, 26-27 (2012).

[88] Promotion and Protection for All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development - Report of the Special Rapporteur on the Human Rights of Migrants - UN Doc A/HRC/11/7, 35, (2009).

In addition, and with the aim that unaccompanied children be recognized as refugees, as well as to ensure that their inclusion in Mexican society is effective, Mexican authorities should explore an accommodation alternative for children in host families, as established in law.[89] This is necessary for their integration for the Mexican society and it also means that the international protection has been carried out.

## VII. Conclusions

Mixed migration movements differ around the world. However, in Mexico and Central America this phenomenon has unique features as they pertain to unaccompanied refugee children. These children, who are fleeing from persecution caused by organized armed crime and domestic violence perpetrated by caregivers or parents in the country of origin, face problems such as travelling without official documentation, and are frequently exposed to criminal smuggling and trafficking as the only accessible options to arrive at a final destination.

In this context, it can be said that unaccompanied refugee children in the region are far more vulnerable in comparison to adults in similar situations, due to the particular conditions of age, gender, maturity, level of education, ethnicity, economic dependence, etc. The combination of these factors makes them particularly vulnerable prey for smugglers and traffickers and/or easy targets of abuse, exploitation, and victimization.

Although some positive developments for protecting unaccompanied refugee children in the region have unfolded, the challenge of identifying them among mixed migration flows remains. In order to live up to the humanitarian sense of international protection, its implementation requires adopting an age and gender-sensitive approach.

Mexico and Central America must be prepared in a variety of ways and fronts to meet and deliver on these challenges by implementing appropriate mechanisms to identify unaccompanied refugee children within mixed migration flows, and to respect and protect their rights in accordance with Refugee Law. States must adopt and promote the effective application of relevant international human rights norms and standards by creating and adapting legal and policy frameworks for the benefit of children.

[89] Comisión Nacional de Derechos Humanos, Informe sobre la problemática de niñas, niños y adolescentes centroamericanos en contexto de migración internacional no acompañados en su tránsito por México, y con necesidades de protección internacional, México, (2016).

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

Jorge Cicero Fernández*

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

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

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

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

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## I. Introduction and Background

> *Legal research is to be technically sound, politically impartial, as well as useful from the social standpoint. Ordinary citizens should expect legal scholars to be able to ascertain and to propose the best juridical options to settle social conflicts within the framework of peaceful conviviality. Our mission is to find out both the best practices and the most avant-garde approaches in order to set out proposals —which competent authorities might eventually make their own— towards the national Rule of law's advancement.*
>
> Pedro Salazar Ugarte[1]

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

[1] *See* [interview by] Gerardo Laveaga, *Pedro Salazar Ugarte. Investigación jurídica desde la UNAM*, El mundo del abogado, (March 29, 2018), *available at http://elmundodelabogado.com/revista/entrevistas/item/pedro-salazar-ugarte*.

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

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

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

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

[3] *See* Jana Maftei, *The Contribution of the European Convention on Consular Functions to International Law*, EUROPEAN INTEGRATION – REALITIES AND PERSPECTIVES. PROCEEDINGS (2005), *available at https://www.researchgate.net/publication/311576884_The_Contribution_of_the_European_Convention_on_Consular_Functions_to_the_Development_of_International_Law*.

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

[5] *See* MARIANO AGUILAR BENÍTEZ DE LUGO, INTERVENCIÓN CONSULAR EN EL DERECHO INTERNACIONAL PRIVADO (Universidad de Sevilla, 2005).

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

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

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

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

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

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[8] *See* Senadora Yolanda de la Torre Valdéz et al. (Partido Revolucionario Institucional, LXIII Legislatura), Iniciativa con Proyecto de Decreto por el que se expide el Código Nacional de Procedimientos Civiles y Familiares y que reforma la Ley General de los Derechos de las Niñas, Niños y Adolescentes, así como, la Ley Orgánica del Poder Judicial de la Federación, en materia de adopción, *available at* Barra Mexicana, Colegio de Abogados A.C., BMA Observatorio Jurídico, 02/11/2017, Código Nacional de Procedimientos Civiles (proyecto), *available at https://www.bmaobservatorio.org.mx/codigo-nacional-de-procedimientos-civiles-proyecto/* [hereinafter draft NCCP or NCCP]; *compare* the draft NCCP, arts. 568-602 *with* Código Federal de Procedimientos Civiles [C.F.P.C.] [Federal Civil Procedure Code, hereinafter FCCP], *as amended*, Diario Oficial de la Federación [D.O.], 24 de febrero de 1943 (Mex.), arts. 543-577.

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

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

## II. Consular Functions, Private International Law and Nationality Conflicts: "Helping and Assisting Nationals"

### 1. *Legislative History*

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

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

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

[13] *See* Santiago Torres, *La Convention de Vienne sur les Relations Consulaires (La Conférence de Nations Unies sur les Relations Consulaires)*, 9 Annuaire français de droit international 78-118 (1963).

[14] *Id.* at 79.

[15] *Ibid.* at 80.

[16] *Ibid.* at 84-85; *see* VCCR art. 5(m).

[17] Santiago Torres, *supra* note 14, at 84-85.

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

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

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

### 2. *"Helping and Assisting Nationals": Individuals*

#### A. *Nationality Conflicts*

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

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

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

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

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

The ILC, in its 2006 Draft articles on Diplomatic Protection,[22] addresses the matter in a similar manner, albeit with particular overtones:

> *Article 6*
> *Multiple nationality and claim against a third State*

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[19] *See*, *e.g.*, Secretaría de Relaciones Exteriores (S.R.E.), Dirección General de Protección a Mexicanos en el Exterior, *Guía de procedimientos de protección consular*, S.R.E., 1st ed., 2013, *available at https://www.gob.mx/cms/uploads/attachment/file/109345/Gu_a_de_Procedimientos_de_Protecci_n_Consular.pdf*; Constitución Política de los Estados Unidos Mexicanos [hereinafter Mex. Const.], D.O. Feb. 5, 1917, *as amended* D.O. March 20, 1997, art. 32; Ley de Nacionalidad, D.O. Jan. 23, 1998 (Mex.), arts. 12 *et seq*.

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

[21] *See* Mariano Aguilar, *Doble nacionalidad*, 10-11 Boletín de la Facultad de Derecho, (UNED, Madrid, 1996), *available at http://e-spacio.uned.es/fez/eserv.php?pid=bibliuned:BFD-1996-10-11-D08AEE0E&dsID=PDF*.

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

> 1. Any State of which a dual or multiple national is a national may exercise diplomatic protection in respect of that national against a State of which that person is not a national.
>
> 2. Two or more States of nationality may jointly exercise diplomatic protection in respect of a dual or multiple national.
>
> *Article 7*
>
> *Multiple nationality and claim against a State of nationality*
>
> A State of nationality may not exercise diplomatic protection in respect of a person against a State of which that person is also a national unless the nationality of the former State is predominant, both at the date of injury and at the date of the official presentation of the claim.

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

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

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

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[23] U.S. State Dept. – Bureau of Consular Affairs, Dual Nationality, *available at https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/Advice-about-Possible-Loss-of-US-Nationality-Dual-Nationality/Dual-Nationality.html* (emphasis added).

[24] Notificación, contacto y asistencia consular de las personas mexicanas detenidas que tengan doble o múltiple nacionalidad. La autoridad no puede tomar en cuenta elementos de alegada pertenencia nacional para negar aquel derecho humano, Primera Sala de la Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Gaceta del

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

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

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

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

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

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

[27] *Id.*, 88-97 (Inter-American Court's reasoning).

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

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

### B. *Other Developments*

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

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

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

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

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[29] *See* Treaty of Peace, Friendship, Limits, and Settlement, U.S.-Mexico, May 30, 1848, art. IX; *available at* National Archives, *available at https://www.docsteach.org/documents/document/guadalupe-hidalgo-original*.

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

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

[32] *See*, *e.g.*, Gobierno de Colombia – Cancillería, Embajadas compartidas entre Chile, Colombia, México y Perú, uno de los logros de la Alianza del Pacífico, (Feb. 8th, 2014), *available at http://www.cancilleria.gov.co/newsroom/news/embajadas-compartidas-entre-chile-colombia-mexico-y-peru-uno-los-logros-la-alianza-del*; Acuerdo Interinstitucional entre los Ministerios de Relaciones Exteriores de los Estados Parte de la Alianza del Pacífico para el Establecimiento de Medidas de Cooperación en Materia de Asistencia Consular, (Feb. 10, 2014), *available at http://apw.cancilleria.gov.co/tratados/AdjuntosTratados/d3f7c_AP_M-ACINTERINTITUCIONALPARAESTABLECIMIENTODEMEDIDASDECOOPERCIONENMATERIACONSULAR2014-TEXTO.pdf*; República de Colombia – Cancillería, Cancilleres de la Alianza del Pacífico

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

### 3. *"Helping and Assisting Nationals": Corporate Bodies*

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

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

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

[33] *See* Protocol to the European Convention on Consular Functions concerning the Protection of Refugees, adopted Dec. 11, 1967, E.T.S. No. 61 A.

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

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

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

[37] Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. Rep. 15 (July 20).

[38] Elina Mereminskaya, *supra* note 36.

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

## III. Consular Services

### 1. *General Framework*

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

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

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

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

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

### 2. *Apostilles*

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

> Article 2
>
> Each Contracting State shall exempt from legalisation documents to which the present Convention applies and which have to be produced in its territory.

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[40] Adolfo Maresca, *supra* note 3, at 130 *et seq*.

[41] *Id*. at 130.

[42] *Ibid.* at 131-133.

[43] *Ibid.* at 133.

[44] *See*, *e.g.*, Consular Convention, Mex.-People´s Rep. of China, Dec. 7, 1986, D.O. Mar. 8th, 1988, art. 10.1.

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

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

> For the purposes of the present Convention, legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.
>
> Article 3
>
> The only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the State from which the document emanates. […]

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

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

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

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

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[47] *See*, *e.g.*, Código de Procedimientos Civiles para el Estado de Baja California (Code of Civil Procedure for the State of Baja California), art. 324.

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

[49] *See* Hague Conference on Private International Law, 10th International Forum on the electronic Apostille Program (e-APP), Conclusions & Recommendations (Nov. 1st, 2016), *available at https://assets.hcch.net/docs/81ed60f1-27f6-49c9-a9a9-fa015f09d396.pdf*.

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

## IV. Inheritance Upon Death, Minors, Persons Lacking Full Capacity, Provisional Measures due to Absence

### 1. *General Framework*

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

> (g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending States in cases of succession *mortis causa* in the territory of the receiving State, in accordance with the laws and regulations of the receiving State;
>
> (h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;
>
> (i) subject to the practices and procedures obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to asume the defence of their rights and interests […]

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

[50] *Id.*

international judicial jurisdiction, applicable law and cross-border enforcement of judgements in succesion matters are concerned.[51]

2. *Inheritance upon Death*

Article VIII of the 1942 U.S.-Mexico Consular Convention is particularly clear in outlining the scope of consular intervention in inheritance upon death:[52]

> 1. In case of the death of a national of either High Contracting Party in the territory of the other […] Party, without having in the locality of his decease any known heirs or testamentary executors by him appointed, the competent local authorities shall at once inform nearest consular officer of the State of which the deceased was a national of the fact of his death, in order that necessary information may be forwarded to the persons interested.
>
> 2. In case of the death of a national of either […] Party in the territory of the other […] Party, whitout will or testament whereby he has appointed testaments executors, the consular officer of the State of which the deceased was a national and within whose district the deceased made his home at the time of the death, shall and pending the appointment of an administration and until letters of administration have been granted, be deemed qualified to take charge of the property left by the decedent for the preservation and protection of such property. Such consular officer shall have the right to be appointed as administrator within the discretion of a court or other agency controlling the administration of estates, provided the laws of the place where the estate is administered so permit.
>
> 3. Whenever a consular officer accept the office of administrator of the estate of a deceased countryman, he subjects himself in that capacity to the jurisdiction of the court or other agency making the appointment for all necessary purposes to the same extent as if he were a national of the State by which he has been received.

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

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[51] *See* Luis Francisco Carrillo, *El Reglamento Europeo 650/212 ante el cambio de paradigma del derecho de sucesiones,* 151 Boletín Mexicano de Derecho Comparado 64 (2018).

[52] *See* VCCR, art. 37. *See also* Consular Convention, Bulg.-Mex., Oct. 1st, 1984, D.O. July 3, 1986, art. 31,

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

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

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

> 1. […] to appear personally or by authorized representative in all matters concerning the administration and distribution of the estate of a deceased person under the jurisdiction of the local authorities, for all such heirs or legatees in the estate, either minors or adults, as may be nonresidents of the country and nationals of the State by which the consular officer was appointed, unless such heirs or legatees have appeared [...]
>
> 2. […] on behalf of his nonresident countrymen collect […] for their distributive shares derived from estates in process of probate or accruing under the provisions of so-called Workmen s Compensation laws or other like statutes, for transmission through channels prescribed by his Government to the proper distributees, provided that the court or other agency making distribution through him may require him to furnish reasonable evidence of the remission of the funds to the distributees.

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

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

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

[56] *See*, *e.g.*, Office of the Privacy Commissioner of Canada, Summary of privacy laws in Canada/ Related content/The Federal Government and your personal information, *available at https://www.priv.gc.ca/en/privacy-topics/your-privacy-rights/the-federal-government-and-your-personal-information/*.

[57] Article 73 of VCCR "Relationship Between The Present Convention And Other International Agreements" reads as follows: "1. The provisions of the present Convention shall not affect other international agreements in force as between States parties to them. 2. Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof".

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

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

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

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

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

[59] *See* Code of Civil Procedure for the State of Mexico, art. 2.365; see also Academia Mexicana de Derecho Internacional Privado y Comparado, A.C., Proyecto de Ley de Derecho Internacional Privado, 34 Revista Mexicana de Derecho Internacional Privado 63, 81 (2015) [hereinafter AMEDIP's draft Private International Law Act], art. 31.

[60] *See* Governmet of Canada, Travelling as a Dual Citizen - Dual Citizenship and Parental Child Abductions, *available at https://travel.gc.ca/travelling/documents/dual-citizenship*.

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

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

## V. International Judicial Assistance

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

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

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[61] Ana Fernández, *Aproximación al interés superior del menor en el derecho internacional privado español*, 151 Boletín Mexicano de Derecho Comparado 108 (2018).

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

[63] *See* Tribunal Superior de Justicia de la Ciudad de México, Advierte Magistrado sobre la carencia de legislación interna que establezca los plazos para la restitución internacional de menores, Press Release No. 52/2016, (Sep. 3, 2016), *available at http://poderjudicialcdmx.gob.mx/wp-content/uploads/2016/pdfs/comunicado/Comunicado_52.pdf*; *see also* Hague Abduction Convention, art. 11.

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

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

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

1. *Service of Process*

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

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[65] Ley Orgánica de la Administración Pública Federal, D.O. Dec. 29, 1976 (Mex.).

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

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

[68] *See* Jorge Cicero, *México y la Convención de La Haya sobre Notificaciones*, 29 *Jurídica* Anuario del Departamento de Derecho de la Universidad Iberoamericana 353 (1999).

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

[70] *See* Jorge Cicero, *Cooperación judicial México-Estados Unidos: Decisiones recientes en torno al reconocimiento internacional de sentencias y la Convención Interamericana sobre Exhortos y Cartas Rogatorias*, 6 Revista Mexicana de Derecho Internacional Privado 89 (1999).

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

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

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

### 2. *Taking of Evidence*

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

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[71] *See* Hague Conference on Private International Law, Conclusions and Recommendations of the Special Commission on the practical operation of the Hague Service, Evidence and Access to Justice Conventions (20-23 May 2014) 37, *available at https://assets.hcch.net/docs/eb709b9a-5692-4cc8-a660-e406bc6075c2.pdf*.

[72] *Id.*, 39.

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

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

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

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

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

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

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

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[74] United States of America - Competent Authority (Art. 18), *available at https://www.hcch.net/en/states/authorities/details3/?aid=870*.

[75] 28 U.S. Code § 1782 - Assistance to foreign and international tribunals and to litigants before such tribunals, *available at* Cornell Law School, Legal Information Institute, *https://www.law.cornell.edu/uscode/text/28/1782*.

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

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

### 3. *Information on Foreign Law*

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

> The court shall apply foreign law in the same manner as the courts of the State whose law is applicable, without prejudice to the parties' disputing the existence and contents of foreign law.
>
> Information on the text, force, meaning and scope of foreign law may be requested by the court to the [MFS], the court may as well order and admit such gathering of evidence diligences as it deems fit, or as the parties may submit.

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

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[76] *See* FCCP, arts. 559 y 561-563.

[77] *See*, *e.g.*, Code of Civil Procedure for the State of Mexico, art. 1.266.1.

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

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

[80] *See* MFSA, *supra* note 11, transitory art. 2.

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

> — Resorting to the Hague Evidence Convention.
>
> — Resorting, where applicable, to the 1979 Inter-American Convention on Proof of and Information on Foreign Law[81] (assessing as well the fact that Mexico's designated Central Authority is the "FAM"[82] *tout court* with the resulting situation of uncertainty as to which office might specifically be responsible for the transmission of the request).
>
> — For proof of and information on U.S. law, resorting to *affidavits* by lawyers admitted to the Bar of the State or jurisdiction whose law is to be proved, with the corresponding apostille and official translation into spanish by an expert certifed to act before the requesting court.

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

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

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

4. *Maintenance Obligations*

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

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

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

[83] Alfonso Calvo & Javier Carrascosa, I Derecho internacional privado 551 (16th ed. Granada, 2016), *quoted in* Andrés Rodríguez & Alfonso Ybarra, *Las nuevas reglas sobre información y prueba del derecho extranjero en el sistema español de derecho internacional privado*, 150 Boletín Mexicano de Derecho Comparado 1358-59 (2017).

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

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

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

## VI. Diplomatic Functions, Private International Law and Nationality Conflicts

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

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

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

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

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

[87] *See* status at U.N. Treaty Collection, *available at https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XX-1&chapter=20&Temp=mtdsg3&clang=_en.*

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

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

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

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

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

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

This said, beyond the exhaustion of consular protection as a threshold for diplomatic intervention in a given case, as a result of the 2011 amendments adding "the respect, protection and promotion of human rights" to Mexico's foreign policy constitutional principles,[92] chief among the priorities

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89 *See* also VCCR, arts. 3 & 70.

90 *See* Draft articles on Diplomatic Protection, *supra* note 23, art. 1.

91 *Id.*, art. 15.

92 *See* Mex. Const., art. 89 § X, *as amended* D.O. June 10, 2011.

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

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

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

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[93] *See* Bernardo Sepúlveda, *Directrices de política exterior para la era Trump. La protección de inmigrantes y el sistema judicial estadounidense*, *Reform*a, Revista dominical, March 19, 2017, at 16-17.

[94] *See* Eduardo Peña, *supra* note 7, at 235-236.

[95] *See* Bernardo Sepúlveda, *supra* note 94, at 16-17.

[96] With the exception of Colorado, Florida, Georgia, Iowa, Maryland, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Virginia, Wisconsin. *See* Secretaría de Relaciones Exteriores, Pensiones alimenticias internacionales, *available at https://www.gob.mx/sre/acciones-y-programas/pensiones-alimenticias-internacionales*

[97] *See* Poder Judicial del Estado de Sinaloa, Firma de convenio de Interconexión Tecnológica entre el Poder Judicial del Estado de Sinaloa y el Poder Judicial de la Federación, (June 30, 2016), *available at http://www.stj-sin.gob.mx/poderjudicial/noticias/337*.

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

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

## VII. Concluding Remarks and Suggestions

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

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

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

[99] *Accord*. AMEDIP's draft Private International Law Act, *supra* note 60, art. 210.

[100] *See* Hague Conference on Private International Law [Hague Abduction Convention], List of Judicial and Other Conferences 1998-2017, *available at https://www.hcch.net/en/publications-and-studies/details4/?pid=5214#latam*.

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

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

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

2) *Apostille*. Due harmonization of the NCCP with the Hague Apostille Convention ought to be assured. Full implementation by Mexican federal and state authorities of e-APPs is critical, the benefits would be maximized with the negotiation of agreements between judicial and education authorities and translation schools providing for *pro bono* services for the official translation of apostilled documents.

3) *Inheritance upon death, family law*. Consular conventions and supervening privacy laws should be aligned, either by the issuance of appropriate criteria by agencies such as Mexico's National Institute for Transparency, Access to Information and Personal Data Protection or by negotiating international protocols on the subject. Mexico's NCCP should, as proposed by AMEDIP's draft Article 21, provide for:[101] "In cases involving minors or individuals lacking full capacity bearing a foreing nationality, notice shall be given by the court both to the corresponding foreign consul and to the [FAM], whose proposals as to whom should be designated as tutor or guardian, where required, may be admitted by the court".

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

[101] *See* AMEDIP's draft Private International Law Act, *supra* note 60.

4) *Service of process and taking of evidence abroad.* Mexico should evaluate the benefits of negotiating additional protocols to the Hague Service and Evidence Conventions on the transmission and execution of requests of assistance by electronic means. Similarly, Mexican federal and state judiciaries—especially those in border States—should consider analogous *démarches* in order to conclude international technological interconnection agreements towards the same goals. Appropriate provisions on the subject should be included as well in the NCCP, ideally with the advice of the Hague Conference, so as to align it with international best practices. Mexico's accession to the 2001 Budapest Cybercrime Convention[102] would significantly enhance the international online security framework for these as well as other purposes.

5) *Information on foreign law*. Information on the text, force, meaning and scope of foreign law through corresponding official websites ought to be given due recognition by the NCCP. Proof of and information on foreign law by other means might be provided for in the absence of digital evidence. When so required upon the previous exhaustion of online research, Mexican federal and state councils of the judicature, as well as bar associations, could provide reciprocal *pro bono* services agreements on the subject with key counterparts abroad, as well as supplemenatry agreements with certified expert translators associations and translation schools for official translations into Spanish, either on a *pro bono* basis or on a preferential fees scheme.

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

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

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

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

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

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# THE CRIMINAL LIABILITY OF CORPORATIONS: A STEP FORWARD IN THE IMPLEMENTATION OF THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS?

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Abstract: *The UN Guiding Principles on Business and Human Rights (UNGP) marked the end of a long journey towards regulating corporate conduct on this issue. However, they were conceived only as a focal point to guide public, corporate and civil governance towards the respect and protection of human rights. For this reason, the UNGP function as a common platform on which new rules and strategies should be developed. In this sense, as an element of public governance, Mexico adopted the criminal liability of corporations (CLC), which entered into force in 2016, along with the accusatory criminal justice system. Thus, since one of the purposes of criminal law is the subsidiary protection of legal assets —most of which have an underlying fundamental right—, the purpose of this article is to determine whether or not Mexico's adoption of the CLC enhances the implementation of the UNGP, and if so, to evaluate its scope and limitations. After scrutinizing the UNGP in light of the regulation of the CLC in Mexico, the author argues that, although its performance can be optimized in many ways, the CLC plays an essential role in the area of business and human rights, not only for its direct contributions, but also for the interaction it generates with corporate and civil governance.*

Keywords: *Business and human rights, corporate criminal liability, human rights due diligence, criminal compliance.*

Resumen: *Los principios rectores de la ONU sobre las empresas y los derechos humanos (PR) marcaron el final de un largo camino hacia la regulación de la conducta de las corporaciones en relación con esta materia. No obstante, los mismos fueron concebidos únicamente como un punto focal tendiente a orien-*

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*tar las gobernanzas pública, corporativa y civil hacia el respeto y protección de los derechos humanos. Por ello, los PR constituyen una plataforma común sobre la cual nuevas reglas y estrategias de regulación deben desarrollarse. En este sentido, como un elemento de la gobernanza pública, México adoptó la responsabilidad penal de las empresas (RPE), la cual entró en vigor en 2016, junto con el sistema acusatorio de justicia penal. En este sentido, si uno de los fines del derecho penal es la protección subsidiaria de bienes jurídicos —en la mayoría de los cuales subyace un derecho fundamental—, el propósito de este artículo es determinar si la adopción en México de la RPE constituye un avance en la implementación de los PR, y en su caso, evaluar cuáles son sus alcances y limitaciones. Después de escrutar los PR a la luz de la regulación de la RPE, el autor sostiene que, aunque existen diversas maneras de optimizar su contribución, la RPE desempeña una función esencial en el campo de las empresas y los derechos humanos, no solo por sus aportaciones directas, sino también por las relaciones de refuerzo que entabla con las gobernanzas corporativa y civil.*

Palabras Clave: *Empresas y derechos humanos, responsabilidad penal de las empresas, debida diligencia en derechos humanos, cumplimiento penal empresarial.*

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## I. Introduction

The UN Guiding Principles on Business and Human Rights (UNGP) marked the end of a long journey towards regulating the conduct of corporations regarding this issue. However, the UNGP were conceived only as a focal point that tends to guide public, corporate and civil governance to the promotion and protection of human rights. Thus, these three systems of regulation must interact in a network-like fashion to enhance their strengths, shore up each other´s weaknesses and face the challenges that a globalized market entail. For this reason, the UNGP work as a common platform on which new rules and strategies can be built upon.

In this sense, as an element of public governance, Mexico adopted the criminal liability of corporations (CLC), which entered into force in 2016, along with an accusatorial criminal justice system. Thereby, since one of the purposes of criminal law is the subsidiary protection of legal assets —in most of which a fundamental right underlies—, the purpose of this article is to

determine whether or not Mexico's adoption of the CLC furthers the implementation of the UNGP, and if so, to evaluate its scope and limitations.

To this end, Chapter II will examine the regulatory framework implemented by the UNGP. In Chapter III, I will address the role of criminal law as a protector of human rights and how it can be enforced against corporations in Mexico. Finally, in Chapter IV, I will scrutinize the UNGP in correlation with the CLC. This will lead to the conclusion that, although its performance can be optimized in many ways, the CLC plays an essential function in the area of business and human rights, not only for its direct contributions, but also for the interaction it generates with the corporate and civil governance.

## II. Business and Human Rights

To contextualize the main topic of the essay, this chapter will first address the need for regulating the impact of business on human rights and the initiatives that have been presented for this purpose. Then, I will examine the content and structure of the regulatory framework proposed by the UNGP, as well as the main critiques against it. Finally, I will explore ways in which the shortcomings of the framework can be overcome by using the UNGP as a common platform from which other developments can depart.

### 1. *Background*

#### A. *The Need for Regulating the Impact of Business on Human Rights*

Traditionally, human rights were conceived as barriers against the abusive exercise of public power.[1] Consequently, the human rights regime was designed in a unidimensional way that considered states as the only duty bearers.[2] However, since power should entail responsibility, the law must limit and discipline any kind of power, not only governmental.[3]

In this sense, we must acknowledge that in the past decades private corporations have gained significant power and authority, which can be wielded with relative autonomy.[4] Companies support politicians and lobby institu-

[1] David Weissbrodt & Muria Kruger, Human Rights Responsibilities of Business as Non-State Actors, in Non-State Actors and Human Rights 315 (Philip Alston, Oxford University Press, 2005).

[2] Philip Alston, The Not-a-Cat Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?, in Non-State Actors and Human Rights 3 (Philip Alston, Oxford University Press, 2005).

[3] Weissbrodt & Kruger, *supra* note 1.

[4] *See* John Gerard Ruggie, Multinationals as Global Institution: Power, Authority and Relative Autonomy, in Regulation and Governance (David Levi-Faur, Wiley Editing Services, 2017).

tions to achieve their goals, request structural reforms in countries as a condition for investment and, contribute to shaping social expectations through marketing campaigns. As well, catastrophes like the one occurred in 1984 in Bhopal, India —in which three thousand people died, and tens of thousands more were injured due to a gas leak at a pesticide plant—, remind us of the risks that commercial activities pose to workers, communities and the environment.[5] Therefore, the regulatory framework must be adapted to this new context and address the potential impact of business on human rights.

### B. *Attempts at Regulation*

The Universal Declaration of Human Rights (UDHR) is addressed to every individual and every organ of society, including corporations.[6] For this reason, there have been many initiatives to regulate corporate responsibility regarding human rights.

A first attempt took place in the 1970s when the UN developed the Draft Code of Conduct on Transnational Corporations, which was never officially implemented.[7] In that same decade, the Organization for Economic Co-operation and Development (OECD) adopted the Guidelines for Multinational Enterprises, and the International Labor Organization (ILO) put into effect the Tripartite Declaration of Principles concerning Multinational Enterprises, which was later complemented with the Declaration of Fundamental Principles and Rights at Work in 1998.[8]

In 1999, the UN developed the Global Compact as a voluntary proposal to encourage companies to embrace ten principles concerning environmental protection, anti-corruption strategies and the respect of international human rights.[9] Nevertheless, even when this initiative has attracted considerable corporate support, it has been criticized due to its vagueness and weakness to motivate companies to improve their performance in these areas.[10]

Consequently, in 1999, the UN designated a working group to draft a code of conduct for corporations regarding human rights. The first issues to arise were to determine whether the regulation should be voluntary or mandatory, and whether it should apply to all business enterprises or only transnational

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[5] *See* Surya Deva, Bhopal: The Saga Continues, in Business and Human Rights: From Principles to Practice 22 (Dorothée Baumann-Pauly & Justine Nolan, Routledge, 2016).

[6] Justine Nolan, Mapping the Movement: The Business and Human Rights Regulatory Framework, in Business and Human Rights: From Principles to Practice 27 (Dorothée Baumann-Pauly & Justine Nolan, Routledge, 2016).

[7] Weissbrodt & Kruger, *supra* note 1, at 318.

[8] *Id.* at 319.

[9] United Nations, Global Compact (2018) *available at www.unglobalcompact.org.*

[10] Philip Alston & Ryan Goodman, International Human Rights 1468 (Oxford University Press, 2013).

corporations.[11] In the end, the working group proposed the Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights (the Norms), as a mandatory standard to regulate all kinds of companies.[12] Even though many NGOs welcomed the Norms, most developed countries considered them unnecessary or overreaching.[13] Thus, in 2004, the UN affirmed that these norms had no legal standing.[14]

Therefore, in 2005, John Gerard Ruggie was appointed as Special Representative of the UN Secretary-General (SRSG) and given the task to identify and clarify standards and best practices in the area of business and human rights.[15] By the end of his assignment in 2011, and going beyond the initial mandate, he proposed the UNGP, which were unanimously supported by the UN Human Rights Council.[16] The development of the UNGP and their regulatory framework will be analyzed in the following section.

### 2. *The UN Guiding Principles on Business and Human Rights*

#### A. *Development of the UNGP*

During the last decades, transnational business enterprises have experienced exponential growth and redefined their role in the globalized society.[17] Nowadays, there are more multinational corporations than ever before, and their traditional integrated composition has been transformed into a network-like structure, characterized by worldwide supply chains and joint ventures.[18] Thus, the task undertaken by the SRSG was anything but simple: to identify the most suitable way of regulating the impact of business on human rights within this complex backdrop.

After the experience of the Norms, the SRSG realized that, while human rights advocates preferred mandatory initiatives, such as a binding international treaty, the business community was in favor of a hybrid alternative,

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[11] Weissbrodt & Kruger, *supra* note 1, at 322.

[12] *Id.*

[13] Alston & Goodman, *supra* note 10, at 1477.

[14] *Id.*

[15] John Gerard Ruggie, Just Business: Multinational Corporations and Human Rights xi (Norton & Company, 2013).

[16] *Id.*

[17] Justine Nolan, Business and Human Rights in Context, in Business and Human Rights: From Principles to Practice 2 (Dorothée Baumann-Pauly & Justine Nolan, Routledge, 2016).

[18] Richard Locke, We live in a World of Global Supply Chains, in Business and Human Rights: From Principles to Practice 299 (Dorothée Baumann-Pauly & Justine Nolan, Routledge, 2016).

which included compliance with domestic law and the implementation of voluntary measures of self-regulation.[19] Nevertheless, the SRSG considered it necessary to move beyond the mandatory-voluntary discussion, and find middle ground on which cumulative progress could be achieved.[20] This approach, which he called "principled pragmatism", intended to optimize the promotion and protection of human rights related to business through practical measures that were capable of transforming the daily situation of people.[21]

To this effect, the SRSG found that the conduct of corporations was affected by three different types of regulation.[22] First, public governance, comprised of international and domestic law and policy.[23] Second, corporate governance, integrated by institutional designs and management systems.[24] And third, civil governance, represented by expectations and social pressure against corporations.[25] Consequently, to effectively improve corporate behavior in regards to human rights, it was necessary to develop a common platform upon which these three systems of regulation could enhance their strengths and compensate their weaknesses.[26] With this in mind, the SRSG drew up the UNGP as the focal point needed to guide public, corporate and civil governance towards the same goal: the protection and respect of human rights.[27] The regulatory framework presented in the UNGP will be studied in the next section.

### B. *Protect, Respect and Remedy Framework*

The UNGP regulatory framework is underpinned with three pillars identified by the verbs protect, respect and remedy.[28] In this segment, I will only outline the general features since an in-depth analysis of each of the UNGP will be provided in chapter IV of this essay.

The first pillar, the obligation to protect, is aimed at States and tends to guide public governance towards the protection of human rights from corporate abuse. For this purpose, States have to adopt effective policies,

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[19] Ruggie, *supra* note 15, at xxii.

[20] *Id.* at xxiii.

[21] *Id*. at xlii.

[22] John Gerard Ruggie, Hierarchy or Ecosystem? Regulating Human Rights Risks of Multinational Enterprises, in Business and Human Rights: Beyond the end of the Beginning 48 (César Rodríguez Garavito, Cambridge University Press, 2017).

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Ruggie, *supra* note 15, at 78.

[27] *Id.* at 47.

[28] UN Guiding Principles on Business and Human Rights, General Principles.

legislation and regulations to prevent, investigate, punish and redress any such abuse.[29]

The second pillar, the responsibility to respect, is directed at all types of corporations, regardless of their size, sector or operational context.[30] It aims to expand corporate governance so it can embrace the respect for human rights by avoiding to cause harm to others and addressing any adverse effect they might have.[31] Thus, every company should develop a human rights due diligence process to identify the potential risks its commercial activity may pose and to adopt the necessary measures to mitigate them.[32]

Finally, the purpose of the third pillar is to provide effective remedy to victims of human rights violations. To this end, States have to punish and redress any corporate violation of human rights through judicial, legislative, administrative or any other appropriate means.[33] As well, corporations must implement and participate in remedial mechanisms, even in the case that the State is unwilling or unable to respond to a given abuse.[34] Consequently, the procedures to provide a remedy to the victims can be State-based judicial (civil or criminal justice), State-based non-judicial (administrative process or conciliation) and non-State-based (agreements with victims, mutually accepted mediation, among others).[35]

Taking into account that three different systems of regulation affect the conduct of business enterprises (public, corporate and civil governance), the UNGP framework follows an experimentalist design, which is characterized by the open participation of a variety of actors and a network-like structure, rather than a rigid, vertical hierarchy between stakeholders.[36] The SRSG considered that experimentalist governance was the adequate approach to govern the conduct of corporations because, in his view, other traditional, integrated or top-down models of governance have limited utility when dealing with current global challenges.[37] Therefore, if corporations are growing exponentially and operating in a network-like fashion, regulation has to be dynamic and flexible enough to keep pace even in the form of soft-law. This SRSG's decision did not go unnoticed by many human rights professionals and scholars, who reacted to the UNGP. The principal points of criticism will be summarized in the following section.

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[29] *Id.* at Art. 1.

[30] *Id.* at Art. 14.

[31] *Id.* at Art. 11.

[32] *Id.* at Art. 15.

[33] *Id.* at Art. 26.

[34] *Id.* at Art. 29.

[35] Ruggie, *supra* note 15, at 102.

[36] Gráinne de Búrca, Robert O. Keohane and Charles Sabel, New Modes of Pluralist Global Governance, 45(1) N.Y.U. J. Int'L L. & Pol. 723, 738 (2013).

[37] Ruggie, *supra* note 22, at 49.

### C. *Critiques of the UNGP*

The main criticism against the UNGP is that they constitute a voluntary initiative with no binding effect and, consequently, misrepresent the proper steps required to regulate corporations in regards to human rights.[38] For many scholars, the respect for human rights cannot be conditioned to the goodwill of corporations because, as Milton Friedman stated, companies are only concerned with making as much money as possible.[39] Therefore, professionals that support this idea are in favor of negotiating and adopting a legally binding treaty on business and human rights, or even the creation of an international court to settle claims against corporations for violating fundamental rights.[40]

In response to this, the SRSG affirmed that the treaty route is unsuitable because, since the topic of business and human rights is still new for governments, the negotiation of a treaty would take a long time and human rights would have to be safeguarded by other means in the meantime.[41] Moreover, the SRSG acknowledged that existing human rights treaties have not been entirely effective.[42] Conversely, the committees currently in place cannot fulfill their duties even though they might only monitor compliance with a single set of rights.[43] Therefore, it would be unrealistic for these committees to cover a broader range of rights in a never-ending number of corporations.[44]

A second criticism is that UNGP do not allow enough civil participation.[45] Consequently, if civil governance is not highly developed,[46] the regulatory framework will be ineffective to shift the power dynamics and compensate for the asymmetrical social relations that cause human rights abuses.[47]

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[38] Christine Parker & John Howe, Ruggie's Diplomatic Project and its Missing Regulatory Infrastructure, in The UN Guiding Principles on Business and Human Rights 273 (Radu Mares, Martinus Nijhoff Publishers 2012).

[39] *See* Milton Friedman, The Social Responsibility of Business is to Increase its Profits, N.Y. Times Magazine, September 11, 1970.

[40] *See* Surya Deva & David Bilchitz, Building a Treaty on Business and Human Rights: Context and Contours (Cambridge University Press, 2017).

[41] Ruggie, *supra* note 19, at 57.

[42] *Id.* at 60.

[43] *Id.* at 64.

[44] *Id.*

[45] *See* Tara J. Melish, Putting Human Rights Back into the UNGP on Business and Human Rights: Shifting Frames and Embedding Participation Rights, in Business and Human Rights: Beyond the end of the Beginning (César Rodríguez Garavito, Cambridge University Press, 2017).

[46] César Rodríguez-Garavito, Business and Human Rights: Beyond the End of the Beginning, in Business and Human Rights: Beyond the end of the Beginning 41 (César Rodríguez Garavito, Cambridge University Press, 2017).

[47] Chris Jochnick, Shifting Power on Business and Human Rights: States, Corporations

In this respect, the SRSG replied that he conceptualized UNGP bearing in mind the importance of civil society participation, which plays a vital role in the experimentalist approach.[48] Furthermore, he said that UNGP constitute an effective tool for advocacy that can be used by NGOs and workers associations.[49]

The above criticism is weighty and persuasive. However, we should remember that even when UNGP marked the end of a long journey towards regulating business and human rights, they are just the starting point on which further developments can be constructed. Therefore, the voluntary nature of UNGP and the limited role of civil society can be strengthened by building upon this common platform, as I will illustrate in the next section.

### D. *Building upon UNGP*

The UNGP have two different dimensions.[50] The static dimension is shaped by their foundational and operational standards.[51] However, the dynamic dimension refers to their ability to foster the creation of new norms and practices that, when pulling in the same direction, can improve corporate compliance with human rights.[52] Therefore, UNGP must be understood as ongoing processes rather than a fixed document.[53]

In this sense, the effectiveness of UNGP must be improved through the strategic development of public, corporate and civil governance. If these three systems operate together, they can generate cumulative progress and contribute to the protection of human rights.[54]

As César Rodríguez-Garavito asserts, the field of human rights is expanding its boundaries with the incorporation of new rights, different duty-bearers and rights-holders, as well as innovative types of regulation and adjudication.[55] These novel elements coexist in a way that is both horizontal and interconnected, resembling the structure of an ecosystem.[56] Consequently, the individual contribution of each component and the reinforcing or symbiotic

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and Civil Society in Global Governance, in Business and Human Rights: Beyond the end of the Beginning (César Rodríguez Garavito, Cambridge University Press, 2017).

[48] Ruggie, *supra* note 22, at 52.

[49] *Id.* at 53.

[50] Rodríguez-Garavito, *supra* note 46, at 11.

[51] *Id.*

[52] *Id.*

[53] Ruggie, *supra* note 22, at 47.

[54] Rodríguez-Garavito, *supra* note 46, at 11.

[55] César Rodríguez-Garavito, The Future of Human Rights, from Gatekeeping to Symbiosis, 20 SUR International Journal on Human Rights 499, 505 (2014).

[56] *Id.*

relations each can build with the others are essential to the effective protection of the people.[57]

Having analyzed the background, context and current regulation of business and human rights, the following sections discuss whether Mexico's recent adoption of the criminal liability of corporations, as part of public governance, advances the implementation of UNGP, and if it builds mutually reinforcing relationships with corporate and civil governance, as encouraged by the dynamic dimension of UNGP.

## III. Criminal Law in Relation to Business and Human Rights

In this chapter, I will address the role of criminal law as a protector of human rights. I will also examine the enforcement of the criminal liability of corporations (CLC), as it is regulated in Mexico. Since the main topic of this essay falls within the field of business and human rights, explanations on the CLC will be brief.

### 1. *Criminal Law as a Protector of Human Rights*

The Political Constitution of the United Mexican States confers authority to the Congress to determine criminal offenses against the Federation and their corresponding penalties.[58] However, this does not imply that the legislators can punish any type of behavior, since their punitive power is limited by the objectives of criminal law.[59]

For this reason, since the primary purpose of criminal law is to safeguard legally protected assets, the only conducts that can be considered crimes are those that can harm said assets or put them in actual danger.[60] Nevertheless, the defense of legally protected assets is not only undertaken by criminal law, but also by the entire legal system.[61] Therefore, since criminal repression is the most violent response of the State against an individual, it should only punish the most severe attacks against the assets deemed most essential for society.[62] Less harmful behaviors should be regulated by other branches of law such as civil

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[57] *Id.*

[58] Constitución Política de los Estados Unidos Mexicanos [C.P.E.U.M.] [Political Constitution of the United States of Mexico], *as amended*, article 73 XXI b), Diario Oficial de la Federación [D.O.], February 5, 1917, (Mex.).

[59] Claus Roxin, Derecho Penal Parte General [Criminal Law General Part] 51 (Civitas, 1997).

[60] *Id.*

[61] *Id.* at 65.

[62] *Id.*

or administrative law.[63] This is why criminal law is considered the last resort of the social policy.[64]

In this sense, legally protected assets can be defined as given circumstances or aims that are useful to the free development of the individual.[65] Consequently, legally protected assets are, for example, life, physical integrity, liberty, public health or the environment, without which the development of the individual would terminate or be severely compromised.[66]

At this point, the object of protection of criminal law coincides with the natural concept of human rights.[67] Nonetheless, we should emphasize that criminal law only punishes serious offenses to legally protected assets, as described in law, while human rights violations can be caused by many other behaviors that may not be considered crimes.

This is not the place to delve further into this topic. However, Chapter IV of this essay provides a chart of the internationally recognized human rights and the crimes that directly go against them. Let us now examine how criminal law can be enforced, so it can regulate the impact that business enterprises have on human rights.

### 2. *Mexico's Regime for Criminal Liability of Corporations*

On June 18, 2016, Mexico's National Code of Criminal Procedures (NCCP) was enacted.[68] Besides the implementation of an accusatorial criminal justice system, the NCCP introduced a special procedure to prosecute legal persons;[69] that is, any collective organization composed of individuals, which operates as a separate entity, such as corporations.[70] In this section, I will address the key features of the CLC.

#### A. *Background*

Historically, the criminal system of Mexico considered that only natural persons could commit crimes. Nevertheless, since commercial activity was

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[63] *Id.*

[64] *Id.*

[65] *Id.* at 54.

[66] Juan Bustos & Hernán Hormazábal, Lecciones de Derecho Penal 56 [Lessons of Criminal Law] (Trotta, 1997).

[67] Marie Bénédicte Dembour, What are Human Rights? Four Schools of Thought, 32 Human Rights Quarterly 1, 2 (2010).

[68] Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], *as amended*, Diario Oficial de la Federación [D.O.], March 5, 2014, (Mex.).

[69] *Id.* at Arts. 421-425.

[70] Luis David Coaña Be, La Responsabilidad Penal de las Empresas 11 [The Criminal Liability of Corporations] (INACIPE, 2017).

increasingly generating risks that oftentimes led to the commission of crimes, Congress drafted the CLC as a mechanism to allow the indictment of all legal persons, excluding State-owned or operated institutions.[71]

In doing so, legislators aimed to modernize the regulations, since the dissipation of liability between the holding and its subsidiaries, the complex distribution of tasks within the organization, and interstate and transnational commercial activities were hindering the enforcement of criminal law.[72] Taking these challenges into account, Congress produced the accusation model to be analyzed next.

### B. *Accusation Model*

Article 421 of the NCCP establishes a direct and autonomous accusation model against legal persons.[73] This means that legal persons can be liable for the commission of a crime, regardless of the responsibility of the natural person directly involved in the facts.[74] Moreover, this provision establishes two requirements for the accusation of a legal person: (i) that the crime be committed in its name, for its benefit or through means provided by it, (ii) and that, in addition, a non-compliance with the due control in the organization be proven.[75]

The second condition implies that, if the legal person demonstrates due control in the organization; that is, the implementation of strategies, protocols and policies to identify risks and prevent crimes from being committed, its criminal responsibility would be ruled out or, at least, attenuated. This is because a natural person that eludes due diligence controls to commit a crime is acting on his or her own and not on behalf of the corporation.[76] Consequently, corporations should adopt a compliance program to manage and mitigate criminal risks as an essential measure to avoid criminal liability.[77] The requirements of such a program will be analyzed hereunder.

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[71] Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], *as amended*, Art. 421, Diario Oficial de la Federación [D.O.], March 5, 2014, (Mex.).

[72] Coaña, *supra* note 70, at 3.

[73] Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], *as amended*, Art. 421, Diario Oficial de la Federación [D.O.], March 5, 2014, (Mex.).

[74] Coaña, *supra* note 70, at 15.

[75] Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], *as amended*, Art. 421, Diario Oficial de la Federación [D.O.], March 5, 2014, (Mex.).

[76] Coaña, *supra* note 70, at 16.

[77] Miguel Ontiveros Alonso, ¿Para qué sirve el compliance en materia penal? [ What is the purpose of a criminal compliance program?], in El Código Nacional de Procedimientos Penales. Estudios 146 [Studies on the National Code of Criminal Procedures] (Sergio García Ramírez, IIJ-UNAM, 2015).

### C. *Criminal Compliance Program*

A criminal compliance program is composed of a broad assortment of measures implemented by an organization to prevent the commission of crimes.[78] It expresses the corporate commitment to adopt a culture of legality.[79] However, in Mexico there is a legal void on this topic because, even when the NCCP assumes the adoption of such program to rule out or attenuate the CLC, there is no further provision that explains it requirements.

Therefore, to fill this legal gap, it is necessary to dip into external materials, such as comparative law or standardization norms like ISO 19600 on compliance management systems, ISO 26000 on social responsibility, or even the UNGP for they provide recommendations on this issue.[80] Thus, a criminal compliance program should consider, at least, the following aspects: (i) the identification of criminal risks, (ii) the adoption and implementation of protocols and policies to mitigate such risks, (ii) corporate commitment to prevent the commission of crimes, (iii) the allocation of financial resources and the creation of a body to run the program, (iv) the creation of internal disciplinary and grievance mechanisms, (v) internal and external communication of the progress made and (vi) the continuous program revision.[81]

There are still several areas of the CLC that need to be complemented by Congress and these will be pointed out in Chapter IV of this essay. However, this has not been an obstacle for some Mexican states to also adopt the CLC at the local level and develop more comprehensive regulations, as in the case of the state of Quintana Roo,[82] to which I will return later. For now, let us continue with the analysis of the CLC as regulated by the NCCP.

### D. *Crimes that can be Attributed to Legal Persons*

One interesting feature of the CLC is that legal persons cannot be prosecuted for the commission of just any crime, but only those listed in the Article 11 bis of the Federal Criminal Code,[83] which are mainly related to what is called economic criminal law.[84] It is not my intention to discuss why legislators only included those offenses in the CLC. However, as I will argue in

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[78] *Id.*

[79] *Id.*

[80] United Nations Guiding Principles on Business and Human Rights Arts. 19-21.

[81] Coaña, *supra* note 70, at 22.

[82] *See* Código Penal para el Estado de Quintana Roo [C.P.Q.R.] [Criminal Code for the State of Quintana Roo] *as amended*, Articles 18-18 nonies, Periódico Oficial del Estado de Quintana Roo [P.O.Q.R.], March 29, 1991, (Quintana Roo, Mex.).

[83] Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, Article 11 bis, Diario Oficial de la Federación [D.O.], August 14, 1931, (Mex.).

[84] Coaña, *supra* note 70, at 27.

Chapter IV, this catalog should be considerably expanded to optimize the contribution of criminal law in the protection of human rights.

### E. *Punishment and Alternative Dispute Resolution Mechanisms*

Since legal persons are inventions and cannot be deprived of their liberty, it was necessary to conceive sanctions that were suitable to their nature. Currently, Article 422 of the NCCP establishes the following: (i) fines, (ii) comprehensive reparation of damages, (iii) confiscation of assets, (iv) the publication of a sentence (v) and the dissolution of the organization.[85]

However, a criminal conviction can also entail non-legal consequences, such as a tarnished image of the corporation, decreased value of the company and its shares, a loss of clients and suppliers, and limitations for obtaining credit, among others.[86] In this sense, the CLC also enables alternative dispute resolution mechanisms, so that, by compensating the victims, corporations can avoid these undesirable effects.[87]

Having studied the role of criminal law as a subsidiary protector of human rights and its enforcement against legal persons, let us analyze the contribution of the CLC to business and human rights.

## IV. The CLC: A Step Forward in the Implementation of the UNGP?

So far, we have explored the current situation of business and human rights, as well as the purpose, content and scope of the CLC as it has recently been implemented in Mexico. We will now delve into the central issue of this article and determine to what extent the CLC contributes to regulate the conduct of corporations in accordance with the UNGP. To this effect, this chapter will scrutinize each of the foundational and operational standards to determine up to what point the CLC can fulfil them.

### 1. *Contribution to the State Duty to Protect*

The State duty to protect human rights is stated in the first part of the framework and comprises UNGP 1 to 10.

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[85] Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], *as amended*, Art. 422, Diario Oficial de la Federación [D.O.], March 5, 2014, (Mex.).

[86] Coaña, *supra* note 70, at 30.

[87] Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], *as amended*, Art. 424, Diario Oficial de la Federación [D.O.], March 5, 2014, (Mex.).

### A. *Guiding Principle 1*

This principle establishes the State duty to protect against human rights violations by third parties, including corporations, within their territory and/or jurisdiction.[88] To this effect, States must take appropriate steps to prevent, investigate, punish and redress human rights abuse, through effective policies, legislation, regulations and adjudication.[89]

Mexico has partially fulfilled these obligations by adopting the CLC, since it is a legislative measure that aims to protect human rights, in the form of legally protected assets, from potentially harmful activities carried out by business enterprises. Furthermore, as a national law, it applies to all Mexican territory at both federal and local levels. Hence, the enactment of the CLC represents an appropriate step towards preventing, investigating, punishing and redressing human rights abuses by corporations.

However, compliance with this UNGP is incomplete because, according to Article 11 bis of the FCC,[90] the CLC is limited to specific crimes, which do not entirely encompass the broad array of human rights outlined in the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work, as indicated in UNGP 12.

Therefore, the scope of protection of the CLC in Mexico should be extended, so it can cover all human rights violations applicable to criminal law. The discussion on the scope of defense provided by the CLC is found in the analysis of the UNGP 12, but let us continue with the following principle.

### B. *Guiding Principle 2*

This principle provides that States must clearly lay down the expectation that all companies in their territory and jurisdiction are to respect human rights throughout their operations.[91]

In this regard, legislation is a suitable way of setting out social expectations since it is ultimately an instrument of communication. Consequently, to fully comply with this principle, among other measures, it is necessary for States to enact law that explicitly specify corporations' obligation to respect human rights. Currently, there is no such law in Mexico. However, the CLC helps to create the expectation that corporations should respect the human rights protected by criminal law. In this sense, due to the restricted catalog of crimes companies can held responsible for, the CLC only partially meets

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[88] United Nations Guiding Principles on Business and Human Rights Art. 1.

[89] *Id.*

[90] Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, Article 11 bis, Diario Oficial de la Federación [D.O.], August 14, 1931, (Mex.).

[91] United Nations Guiding Principles on Business and Human Rights Article 1.

with this UNGP. Nevertheless, as I will further argue, if this catalog were extended to other existing crimes, it could enhance the contribution of the CLC to this UNGP.

### C. *Guiding Principle 3*

This principle refers to the State regulatory function and establishes four different obligations.[92] First, to enforce laws that require corporations to respect human rights; second, to ensure that other laws and policies that govern corporations do not limit but promote respect for human rights; third, to provide guidance to companies on how to respect human rights in their operations; and fourth, to encourage business enterprises to communicate how they are addressing their impact on human rights.[93]

In connection with the first obligation, the CLC constitutes a legislative measure that clearly demands corporations to respect human rights. Article 421 of the NCCP states that legal persons shall be responsible for any crimes committed in their name, in their benefit or through the means that they provide, if it can be proven a lack of control in the organization.[94] As analyzed in Chapter III, to prove proper control and, consequently, rule out their liability, corporations must demonstrate the existence of an effective compliance program, which includes the detection, prevention and mitigation of criminal risks. Consequently, the CLC indirectly contributes to this compliance since it requires companies to implement a criminal preventive program as part of their responsibility to respect human rights.

As regards the second obligation, the CLC has made no contribution because it is mainly related to corporate law. Nevertheless, the CLC can play an important role in the third and fourth obligations. Currently, neither the FCC nor the NCCP explain the mandatory features of a criminal compliance program. However, these provisions can be reformed to provide sufficient guidance on how to develop an efficient criminal compliance program, which can include the creation of channels to communicate the preventive measures implemented by the corporations. One example of this is found in the local legislation of the state of Quintana Roo, Mexico, which elaborates on the requirements of a criminal compliance program, including the identification of risks, the adoption of protocols and the allocation of financial resources for the prevention of crimes, the creation of a body in charge of the program implementation, the creation of internal grievance mechanisms, and the constant review and updating of the adopted programs.[95] If this guidance on

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[92] *Id.* at Art. 3.

[93] *Id.*

[94] Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], *as amended*, Art. 421, Diario Oficial de la Federación [D.O.], March 5, 2014, (Mex.).

[95] *See* Código Penal para el Estado de Quintana Roo [C.P.Q.R.] [Criminal Code for the

how corporations can respect human rights is provided at a local level, there is no obstacle for doing the same at the federal level.

### D. *Guiding Principles 4, 5 and 6*

These guidelines are related to the State's responsibility when conducting commercial activities, licensing others to provide services with potential impact on human rights and hiring private corporations.[96]

Principle 4 establishes the obligation to protect against human rights abuses by corporations that are owned or controlled by the State.[97] To this effect, the CLC has nothing to offer since, according to the second paragraph of Article 421 of the NCCP, State institutions cannot incur in criminal liability.[98] It is understandable to safeguard the operation of official corporations because, to some extent, they perform public services. Therefore, the suspension of activities or the dissolution of the company would be undesirable for the State and possibly more harmful to society than the crime committed. However, this exemption should not be interpreted as if the official corporations were not required to implement a criminal compliance program. They might not be accountable for the crimes, but they still have the duty to prevent crimes from happening. For these reasons, non-criminal (administrative) measures would be more suitable to comply with this obligation.

Meanwhile, principle 5 provides that States must oversee the operations of companies that provide privatized services with a direct impact on human rights, such as water supply, electric energy, healthcare, and private security, among others.[99] In this regard, since such corporations are not owned or controlled by the State, they can be criminally liable. Consequently, the CLC contributes to comply with this guideline because by monitoring company operations, the State is able to initiate a criminal procedure for the commission of a crime as an accountability mechanism.

In addition, principle 6 orders that States should promote respect for human rights by corporations with which they conduct commercial transactions.[100] To this end, the CLC can play an important role since States are able to set the implementation of a criminal compliance program as an official requirement for public contracting.

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State of Quintana Roo] *as amended*, Article quinquies, Periódico Oficial del Estado de Quintana Roo [P.O.Q.R.], March 29, 1991, (Quintana Roo, Mex.).

[96] United Nations Guiding Principles on Business and Human Rights Articles 4-6.

[97] *Id.* at Art. 4.

[98] Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], *as amended*, Article 421, Diario Oficial de la Federación [D.O.], March 5, 2014, (Mex.).

[99] United Nations Guiding Principles on Business and Human Rights Article 5.

[100] *Id.* at Art. 6.

E. *Guiding Principle 7*

This principle establishes the obligation of States to guarantee that business enterprises will respect human rights in conflict-affected areas.[101] John Ruggie defines a conflict-affected area as a law-free zone with no central authority because the State is unwilling or unable to respect, protect and fulfill human rights.[102] This generally occurs in countries involved in armed conflict or with authoritarian governments. It is a delicate problem since most gross human rights violations take place under these circumstances.[103]

To comply with this UNGP, countries must help corporations identify and prevent human rights risks and assist them in the implementation of procedures to minimize such risks.[104] Moreover, States should suspend or deny public support to companies that do not cooperate in this effort, and ensure that measures are in place to sanction any involvement in human rights abuses.[105]

In this regard, the CLC can be very helpful because, as seen above, it obligates corporations to develop a due diligence program to detect and mitigate criminal risks. Hence, the assistance that States must provide to protect human rights can be more effective if corporations have already implemented preventive policies and compliance structures.

Moreover, the CLC is an enforcement mechanism to punish human rights abuses perpetrated by corporations, which can not only be applied within the Mexican territory but also beyond its borders. Article 4 of the FCC provides that the crimes committed abroad by or against Mexicans can be prosecuted and punished according to the federal laws when the defendant is domiciled in Mexico, when the crime has not already been judged elsewhere and the facts constitute a crime both in Mexico and in the country where they took place.[106]

For this reason, the CLC makes it possible to sanction not only the crimes committed in Mexico by domestic or foreign corporations, but also those perpetrated by Mexican companies in any other country. This extraterritorial feature of the CLC has enormous potential for the "home country" to punish human rights violations that occur in "host countries", that might be conflict-affected zones, where law enforcement is almost impossible.

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[101] *Id.* at Art. 7.

[102] *See* Ruggie, *supra* note 15, Chapter 1.

[103] *Id.*

[104] United Nations Guiding Principles on Business and Human Rights Art. 7.

[105] *Id.*

[106] Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, Article 4, Diario Oficial de la Federación [D.O.], August 14, 1931, (Mex.).

F. *Guiding Principles 8, 9 and 10*

These principles are related to the policy coherence that States must uphold.[107] To this effect, countries must provide State-based institutions nationwide with information and support to fulfill their human rights obligations.[108] This includes preparing and training investigation and law enforcement agencies to learn how to draw upon the CLC. In the international arena, States should promote business respect for human rights in the multilateral institutions of which they are members.[109] In this case, if the CLC helps to comply with this duty, Mexico should encourage other countries to adopt similar measures in their criminal justice systems.

2. *Contribution to the Corporate Responsibility to Respect*

So far, I have analyzed how the adoption of the CLC contributes to the State duty to protect human rights. In this section, I will examine whether it is also useful to comply with the corporate responsibility to respect these rights.

A. *Guiding Principle 11*

This principle provides that corporations should respect human rights.[110] Therefore, they must avoid infringing on the human rights of others and address any negative impact they might have.[111]

As discussed, this guideline has been severely criticized because its observation depends on corporate goodwill and entails a voluntary system of adoption and implementation of codes of conduct with no enforcement mechanisms.[112] Therefore, it urges, but does not oblige companies to respect human rights.

In this respect, the adoption of the CLC establishes not only the moral responsibility, but also the binding obligation of corporations to respect human rights protected by criminal law. The CLC also encourages business enterprises to implement a criminal compliance program, for it is necessary for them to exclude or attenuate their liability. Furthermore, it enables criminal procedure to function as an enforcement mechanism to punish companies that violate human rights while equipping victims with a comprehensive set of substantive and procedural rights. For these reasons, the CLC has great

[107] United Nations Guiding Principles on Business and Human Rights Arts. 8-10.

[108] *Id.* at Art. 8.

[109] *Id.* at Art. 10.

[110] *Id.* at Art. 11.

[111] *Id.*

[112] Weissbrodt & Kruger, *supra* note 1, at 338.

potential to transform the international soft law of the UNGP into domestic hard law, and to empower the participation of civil society.

### B. *Guiding Principle 12*

This UNGP determines the scope of human rights that corporations should respect. Since commercial activity is potentially harmful to almost all of the internationally recognized human rights, it states that business enterprises must respect, at least, those established in the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, as well as the principles set out by the International Labour Organization in the Declaration on Fundamental Principles and Rights at Work.[113]

As analyzed in Chapter III, the CLC in Mexico is restricted to the crimes that are listed in Article 11 bis of the FCC.[114] The next chart contains the criminal offenses that can be attributed to companies and the legal asset to be protected.

Crimes Considered in the CLLP

| *Crime* | *Protected Asset* |
|---|---|
| Terrorism | Several |
| Drug-related | Health |
| Corruption of minors and persons with disabilities | Unhindered development of personality |
| Anti-corruption crimes | Public service |
| Money forgery | Public finances |
| Crimes against national wealth | National wealth |
| Human trafficking | Several |
| Vehicle theft and commercialization of stolen goods | Property |
| Fraud | Property |
| Concealment | Justice administration |
| Money laundering | Several |
| Environmental crimes | Environment |
| Crimes against the author's right | Author's right |
| Arms trafficking, introduction and gathering | Several |
| Human organ commercialization | Several |
| Kidnapping | Liberty |
| Smuggling | Public finances |

[113] United Nations Guiding Principles on Business and Human Rights Art. 12.

[114] Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, Art. 11 bis, Diario Oficial de la Federación [D.O.], August 14, 1931, (Mex.).

| *Crime* | *Protected Asset* |
|---|---|
| Tax fraud | Public finances |
| Crimes against industrial property | Industrial property |
| Banking and financial crimes | Financial system |
| Bankruptcy-related crimes | Property |
| Chemical substance-related crimes | Several |

Considering that it is a small catalog, most of the human rights that corporations should respect fall outside the scope of the CLC. However, it would be desirable to reform this article so as to include other existing crimes and optimize the protection of a broader range of human rights.

The following charts draw a parallel between the human rights recognized in the International Bill of Rights and the Declaration on Fundamental Principles and Rights at Work, and the specific offence that is legally defined to protect them. It is also indicated whether these crimes can be attributed to corporations or not. The abbreviation N/A is used when there is no offence established in law that directly aims to protect the corresponding human right.

### Universal Declaration of Human Rights

| *Art.* | *Human Right* | *Crime* | *Legal Basis* | *CLC* |
|---|---|---|---|---|
| 2 | Non-discrimination | Discrimination | Art. 149 ter FCC | NO |
| 3 | Life | Homicide | Art. 302 FCC | NO |
| | | Genocide | Art. 149 bis FCC | NO |
| | Physical integrity | Injuries | Art. 288 FCC | NO |
| | Liberty and security of person | Unlawful deprivation of liberty | Art. 364 FCC | NO |
| | | Kidnapping | Special Law | YES |
| 4 | Prohibition of slavery or servitude | Human trafficking | Special Law | YES |
| 5 | Prohibition of torture, cruel, inhuman or degrading treatment or punishment | Torture, cruel, inhuman or degrading treatment or punishment | Special Law | NO |
| 6 | Legal personality | N/A | N/A | N/A |
| 7 | Equality and non-discrimination | Discrimination | Art. 149 ter FCC | NO |
| 8 | Access to justice and effective remedy | Denial of Justice | Art. 215 (IV) FCC | NO |
| 9 | Prohibition of arbitrary arrest, detention or exile | Abuse of authority | Art. 215 (VI) FCC | NO |
| 10 | Public hearing, independent and impartial tribunal | Against justice administration | Art. 225 FCC | NO |

| *Art.* | *Human Right* | *Crime* | *Legal Basis* | *CLC* |
|---|---|---|---|---|
| 11 | Presumption of innocence and procedural rights | Against justice administration | Art. 225 FCC | NO |
| 12 | Prohibition of arbitrary interference with privacy, family, home, correspondence, honor and reputation | Violation of correspondence and communications | Art. 173 FCC | NO |
| 13 | Freedom of movement and residence | Unlawful deprivation of liberty | Art. 364 FCC | NO |
| | | Attacks to public roads | Art. 165 FCC | NO |
| 14 | Asylum from prosecution | N/A | N/A | N/A |
| 15 | Nationality | N/A | N/A | N/A |
| 16 | Consent to marriage and family rights | Human trafficking | Special Law | YES |
| 17 | Private property | Theft | Art. 367 FCC | YES |
| | | Abuse of confidence | Art. 382 FCC | NO |
| | | Fraud | Art. 386 FCC | YES |
| | | Extortion | Art. 390 FCC | NO |
| | | Dispossession of land | Art. 395 FCC | NO |
| | | Damages | Art. 397 FCC | NO |
| 18 | Freedom of thought, conscience and religion | N/A | N/A | N/A |
| 19 | Freedom of opinion and expression | N/A | N/A | N/A |
| 20 | Freedom of assembly and association | N/A | N/A | N/A |
| 21 | Political rights | Electoral crimes | Special law | NO |
| 22 | Social security | Social security crimes | Special law | NO |
| 23 | Labor rights | Labor crimes | Special law | NO |
| 24 | Rest and leisure | Labor crimes | Special law | NO |
| 25 | Adequate standard of living and health | N/A | N/A | N/A |
| 26 | Education | N/A | N/A | N/A |
| 27 | Cultural life and scientific advancements | N/A | N/A | N/A |
| 27 | Author's right | Against the author's right | Art. 424 FCC | YES |

## International Covenant on Civil and Political Rights

| *Art.* | *Human Right* | *Crime* | *Legal Basis* | *CLC* |
|---|---|---|---|---|
| 1 | Self-determination | N/A | N/A | N/A |
| 2 | Non-discrimination | Discrimination | Art. 149 ter FCC | NO |
| 3 | Equality between men and women | Discrimination | Art. 149 ter FCC | NO |
| 6 | Life | Homicide | Art. 302 FCC | NO |
| | | Genocide | Art. 149 bis FCC | NO |
| | Physical integrity | Injuries | Art. 288 FCC | NO |
| 7 | Prohibition of torture, cruel, inhuman or degrading treatment or punishment. | Torture, cruel, inhuman or degrading treatment or punishment. | Special Law | NO |
| 8 | Prohibition of slavery, servitude, compulsory labor | Human trafficking | Special Law | YES |
| 9 | Liberty and security of person | Unlawful deprivation of liberty | Art. 364 FCC | NO |
| | | Kidnapping | Special Law | YES |
| | Prohibition of arbitrary arrest or detention. | Abuse of authority | Art. 215 (VI) FCC | NO |
| 11 | Prohibition of imprisonment for civil debts | N/A | N/A | N/A |
| 12 | Freedom of movement and residence | Unlawful deprivation of liberty | Art. 364 FCC | NO |
| 14 | Presumption of innocence and procedural rights | Against justice administration | Art. 225 FCC | NO |
| 15 | Non-retroactivity of criminal laws | N/A | N/A | N/A |
| 16 | Legal personality | N/A | N/A | N/A |
| 17 | Prohibition of arbitrary interference with privacy, family, home, correspondence, honor and reputation | Violation of correspondence and communications | Art. 173 FCC | NO |
| 18 | Freedom of thought, conscience and religion | N/A | N/A | N/A |
| 19 | Freedom of opinion and expression | N/A | N/A | N/A |
| 21 | Freedom of assembly | N/A | N/A | N/A |
| 22 | Freedom of association | N/A | N/A | N/A |

| *Art.* | *Human Right* | *Crime* | *Legal Basis* | *CLC* |
|---|---|---|---|---|
| 23 | Consented marriage and family rights | Human trafficking | Special Law | YES |
| 24 | Name and nationality | N/A | N/A | N/A |
| 25 | Political rights | Electoral crimes | Special law | NO |
| 26 | Equality and non-discrimination | Discrimination | Art. 149 ter FCC | NO |

## International Covenant on Economic, Social and Cultural Rights

| *Art.* | *Human Right* | *Crime* | *Legal Basis* | *CLC* |
|---|---|---|---|---|
| 1 | Self-determination | N/A | N/A | N/A |
| 3 | Equality between men and women | Discrimination | Art. 149 ter FCC | NO |
| 6 | Right to work | N/A | N/A | N/A |
| 7 | Minimum remuneration | Labor crime | Special law | NO |
| | Safe and healthy working conditions | Labor crime | Special law | NO |
| | Rest and leisure | Labor crime | Special law | NO |
| 8 | To form unions | N/A | N/A | N/A |
| | Strike | N/A | N/A | N/A |
| 9 | Social security | Social security crimes | Special law | NO |
| 10 | Consented marriage and family rights | Human trafficking | Special Law | YES |
| 11 | Adequate standard of living | N/A | N/A | N/A |
| 12 | The highest attainable standard of health | N/A | N/A | N/A |
| 13 | Education | N/A | N/A | N/A |
| 14 | Education | N/A | N/A | N/A |
| 15 | Cultural life | N/A | N/A | N/A |
| | Scientific progress | N/A | N/A | N/A |

ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK

| *Art.* | *Human Right* | *Crime* | *Legal Basis* | *CLC* |
|---|---|---|---|---|
| 2 | Freedom of association and collective bargaining | N/A | N/A | N/A |
| | Elimination of forced labor | Human trafficking | Special Law | YES |
| | Abolition of child labor | Labor crime | Special law | NO |
| | Non-discrimination in employment and occupation | Discrimination | 149 ter FCC | NO |

As seen, in terms of civil and political rights, Mexican legislation defines several offences that intend to protect almost all of them. The ones that are not directly addressed, such as the right to a name, nationality or legal personality, can be indirectly protected by other figures such as human trafficking. Moreover, in regards to economic, social and cultural rights, there is specific criminal protection for labor and social security rights, as well as for the principle of non-discrimination. Furthermore, the progressive achievement of the rights to health, education, adequate standard of living, enjoyment of cultural life and scientific progress can be indirectly protected by the punishment of anti-corruption crimes.

Therefore, the currently limited contribution of the CLC to comply with this UNGP can be significantly enhanced if the catalog of crimes that can be attributed to corporations is expanded as follows:

CRIMES THAT SHOULD BE CONSIDERED IN THE CLLP

| *Crime* | *Protected Human Right* | *Legal Basis* |
|---|---|---|
| Discrimination | Non-discrimination | Art. 149 ter FCC |
| Homicide | Life | Art. 302 FCC |
| Genocide | Life | Art. 149 bis FCC |
| Injuries | Physical integrity | Art. 288 FCC |
| Against reproductive rights | Reproductive rights | Art. 199 FCC |
| Unlawful deprivation of liberty | Personal liberty and security | Art. 364 FCC |
| Torture, cruel, inhuman or degrading treatment or punishment. | Prohibition of torture, cruel, inhuman or degrading treatment or punishment. | Special law |
| Denial of justice | Access to justice | Art. 215 (IV) FCC |
| Abuse of authority | Several | Art. 215 (VI) FCC |

| *Crime* | *Protected Human Right* | *Legal Basis* |
|---|---|---|
| Against justice administration | Legal certainty, procedural rights | Art. 225 FCC |
| Violation of correspondence and communications | Privacy, inviolability of communications | Art. 173 FCC |
| Attacks to public roads | Freedom of transit | Art. 165 FCC |
| Theft | Property | Art. 367 FCC |
| Abuse of confidence | Property | Art. 382 FCC |
| Extortion | Property | Art. 390 FCC |
| Dispossession of land and water sources | Property | Art. 395 FCC |
| Damages | Property | Art. 397 FCC |
| Electoral crimes | Political rights | Special law |
| Social security crimes | Social security rights | Special law |
| Labor crimes | Labor rights | Special law |
| Child pornography | Unhindered development of personality | Art. 202 FCC |
| Sexual tourism of minors | Unhindered development of personality | Art. 203 FCC |
| Prostitution of minors | Unhindered development of personality | Art. 204 FCC |
| Pederasty | Sexual liberty and unhindered development of personality | Art. 209 bis FCC |
| Rape, sexual assault, sexual harassment. | Sexual liberty and sexual development | 259 bis, 260 and 265 FCC |

This extension of the catalog is not a legislative illusion, but is a real possibility. For example, at the local level, the state of Quintana Roo has adopted a broader list of crimes that can be attributed to corporations, such as homicide, injuries, and dispossession of land, among others, which are often violated by companies.[115] Hence, there is no limitation for the federal congress to place the CLC within the scope of protection established by this UNGP.

### C. *Guiding Principle 13*

This principle provides that corporations should avoid causing harm or contributing to adverse human rights impacts, not only through their opera-

[115] *See* Código Penal para el Estado de Quintana Roo 2017 [Criminal Code for the State of Quintana Roo] (Mexico) Art. 18 nonies.

tions, but also within the activities of their business partners.[116] To this effect, the CLC can be very useful, taking into account the fact that crimes can be committed by one or several actors,[117] and also result from actions or omissions.[118] In this sense, if just one corporation is involved in a crime, it can be punished as a direct perpetrator.[119] If a business partner commits the crime, the corporation can be sanctioned as joint-perpetrator by omission if the company fails to comply with its preventive duties within the supply chain.[120]

### D. *Guiding Principle 14*

All business enterprises, regardless of their size, can have severe human rights impacts. Therefore, this principle declares that the responsibility to respect applies to all corporations.[121] However, the steps they take to meet this requirement are expected to be proportional and suitable to their size, sector, operational context, ownership and structure.[122]

The principle of equal application of the law is also embraced by the CLC, as Article 11 bis of the FCC establishes that all legal persons, without distinction, can be punished for crimes.[123] Even when the FCC does not provide much detail about the requirements of a criminal compliance program, Article 18 quinquies of the Criminal Code for the state of Quintana Roo stipulates that corporate governance models should be fitting for each business enterprise.[124] Consequently, the CLC can be arranged along the lines of this guideline.

### E. *Guiding Principles 15 and 16*

In a similar sense, principle 15 says that the policies adopted by corporations to comply with their responsibility should include three essential aspects: the specific commitment to respect human rights, a human rights due

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[116] United Nations Guiding Principles on Business and Human Rights Art. 13.

[117] Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, Art. 13, Diario Oficial de la Federación [D.O.], August 14, 1931, (Mex.).

[118] *Id.* at Art. 7.

[119] *Id.* at Art. 13.

[120] *Id.* at Art. 7.

[121] United Nations Guiding Principles on Business and Human Rights Art. 14.

[122] *Id.*

[123] Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, Article 11 bis, Diario Oficial de la Federación [D.O.], August 14, 1931, (Mex.).

[124] Código Penal para el Estado de Quintana Roo [C.P.Q.R.] [Criminal Code for the State of Quintana Roo] *as amended*, Article 18 quinquies, Periódico Oficial del Estado de Quintana Roo [P.O.Q.R.], March 29, 1991, (Quintana Roo, Mex.).

diligence process and mechanisms to provide remediation of any violation.[125] Meanwhile, principle 16 explains that the corporate commitment to respect human rights should be approved by the most senior level of the corporation and be communicated to its personnel and business partners.[126]

In the absence of a specific provision in the FCC, the corporate governance adopted by the CLC to prevent the commission of crimes can be informed by these guidelines. Thus, a criminal compliance program should include a meeting of shareholders or directors to formally adopt the commitment to prevent crimes from being committed, as well as communication channels to make this policy known both internally and externally.

### F. *Guiding Principles 17, 18, 19, 20 and 21*

These principles explain the requirements of a human rights due diligence.[127] The first stage of this process is to identify the risks against human rights generated by the corporation's commercial activities and its supply chain.[128] To this effect, companies should ensure the participation of workers, consumers, communities and other potentially affected groups.[129] The second phase is to prevent and mitigate such risks by adopting internal policies and protocols, as well as the allocation of financial resources to ensure their communication, implementation, evaluation and revision.[130]

As seen in Chapter III, the adoption of an effective criminal compliance program excludes or attenuates corporate criminal liability, for it aims at detecting, preventing and mitigating criminal risks. If the legal definition of crimes aims to protect human rights in the form of legal assets, a criminal compliance program is, to some extent, a human rights due diligence. However, the former cannot replace the latter because, even if the scope of application of the CLC is extended to all the offences that are legally defined to protect human rights, it would not encompass all possible abuses. While criminal law only sanctions serious offenses to legally protected assets, human rights violations are caused by many other means, even minor offenses that involve administrative infractions or civil liability. Nevertheless, a criminal compliance program can be an essential component of a human rights due diligence.

One relevant feature required by these UNGP is the participation of the civil society in the identification and assessment of the risks. There is no provision in Mexico that requires civil participation in a criminal compliance program. However, it would be desirable for the FCC to call for such ac-

[125] United Nations Guiding Principles on Business and Human Rights Article 15.

[126] *Id.* at Art. 16.

[127] *Id.* at Art. 17.

[128] *Id.* at Art. 18.

[129] *Id.*

[130] *Id.* at Arts. 19-21.

tion because, if violations generally occur in situations with significant power asymmetries, an effective way to prevent them is by empowering potential victims.[131]

### 3. *Access to Remedy*

In the last two sections, I have examined how the implementation of the CLC helps to comply with the UNGP in regards to the State duty to protect human rights and corporate responsibility to respect human rights. To finalize the analysis, in this chapter I will evaluate the function of the CLC as a remedial mechanism for human rights violations.

#### A. *Guiding Principles 25, 26 and 27*

Besides the duty to protect human rights, these principles provide that the State must also ensure effective remedy to the victims.[132] These State-based mechanisms can be judicial or non-judicial in nature.[133] In this sense, the adoption of the CLC helps to meet this obligation, since it constitutes a legislative measure that enables a State-based judicial procedure to investigate and punish the crimes committed by corporations, which might involve the violation of human rights.

The sanctions that can be applied to business enterprises seek not only punishment, but also compensation.[134] Thus, after the commission of a crime, corporations can be sentenced to full remediation of the damages, which includes, at least: the restitution of the assets obtained through the crime or the payment of their cost; compensation for material and moral harm, indirect damages and the loss of profit, the loss of employment or educational opportunities, medical and psychological assistance; public apologies and guarantees of non-repetition.[135]

Moreover, the CLC allows alternative dispute resolution mechanisms, such as reparatory agreements and conditional suspension of the process, which entail mediation or conciliation between the parties and the payment for the full remediation of the damages.[136] Consequently, the CLC also allows State-based non-judicial grievance mechanisms in favor of the victims.

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[131] *See* Melish, *supra* note 45; and Jochnick, *supra* note 47.

[132] United Nations Guiding Principles on Business and Human Rights Art. 25.

[133] *Id.* at Arts. 26-27.

[134] Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, Article 422, Diario Oficial de la Federación [D.O.], August 14, 1931, (Mex.).

[135] *Id.* at Art. 30.

[136] *Id.* at Art. 424.

Furthermore, the CLC has other convenient features. For example, it can be attributed directly to the corporation, regardless the liability of the natural persons involved in the crime, it has extraterritorial application against Mexican companies that operate in a host country that might be unwilling or unable to prosecute them, and it is free of charge for the victims. Consequently, the CLC contributes to overcoming some legal barriers to the effective access to justice.

### B. *Guiding Principles 28, 29, 30 and 31*

These principles provide that, besides the State-based judicial and non-judicial grievance mechanisms, States must encourage the implementation of non-State based alternatives, such as internal procedures administered by corporations alone or with the participation of other stakeholders.[137] Companies must also implement and collaborate in operational-level grievance mechanisms, to address any adverse impact on human rights in a timely manner.[138]

With the adoption of the CLC, companies are required to adopt a criminal compliance program that can include a channel to file claims, as well as a dialogue-based and operational-level grievance mechanism (informed by the principles established in UNGP 31), in order to provide adequate remedy for crimes without the need of initiating a criminal procedure. This mechanism can be applied to crimes that only affect particular interests, since a direct claim for the victim is required for such crimes to be prosecuted.[139] In the case of crimes that are prosecuted *ex officio*, the implementation of a non-State based grievance mechanism by which the corporation provides compensation to the victim can attenuate its responsibility.[140]

### 4. *Summary*

After evaluating the CLC in light of the UNGP, we can conclude that the CLC plays a significant role in the business and human rights sub-ecosystem, not only because of its direct contributions, but also for the mutually reinforcing connections it creates with corporate and civil governance. However, there are still many areas in which its performance can be optimized.

To finish this analysis, the next chart recaps the individual contributions, symbiotic relations and shortcomings of the CLC in relation to each UNGP.

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[137] United Nations Guiding Principles on Business and Human Rights Art. 28.

[138] *Id.* at Art. 29

[139] Código Nacional de Procedimientos Penales [C.N.P.P.] [National Code of Criminal Procedures], *as amended*, Article 225, Diario Oficial de la Federación [D.O.], March 5, 2014, (Mex.).

[140] Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, Article 11 bis, Diario Oficial de la Federación [D.O.], August 14, 1931, (Mex.).

| *UNGP* | *Individual Contribution of the CLC to the Field of Business and Human Rights* | *Symbiotic Relation with Corporate and Civil Governance* | *Suggestions to Optimize its Contribution* |
|---|---|---|---|
| 1 | It represents an appropriate legislative step to protect against human rights violations by corporations. | N/A | Expand the catalog of crimes that can be attributed to corporations to broaden the scope of protection. |
| 2 | It helps to create the social expectation that corporations should respect the human rights that are protected by the criminal offenses defined in law. | It raises awareness in corporations about their duty to respect human rights and creates the social expectation that they should do so. | Expand the catalog of crimes that can be attributed to corporations to broaden the scope of protection. |
| 3 | It encourages corporations to develop a criminal compliance program to rule out or attenuate their liability, which also demands corporate respect for human rights. | It requires the implementation of a criminal compliance program in corporate governance to rule out or attenuate the liability. | Guide corporations on how to develop a criminal compliance program, including the participation of civil society. |
| 4 | N/A | N/A | N/A |
| 5 | It can punish corporations that provide privatized services with a direct impact on human rights. | N/A | Expand the catalog of crimes that can be attributed to corporations to broaden the scope of protection. |
| 6 | N/A | N/A | Require a criminal compliance program as a condition for public contracting. |
| 7 | It enables the extraterritorial application of criminal law to sanction violations committed by Mexican corporations in conflict-affected areas. | N/A | Expand the catalog of crimes that can be attributed to corporations to broaden the scope of protection. |
| 8-10 | N/A | N/A | Promote the adoption of the CLC by other countries in multilateral organizations. |
| 11 | It establishes a binding obligation for corporations to respect the human rights that are protected by the offences defined in law, and criminal procedure has the function of an enforcement mechanism. | It equips civil society with a comprehensive set of substantive and procedural rights, in case they become victims of a crime. | Expand the catalog of crimes that can be attributed to corporations to amplify the scope of protection. |

| *UNGP* | *Individual Contribution of the CLC to the Field of Business and Human Rights* | *Symbiotic Relation with Corporate and Civil Governance* | *Suggestions to Optimize its Contribution* |
|---|---|---|---|
| 12 | It lists crimes that can be attributed to corporations. | N/A | Expand the catalog of crimes that can be attributed to corporations to encompass most internationally recognized human rights. |
| 13 | It is possible to sanction corporations if they fail to comply with their preventive duties, even by omission, within the supply chain. | It requires corporations to demand that their business partners in the supply chain uphold the same respect for human rights. | Clarify the preventive duties of corporations within the supply chain. |
| 14 | It establishes that all private corporations can be punished for the commission of such crimes without any distinction. | N/A | Emphasize that the criminal compliance program should be proportional to the size, sector and operational context of the corporation. |
| 15-16 | N/A | N/A | Specify that the criminal compliance program must contain the specific commitment to respect human rights and be approved by senior levels of the corporation. |
| 17-24 | The criminal compliance program can be an essential component of a human rights due diligence. | N/A | Guide corporations on how to develop a criminal compliance program with the participation of civil society. |
| 25-27 | It enables a State-based judicial procedure to obtain a remedy and allows State-based non-judicial alternative dispute resolution mechanisms. | It gives victims the right to full remediation of the damages. | Expand the catalog of crimes to amplify the scope of protection. |
| 28-31 | N/A | N/A | Specify that a criminal compliance program should include a dialogue-based and operational-level grievance mechanism. |

## V. Conclusion

The findings of this research have been already synthetized in the previous section. Thus, I prefer to use these lines to point out some of the challenges to be faced in the future.

Policy-makers and human rights professionals should explore the dynamic dimension of the UNGP to create innovative mechanisms, like the CLC, which engages and orients public, corporate and civil governance in the same direction. By doing so, it will be possible to narrow the gap between regulation and complex transnational business activities. Emphasis should be put on developing civil governance, for it is essential to shift the power dynamics and improve the situation of workers, consumers and communities. In the case of Mexico, the working group appointed by the Ministry of the Interior to address the issue of business and human rights should also consider the potential of the CLC in drafting the national action plan.[141]

On the other hand, in terms of criminal justice, the implementation of the CLC will be useless if the impunity rate in Mexico continues at around 98%.[142] Therefore, the criminal policy needs to be comprehensively restructured to diminish impunity and increase remedy for the victims. Not only for the UNGP, but also for the CLC, this is only the end of the beginning.

[141] The preliminary documents produced by this working group are *available at* Secretaría de Gobernación [Ministry of the Interior] (Mexico), *www.gob.mx/segob/documentos/documentos-del-grupo-de-trabajo-sobre-empresas-y-derechos-humanos*.

[142] *See* INEGI [National Institute of Statistics and Geography] (Mexico) Encuesta Nacional de Victimización 2017 [National Survey of Victimization] *available at www.inegi.org.mx/saladeprensa/boletines/2017/envipe/envipe2017_09.pdf*.

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# THE MEXICAN GENERAL LAW ON THE FORCED DISAPPEARANCE OF PERSONS, DISAPPEARANCES COMMITTED BY INDIVIDUALS AND THE NATIONAL MISSING PERSONS SYSTEM: HOW MANY STEPS FORWARD?

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Abstract: *In 2017, more than 40 years after some of the first documented cases of forced disappearance in Mexico, the General Law on the Forced Disappearance of Persons, Disappearances Committed by Individuals and the National Missing Persons System was published. The approval and enactment of the General Law constitutes a step toward ensuring the free and full enjoyment of human rights of victims of forced disappearance and their next of kin, in accordance with the international human rights standards concerning forced disappearances established by international human rights treaties, the Inter-American Court of Human Rights case law, the recommendations issued by the United Nations Committee and Working Group on Forced or Involuntary Disappearances, and the Inter-American Commission on Human Rights. The General Law introduces and modifies institutions, procedures and guidelines that contribute to ensuring the rights to justice, truth and reparation. However, the General Law does not fully comply with international human rights standards regarding military jurisdiction and criminal responsibility within the chain of command. Also, the proper and effective implementation of the General Law requires strong political will and sufficient material and human resources from the three levels of government. Otherwise, the General Law will simply be regarded as a piece of paper.*

Keywords: *Forced disappearances, International Human Rights Law, Mexico, legislation.*

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Resumen: *En el 2017, más de 40 años después de algunos de los primeros casos documentados de desaparición forzada en México, se publicó la Ley General en Materia de Desaparición Forzada de Personas, Desaparición Cometida por Particulares y del Sistema Nacional de Búsqueda de Personas. La aprobación y la promulgación de la Ley General constituye un paso adelante para garantizar el disfrute libre y pleno de los derechos humanos de las víctimas de desaparición forzada y sus familiares, de conformidad con las normas internacionales de derechos humanos en material de desapariciones forzadas, así como con la jurisprudencia de la Corte Interamericana de Derechos Humanos, las recomendaciones emitidas por el Comité de las Naciones Unidas y el Grupo de Trabajo sobre Desapariciones Forzadas o Involuntarias, y la Comisión Interamericana de Derechos Humanos. La Ley General introduce y modifica instituciones, procedimientos y directrices que contribuyen a garantizar los derechos a la justicia, la verdad y la reparación. Sin embargo, la Ley General no está del todo conforme con los estándares internacionales de derechos humanos en lo atinente a la jurisdicción militar y la responsabilidad penal en la cadena de mando. Además, la implementación correcta y efectiva de la Ley General requiere una fuerte y política voluntad política, así como de la asignación de suficientes recursos materiales y humanos por parte de los tres niveles de gobierno. De lo contrario, la Ley General será solamente letra escrita.*

Palabras clave: *Desaparición forzada, Derecho Internacional de los Derechos Humanos, México, legislación.*

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## I. Introduction

Latin America, and therefore Mexico, has been historically associated with the use of forced disappearances as a generalized State policy and terror tactics, but it is also the place where efficient responses to overcome such heinous crimes have emerged.[1] The use of forced disappearance as a tool for political repression in Mexico can be traced back to the 1970s in the context of the so-called "Dirty War".[2] While it is true that forced disappearances have been traditionally used as a strategy against subversive groups or "terrorists", it is also true that they are now being used in other contexts like those involving organized criminal groups or human mobility and human trafficking, which require a renewed scope of action.[3] This renewed scope of action is the one that must be taken into account in Mexico's situation, where "[c]riminal cartels […] often with the collusion of corrupt government officials, engage in

[1] Ariel Dulitzky, *Prologue*, in La Desaparición Forzada en México: Una mirada desde los organismos del sistema de Naciones Unidas 7 [Forced disappearance in Mexico: From the perspective of United Nations bodies] (Office of the UN High Commissioner for Human Rights in Mexico ed. 2016).

[2] Undeniable Atrocities: Confronting Crimes Against Humanity in Mexico, Open Society Foundation 23-25 (2016), *available at https://www.opensocietyfoundations.org/reports/undeniable-atrocities-confronting-crimes-against-humanity-mexico*; Recomendación 26/2001, Casos sobre las quejas en materia de desapariciones forzadas ocurridas en la década de los 70 y principios de los 80, Comisión Nacional de Derechos Humanos (2001), *available at http://www.cndh.org.mx/sites/all/doc/Recomendaciones/2001/Rec_2001_026.pdf*; and Radilla Pacheco Case, 2009 Inter-Am Ct.H.R, (ser C) No. 209, at 132-137 (Nov. 23 2009). *Also*, the Special Prosecutors' Office for Social and Political Movements of the Past pointed at Rodolfo Reyes Crespo, a militant of the "Liga Comunista 23 de septiembre" as the first documented case of forced disappearance, occurred on 22 December 1973 in Guadalajara, Jalisco. Fiscalía Especial para Movimientos Sociales y Políticos del Pasado, *Informe Histórico Presentado a la Sociedad Mexicana* [Historical report for the Mexican Society], in Comité 68 Pro Libertades Democráticas, Genocidio y delitos de lesa humanidad: documentos fundamentales 1968-2008, 516-554 (Carolina Verduzco Ileana Chávez José Revueltas ed. 2006).

[3] Dulitzky, *supra* note 1, at 8-9.

kidnappings for ransom, abductions for purposes of forced labor, and human trafficking related to the sex trade."[4]

Since its first judgment on the merits regarding the crime of the forced disappearance of Manfredo Velásquez Rodríguez,[5] the Inter-American Court of Human Rights announced the States' obligation to "prevent, investigate and punish any violation of the rights recognized by the [American Convention on Human Rights] and, moreover, if possible, attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."[6]

On October 12, 2017, the Mexican Chamber of Deputies approved a decree that created the General Law on the Forced Disappearance of Persons, Disappearances Committed by Individuals and the National Missing Persons System ("the General Law").[7] The Chamber of Deputies submitted the General Law to the President, who in turn enacted it on November 16, 2017. After being published in the "Diario Oficial de la Federación" [Federal Official Gazette], the General Law came into effect 60 days later, that is to say, January 18, 2018.[8]

The approval and enactment of the General Law constitutes a step toward ensuring the free and full enjoyment of human rights of victims of forced disappearance and their next of kin, according to the international human rights standards concerning forced disappearances. In particular, the Gen-

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[4] Undeniable Atrocities: Confronting Crimes against Humanity in Mexico, *supra* note 2, p. 40. *See also*, The Human Rights Situation in Mexico, Inter-Am C.H.R., OEA/Ser.L/V/II.Doc.44/15, 41, 44, and 47 (2015).

[5] Velásquez Rodríguez Case, 1988 Inter-Am. Ct.H.R., (ser C), 4, 147-148 (Jul. 29 1988).

[6] *Id*. 166. *See also* G.A. Res 60/147. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law [*hereinafter* Basic Principles], Principle I, A/RES/60/147, (Mar. 21, 2006).

[7] Dictámenes de las Comisiones Unidas de Justicia y de Derechos Humanos, con proyecto de decreto por el que se expide la Ley General en materia de Desaparición Forzada de Personas, Desaparición Cometida por Particulares y del Sistema Nacional de Búsqueda de Personas, y se reforman y derogan diversas disposiciones del Código Penal Federal y de la Ley General de Salud [Opinions of the United Commissions on Justice and Human Rights with a decree to enact the General Law on the Forced Disappearance of Persons, Disappearances Committed by Individuals and the National Missing Persons System, amending and repealing the Federal Criminal Code and the General Health Law] [Hereinafter *Opinions with the General Law*], Gaceta Parlamentaria, October 12, 2017 (Mex.).

[8] Decreto por el que se expide la Ley General en Materia de Desaparición Forzada de Personas, Desaparición Cometida por Particulares y del Sistema Nacional de Búsqueda de Personas, y se reforman y derogan diversas disposiciones del Código Penal Federal y de la Ley General de Salud [Decree to enact the General Law on the Forced Disappearance of Persons, Disappearances Committed by Individuals and the National Missing Persons System, amending and repealing the Federal Criminal Code and the General Health Law] [Hereinafter *General Law*], Diario Oficial de la Federación [D.O.], November 12, 2017 (Mex.), Transitory Article 1.

eral Law introduces and modifies institutions, procedures and guidelines that contribute to ensuring the rights to justice, truth and reparation. However, further amendments are needed for the General Law to fully comply with international human rights standards. Moreover, the correct and effective implementation of the General Law requires strong political will and sufficient material and human resources from the three levels of government.

In order to establish such an assessment, the General Law is evaluated under the scope of the established international obligations, especially but not restrictively, in the Inter-American Convention on the Forced Disappearance of Persons,[9] the International Convention for the Protection of All Persons from Forced Disappearance,[10] the judgment of the Inter-American Court in the Radilla Pacheco Case,[11] the recommendations issued to Mexico by the United Nations Committee and Working Group on Forced or Involuntary Disappearances,[12] and the precedents of the Inter-American Commission on Human Rights.[13]

The second section briefly refers to the history of some international human rights instruments that regulate the crime of forced disappearance applicable to Mexico. The third section discusses the national legal and political context surrounding the approval and enactment of the General Law. Section four assesses Mexico's obligation to typify the crime of forced disappearance in criminal law. The fifth section discusses and analyzes the duty to investigate forced disappearances under the provisions of the General Law. The next section addresses several amendments made to laws and the creation or adjustment of the procedures and institutions used to ensure the right to know the whereabouts or fate of disappeared or missing persons. Finally, section seven refers to the rights of the victims of forced disappearance and their next of kin as recognized in the General Law.

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[9] Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, *available at http://www.oas.org/juridico/english/treaties/a-60.html*.

[10] International Convention for the Protection of All Persons from Forced Disappearance, Dec. 20, 2006, adopted by Resolution A/RES/61/177, Jan. 12, 2007, *available at https://treaties.un.org/doc/Publication/UNTS/Volume%202716/v2716.pdf*.

[11] Radilla Pacheco Case, 2009 Inter-Am Ct.H.R, (ser C) No. 209, (Nov. 23 2009).

[12] Commission on Human Rights, Report of the Working Group on Forced or Involuntary Disappearances, E/CN.4/1996/38 (Jan 15, 1996); General Assembly, Report of the Working Group on Forced or Involuntary Disappearances, Addendum, Mission to Mexico [Hereinafter Report of the Working Group-2011], A/HRC/19/58/Add.2 (Dec. 20, 2011); and Committee on Forced Disappearances, Concluding observations on the report submitted by Mexico under article 29, paragraph 1, of the Convention [Hereinafter Concluding observations], CED/C/MEX/CO/1, (Mar. 5, 2015).

[13] The Human Rights Situation in Mexico, Inter-Am C.H.R., OEA/Ser.L/V/II.Doc. 44/15, (2015).

## II. International Human Rights Law Precedents Concerning the Crime of Forced Disappearance Applicable to Mexico

In 1993 the UN General Assembly adopted the Declaration on the Protection of All Persons from Forced Disappearance, proclaiming it as a "body of principles for all States", and urging them to make all efforts so that the Declaration becomes "generally known and respected."[14] Article 3 of the Declaration establishes "a broad obligation" to prevent and terminate acts of forced disappearance through the adoption and implementation of effective legislative, administrative, judicial, and other measures; the suitability of these measures will be reflected in their effectiveness "in preventing and, as appropriate, terminating acts of forced disappearance."[15] Even when the Declaration did not provide a concrete definition of the term "forced disappearance", its elements were already present in the General Assembly's concern:

> […] in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law […][16]

After the Declaration was made, the Inter-American Convention on Forced Disappearance of Persons (hereinafter "CFD") was adopted and defined "forced disappearance"[17] as:

> [T]he act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by the absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.[18]

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[14] Declaration on the Protection of All Persons from Forced Disappearance, Preamble, Feb. 12, 1993, A/RES/47/133, *available at http://www.un.org/documents/ga/res/47/a47r133.htm*.

[15] Commission on Human Rights, *Report of the Working Group on Forced or Involuntary Disappearances*, 52-53, E/CN.4/1996/38 (Jan 15, 1996).

[16] Declaration on the Protection of All Persons from Forced Disappearance, 3.

[17] The terms "forced disappearance" and "enforced disappearance" are used indistinctly in this work.

[18] *See* Inter-American Convention, Art. II.

Mexico became a party to the CFD in 2002.[19] The International Convention for the Protection of All Persons from Forced Disappearance (hereinafter "CED") was adopted by the United Nations General Assembly in 2006 and Mexico became a party in 2008.[20] Article 2 of the CED defines forced disappearance as:

> […] the arrest, detention, abduction or any form of deprivation of liberty by agents of the State or by persons or group of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

On November 23, 2009, the Inter-American Court declared Mexico responsible for the forced disappearance of Rosendo Radilla Pacheco at the hands of the security forces in 1974 within the context of the "Dirty War".[21] Seven years later, on November 2016, the Inter-American Commission submitted to the Inter-American Court the Case 12.916, regarding the forced disappearance of Nitza Paola Alvarado Espinoza, José Ángel Alvarado Herrera, and Rocío Irene Alvarado Reyes "at the hands of State agents […], since December 29, 2009. The fate or whereabouts of the three missing victims are still unknown." The Commission recalled that "[t]his is the first case [brought before the Court] concerning forced disappearance in the context of the fight against drug trafficking and organized crime in Mexico."[22]

It is worth mentioning, that even when Mexico's international obligations on matters of forced disappearances came years before the Radilla Pacheco judgment, with the ratification of the abovementioned international treaties and conventions, among others, it was not until this judgment that Mexican authorities, starting with the Supreme Court of Justice, began paying attention to the fact that Inter-American Court judgments were mandatory.[23]

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[19] *See*, Decrees published on the Mexican Federal Official Gazette on January 18, 2002; February 27, 2002; May 6, 2002; and March 20, 2014; all *available at http://legislacion.scjn.gob.mx/Buscador/Paginas/wfOrdenamientoDetalle.aspx?q=zmlkJ/89AXJJKRY4OR4AdKvKSxUfaqKXdcTgYjK+29SOONvsI1RMTSsIm6Y9p/ZM*.

[20] *See* Decrees published in the Mexican Federal Official Gazette on December 18, 2007, and June 22, 2012, Mexico City, Mexico, *available at http://legislacion.scjn.gob.mx/Buscador/Paginas/wfOrdenamientoDetalle.aspx?q=lOyqDofbFLGDAD4UXA/alAduJpMLLkFmaj8iPtC8gVNCbMKRtXOPeyJ3e/3+bN2y*.

[21] Radilla Pacheco Case, *supra* note 11, 120-159 and Resolutive 3.

[22] *IACHR Takes Case involving Mexico to the Inter-American Court*, IACHR, (Nov. 22, 2016), *available at http://www.oas.org/en/iachr/media_center/PReleases/2016/173.asp*.

[23] *See* Derechos humanos contenidos en la Constitución y en los tratados internacionales. Constituyen el parámetro de control de regularidad constitucional, pero cuando en la Constitución haya una restricción expresa al ejericio de aquéllos, se debe estar a lo que establece el texto constitucional. Jurisprudencia emitida por la Corte Interamericana de Derechos Humanos.

Since then, the judiciary's criteria has evolved and developed on the issue; however, due to the scope limitation of this work, that development will not be specifically addressed here.

## III. General Law on the Forced Disappearance of Persons, Disappearances Committed by Individuals and the National Missing Persons System

In 2015 the Mexican Constitution was amended to allow the Congress to enact general laws that establish, at least, the crimes and sanctions of kidnapping, forced disappearance or other kinds of illegal deprivation of freedom, human trafficking, torture and other cruel, inhuman or degrading treatment, as well as electoral crimes; a 180-day term was given to the Congress for it to issue the correspondent laws, a term which expired on January 6, 2016.[24]

A year later, the General Law on the Forced Disappearance of Persons, Disappearances Committed by Individuals and the National Missing Persons System was published. The International Committee of the Red Cross and the Office of the United Nations High Commissioner for Human Rights in Mexico recognized its importance.[25]

The enactment of the General Law responds to the intense activity and pressure from the civil society,[26] and to the constant pronouncements issued by different international organizations like the Inter-American Commission on Human Rights ("the Commission"), the UN Committee on Forced Disap-

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Es vinculante para los jueces mexicanos siempre que sea más favorable a la persona. Pleno de la Suprema Corte de Justicia [S.C.J.N.] [Supreme Court], Gaceta del Semanario Judicial de la Federación, Décima Época, tomo I, September 2013, Contradicción de Tesis 293/2011, Page 96 (Mex.).

[24] Decreto por el que se reforma el artículo 73, fracción XXI, inciso a), de la Constitución Política de los Estados Unidos Mexicanos [Decree that amends Art. 73, Section XXI, Paragraph a) of the Mexican Constitution], Diario Oficial de la Federación [D.O.], July 10, 2015 (Mex.), Art. 73, Section XXI, paragraph b, and Second Transitory Article.

[25] México: aprobación de ley general es un avance fundamental para fortalecer la búsqueda de decenas de miles de personas desaparecidas en el país, ICRC (2017), *available at https://www.icrc.org/es/document/mexico-aprobacion-de-ley-general-es-un-avance-fundamental-para-fortalecer-la-busqueda-de*, and La ONU-DH saluda la aprobación de la Ley general sobre desaparición de personas, Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos en México (2017), *available at http://www.hchr.org.mx/index.php?option=com_k2&view=item&id=1032:la-onu-dh-saluda-la-aprobacion-de-la-ley-general-sobre-desaparicion-de-personas&Itemid=265*.

[26] *See* Karla Tinoco, *Exigen colectivos de Coahuila descongelar Ley Contra la Desaparición Forzada*, Vanguardia (2016), *available at http://www.vanguardia.com.mx/articulo/exigen-colectivos-de-coahuila-descongelar-ley-contra-la-desaparicion-forzada*; and Gloria Leticia Díaz, *Familiares de víctimas exigen que se apruebe Ley de Desaparición Forzada*, Proceso (2017), *available at http://www.proceso.com.mx/478924/familiares-victimas-exigen-se-apruebe-ley-desaparicion-forzada*.

pearances ("the Committee"), the UN General Assembly, and the UN Working Group on Forced or Involuntary Disappearances ("the Working Group").[27]

## IV. Typification of the Crime of Forced Disappearance in Criminal Law

International human rights standards forbid Mexico from practicing, permitting, or tolerating the forced disappearance of persons under any circumstances, and bind it to punish those persons who commit or attempt to commit such crime, including their accomplices and accessories, and if applicable, their superiors; such obligations are to be met through any necessary measure. In that order, as a legislative measure, Mexico is bound to define forced disappearances as an offence under its criminal law, in accordance to international human rights standards, and shall establish appropriate penalties proportionate to the "extreme seriousness" of the crime.[28]

Now, even when forced disappearances were considered crimes in the Federal Criminal Code[29] and in some state criminal codes, it was typified differently, leading to contradictions and obstacles in prosecuting those responsible for committing the crime.[30] Regarding the Federal Criminal Law, the Inter-American Court had already ordered Mexico to "adopt […] the appropriate legislative reforms in order to make Article 215 A […] compatible with the international standards in this subject" since "the elements of the crime shall guarantee the punishment of all the 'authors, accomplices, and accessories […] whether agents of the State or 'people or groups of people that act with the authorization, support, or acquiescence of the State.'"[31]

Besides the obligation to reform the typification of the crime of forced disappearance, the Working Group also recommended that it "should be in-

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[27] The Human Rights Situation in Mexico, *supra* note 13, Recommendation 9; Concluding observations Mexico, *supra* note 12, 16; General Assembly, *Report of the Working Group on the Universal Periodic Review*, 148.15, A/HRC/25/7 (Dec. 11, 2013); and Report of the Working Group-2011, *supra* note 12, 86.

[28] Inter-American Convention on Forced Disappearance of Persons, Arts. I and III; International Convention for the Protection of All Persons from Forced Disappearance, Arts. 3, 4, 6, and 7; Goiburú *et al.* Case, 2006 Inter-Am. Ct.H.R., (ser C) No. 153, 92 (Sep. 22, 2006); Heliodoro-Portugal Case, 2008 Inter-Am. Ct.H.R., (ser. C) No. 186, 34, 107, and 112 (Aug. 12, 2008); Report of the Working Group-2011, *supra* note 12, 87; and Concluding observations Mexico, *supra* note 12, 20.

[29] Código Penal Federal [Federal Criminal Code], as amended, Arts. 215-A, Diario Oficial de la Federación [D.O.], June 26, (Mex.).

[30] Opinions with the General Law, *supra* note 7, 13-22. *See also*, Concluding observations Mexico, *supra* note 12, 19 and 20.

[31] Radilla Pacheco Case, *supra* note 11, Operative Paragraph 11, and Radilla Pacheco Case, *supra* note 11, 320.

cluded in the criminal codes of all states and that a comprehensive law on forced or involuntary disappearances should be adopted without delay."[32]

In that sense, in order to overcome the obstacle presented by the multiple typifications of the crime of forced disappearance and considering that the effectivity of its investigation needs the regulation of such crime to be defined as an autonomous offence,[33] the General Law now applies to the three Government levels (i.e. federal, state and municipal),[34] is excluded under military jurisdiction,[35] and defines the crime of forced disappearance as follows:

> The crime of forced disappearance is committed when a public servant or the individual who, with authorization, support or acquiescence of a public servant, deprives a person of his or her liberty in any form, followed by the abstention or refusal to acknowledge such deprivation of liberty or to provide information related to the concerned person's fate or whereabouts[36] (Unofficial translation).

The General Law establishes sanctions from 40 to 60 years of imprisonment and fines from 10,000 to 20,000 daily salaries to the person responsible for committing the crime of forced disappearance, and when perpetrated by a public servant, it requires removal from office and a ban on future service.[37] The penalties may be subject to aggravating[38] or mitigating[39] circumstances

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[32] Report of the Working Group-2011, *supra* note 12, 86.

[33] Radilla Pacheco Case, *supra* note 11, 144; Gomes Lund et al. ("Guerrilha do Araguaia") Case, 2010 Inter-Am. Ct.H.R. (ser. C) No. 219, 103 (Nov. 24, 2010); Gelman Case, 2011 Inter-Am. Ct.H.R. (ser. C) No. 221, 74 (Feb. 24, 2011); Torres Millacura *et al.* Case, 2011 Inter-Am. Ct.H.R. (ser. C) No. 229, 94 (Aug. 26, 2011); and Concluding observations Mexico, *supra* note, 20.

[34] *See* General Law, Arts. 3, 24, and 25.

[35] *See* General Law, Art. 26.

[36] *See* General Law, Art. 27.

[37] *Id.* at Art. 30.

[38] The penalties for the crime of forced disappearance provided for in this Law may be increased by up to half when: during or after the disappearance, the Disappeared Person dies due to any alteration in his or her health that is a consequence of the disappearance […]; the disappeared person is a child or adolescent, a woman, […] a person with a disability or an elderly person; the condition of migrant, afrodescendant, belonging to an indigenous people or community […] the victim's gender identity or sexual orientation is the motivation for committing the crime; the person has been made to disappear as a result of his or her work as a human rights defender [… or] a journalist; the disappeared person is a member of a public security institution; the perpetrator or perpetrators have a family, friendship, employment, or trust relationship with the victim; or when the offenses are committed for the purpose of preventing the competent authorities from becoming aware of the commission of other offenses. *Id.*, Art. 32 (Unofficial translation).

[39] The penalties […] may be reduced as follows: I. If the perpetrators or participants spontaneously release the victim within ten days of the disappearance […]; II. If the perpetrators or participants provide effective information leading to the whereabouts of the disappeared person alive […] III. If the perpetrator or participants provide effective information

in accordance with international standards.[40] The same sanctions apply to "the public servant or the individual who, with authorization, support or acquiescence of a public servant, conceals or refuses to provide information concerning the depravation of liberty or the whereabouts of a person, or conceals a detainee in any form […]."[41]

On the other hand, civil society organizations pointed out that the General Law refuses to establish criminal responsibility for hierarchical superiors as the masterminds behind the crime.[42] The lack of investigation of hierarchical superiors as the masterminds of the crime ("cadena de mando") prevents victims and society in general from knowing the circumstances of gross human rights violations committed by the military. It also prevents high rank officers and other civil public servants that request or allow military presence within their jurisdiction (i.e. municipalities or states), from being held accountable.[43]

The General Law provides for the responsibility of the hierarchical superiors "under the terms of the applicable criminal law".[44] However, it does not fulfill the premises provided by the CED in which superior officials should also be held criminally responsible, and which in its concluding observations the Committee had already noted.[45] In referring to the "terms of applicable criminal law", the General Law provides that hierarchical superiors may be

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leading to the whereabouts of the body or human remains of the disappeared person […]; IV. If the perpetrators or participants provide effective information that makes it possible to clarify the facts or identify those responsible […]. *Id.,* Art. 33 (Unofficial translation).

[40] *See* Inter-American Convention on Forced Disappearance of Persons, Art. III, and International Convention for the Protection of All Persons from Forced Disappearance, Art. 7.2.

[41] General Law, Art. 28. (Unofficial translation.) The establishment of such crime complies, at least as a legislative measure, with the obligation to "prevent and sanction acts that hinder the conduct of an investigation." International Convention for the Protection of All Persons from Forced Disappearance, Art. 12.4

[42] La aprobación de la Ley General en materia de Desaparición Forzada de Personas, Desaparición Cometida por Particulares y del Sistema Nacional de Búsqueda de Personas un paso positivo pero insuficiente para lograr la presentación con vida de las víctimas de desaparición forzada y el castigo a los culpables, Campaña Nacional contra la Desaparición Forzada en México (2017), *available at http://hastaencontrarlos.org/spip.php?article2139*, and Arturo Angel, Registro inexistente, mandos sin sanción: 8 ausencias en la ley contra desaparición forzada, Animal Político (2017), *available at http://www.animalpolitico.com/2017/05/ley-desaparicion-forzada/*.

[43] Ximena Suárez-Enríquez et al., *La impunidad de las violaciones a derechos humanos cometidas por soldados en México*, WOLA, Justicia Olvidada 29 (2017), *available at https://www.wola.org/wp-content/uploads/2017/11/WOLA_MILITARY-CRIMES_RPT_SPANISH.pdf*. With regards to Inter-American standards to this regard, *see*, Oscar Parra Vera, *La jurisprudencia de la Corte Interamericana respect a la lucha contra la impunidad: algunos avances y debates*, Revista Jurídica de la Universidad de Palermo 19-20 (2012), *available at https://www.palermo.edu/derecho/revista_juridica/pub-13/13JURIDICA_01PARRAVERA.pdf*.

[44] *See* General Law, Art. 29.

[45] International Convention for the Protection of All Persons from Forced Disappearance, Art. 6.b., and Concluding observations Mexico, *supra* note 12, 21 and 22.

responsible for the crime of forced disappearance due to omission in cases when he or she had the legal duty to prevent it, as is the case of any public servant.[46] However, it does not expressly include situations in which the hierarchical superiors may be prosecuted and sanctioned as intellectual authors, in accordance with international standards.

Additionally, the General Law establishes different penalties for the person responsible for failing to deliver to the competent authority or the victim's relatives a child born to the victim of forced disappearance during the period of captivity, and for the person who, with knowledge of the forced disappearance or disappearance committed by private individuals, retains or conceals the newborn.[47] This typification complies with the recommendation issued by the Committee with this regard.[48]

According to Vélez Salas, distinguishing the crime of forced disappearance from other crimes related to the deprivation of liberty is crucial for the investigation and prosecution of forced disappearances, especially when the current situation in Mexico illustrates how many of these crimes, even when committed by private individuals, may entail the State's responsibility due to omission.[49]

Moreover, the General Law also typifies the crime of disappearance committed by private individuals. Such crime is committed when private individuals (non-public servants) deprive a person of liberty for the purpose of concealing the victim, or his or her fate or whereabouts. Furthermore, the crime is punishable by imprisonment and a fine.[50] The crime of disappearance committed by private individuals differs from that of forced disappearance "in that there is no certainty of the status of the perpetrator as a public servant, and until that status is determined, the charges are less severe […]."[51]

The General Law also typifies other acts linked to forced disappearance, such as: concealing, disposing of, incinerating, burying, disintegrating, or destroying the remains or the corpse of a person, in order to conceal the commission of a crime; a public servant's preventing access to the authorities responsible for searching for missing persons, or obstructing said search; knowingly failing to provide information concerning the fate or whereabouts of a child born in captivity; falsifying, concealing or destroying documents proving the child's identity or using falsified documents of a child born in captivity. Public servants are subject to administrative responsibility when unjustifiably

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[46] Opinions with the General Law, *supra* note 7, 85.

[47] *See* General Law, Arts. 31, 35 and 36.

[48] Concluding observations Mexico, *supra* note 12, 45.

[49] Alejandro Vélez Salas, *Narrativas interdisciplinarias sobre desaparición de persona en México*, CNDH 29-32 (2016), *available at https://archivos.juridicas.unam.mx/www/bjv/libros/10/4985/4.pdf*.

[50] *See* General Law, Art. 34.

[51] Opinions with the General Law, (unofficial translation), *supra* note 7, at 86.

failing to comply with their obligations as established in the General Law as long as that failure does not constitute a crime.[52]

Additionally, the approved decree contemplates the amendment and repeal of several provisions in the Federal Criminal Code, as well as to eliminate the 60-year imprisonment sanction limit for the crime of forced disappearance and transfer it to the General Law.[53] Finally, it adds an article to the Federal Criminal Code that punishes the person responsible for concealing, disposing of, incinerating, burying, disintegrating, or destroying, totally or partially, the remains or corpse of an unidentified person, without consent from the competent authority with imprisonment and a fine.[54]

The establishment of a single definition of the crime of forced disappearance in a general law that applies to the three levels of government constitutes a great step forward in prosecuting this crime. However, Mexico still has to fill the gap between what is written in its laws and their actual enforcement. It must not be forgotten that despite the fact the General Law applies nationwide, its enforcement will depend largely on state and municipal authorities (e.g. prosecutors, police officers, judges, magistrates, etc.) and on the local legal framework. In order to enforce these laws, material and human resources will be provided to the authorities in charge of investigating and prosecuting. On the other hand, even though the General Law applies nationwide, political will from states authorities is also needed and the mere publishing of the General Law cannot ensure that it will be forced.

Finally, further amendments to the General Law are needed in order to establish criminal responsibilities for hierarchical superiors as the masterminds of the crime of forced disappearance since, as it is now, it does not seem to be possible.

## V. Duty to Investigate the Crime of Forced Disappearance

### 1. *Exclusion of Military Jurisdiction*

Article IX of the CFD establishes that the "[p]ersons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state,

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[52] *See* General Law, Arts. 37 to 43.

[53] Opinions with the General Law, *supra* note 7, at Código Penal Federal, Arts. 25 and 215-A to 215-D.

[54] *Id.* at Art. 280 Bis. The decree also includes several amendments to the Law on General Health related to the treatment of corpses and human remains. *Id.* at Ley General de Salud, Arts. 348, 350 Bis 3, 350 Bis 4, and 350 Bis 5.

to the exclusion of all other special jurisdictions, particularly military jurisdictions. […]."

The first time the Inter-American Court addressed the issue of the matter of military jurisdiction in relation to human rights violations was in the Genie Lacayo Case in 1997.[55] Since then, the Court has been constantly developing and modifying precedents on the matter.[56]

Moreover, in the 2009 Radilla Pacheco judgment, the Inter-American Court recalled its precedents in the sense that military criminal jurisdiction "shall have a restrictive and exceptional scope and be directed toward the protection of special juridical interests, related to the tasks characteristic of the military forces", namely crimes or offenses committed by active soldiers that threaten juridical rights of the military order itself. Therefore, it is not the competent jurisdiction for human rights violations, which correspond to the ordinary justice system.[57] Therefore, it ordered Mexico to reform Article 57 of the Code of Military Justice, which established, in its relevants parts, that "[t]he crimes against military discipline are […] those of the common or federal order, when […] committed by soldiers during times of duty or based on the actions of the same."[58]

Two years after the judgment in the Radilla Pacheco Case, the Supreme Court of Justice in Mexico, applying the conventionality control between international human rights norms and domestic law, found that Article 57, Section II, paragraph e) of the Code of Military Justice was not in compliance with international human rights law and, therefore, should not be applied.[59]

On ratifying the CFD, the Mexican Government made express reservation to Article IX "inasmuch as the Political Constitution recognizes military jurisdiction when a member of the armed forces commits an illicit act while on duty," stating that:

> [m]ilitary jurisdiction does not constitute a special jurisdiction in the sense of the Convention given that according to […] the Mexican Constitution nobody

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[55] Genie Lacayo Case 1997 Inter-Am. Ct.H.R., (ser C) No. 30, 84 (Jan. 29, 1997).

[56] With regards to the Inter-American Court's jurisprudence evolution, *see* Eduardo Ferrer Mac-Gregor, *Las siete principales líneas jurisprudenciales de la Corte Interamericana de Derechos Humanos aplicable a la justicia penal*, Vol. 59, Revista IIDH, 59-61 (2014).

[57] Radilla Pacheco Case, *supra* note 11, 272-275. *See also* Economic and Social Council, Updated Set of principles for the protection and promotion of human rights through action to combat impunity [hereinafter Updated Set of principles], E/CN.4/2005/102/Add.1 Principle 1 (Feb. 8, 2005).

[58] Code of Military Justice, cited in Radilla Pacheco Case, *supra* note 11, 271, footnote 272. *Also*, Sierra Leone, Peru, Brazil, Canada, Czech Republic, Italy, Australia, France, and Republic of Korea made similar recommendations within the context of the United Nations Universal Periodic Review. *See* Report of the Working Group on the Universal Periodic Review, *supra* note 27, 148.109.

[59] Expediente Varios 912/10, Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], July 14, 2011, 37-45 (Mex.)

> may be deprived of his life, liberty, property, possessions, or rights except as a result of a trial before previously established courts in which due process is observed in accordance with laws promulgated prior to the fact.

The Government also made a declarative interpretation in the terms that "[the Convention] shall apply to acts constituting the forced disappearance of persons ordered, executed, or committed after the entry into force of [the] Convention."[60]

On July 11, 2014, Mexico withdrew its reservation with the express welcoming of the Inter-American Commission.[61] Previously, on June 13, 2014, the executive branch published a decree amending several provisions of the Code of Military Justice, including Article 57, establishing the ordinary jurisdiction for cases where the victim concerned is a civilian.[62] This amendment was assessed by the Inter-American Court through its compliance monitoring supervision attribution in the Radilla Pacheco Case and two other cases against Mexico. The Court declared that it "constitutes an important alignment of Mexican domestic law with conventional and international standards relating to military criminal jurisdiction," but that compliance was partial since the Military Code "still allows military jurisdiction for crimes committed by a military officer against another military officer."[63]

A year after the amendment to Article 57, a federal court convicted a military officer of the crime of forced disappearance for the first time, imposing the penalty of 31 years in prison. The judge based his decision on the gross violation of the direct victim's rights to personal integrity, personal liberty and life, as well as the suffering of the victim's relatives and their right to the truth.[64] Furthermore, by 2017, 545 members of the armed forces (502 from the Army, 32 from the Navy, and 11 from the Air Force) have been convicted or are being tried under the military jurisdiction, and sentenced to terms in military prison for committing or allegedly committing different crimes, including manslaughter, torture, forced disappearance, clandestine burial, and

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[60] Decrees published in the Mexican Federal Official Gazette on January 18, 2002, February 27, 2002 and May 6, 2002, *supra* note 18.

[61] *IACHR Welcomes Mexico's Withdrawal of Treaty Reservations*, IACHR (2014), *available at http://www.oas.org/en/iachr/media_center/PReleases/2014/076.asp*, and Decree published in the Mexican Federal Official Gazette on March 20, 2014, *supra* note 19.

[62] Decreto por el que se reforman, derogan y adicionan diversas disposiciones del Código de Justicia Militar, del Código Federal de Procedimientos Penales y de la Ley que Establece las Normas Mínimas sobre Readaptación Social de Sentenciados [Decree to amend, derogate, and add several provisions to the Code of Criminal Procedures for Military Justice and the Law on Social Readaptation for Convicts], Diario Oficial de la Federación [D.O.], 13 de junio de 2014.

[63] Radilla Pacheco, Fernández Ortega *et al.*, and Rosendo Cantú and other Cases, 2015 Inter-Am. Ct.H.R., Monitoring Compliance with Judgment, 20, 22-23, and Resolutive Paragraph 1 (Apr. 17, 2015) (Unofficial translation).

[64] *Nota Informativa 88/2015*, Poder Judicial de la Federación (2015), *available at http://www.cjf.gob.mx/documentos/notasInformativas/docsNotasInformativas/2015/notaInformativa88.pdf*.

destruction of corpses; however, must of the military convicted or tried are from the lower military ranks.[65]

Removing cases concerning human rights violations from out of military jurisdiction has been a protracted struggle in Mexico. It has been more than seven years since the Radilla Pacheco case, and even when human rights violations, including forced disappearances, must now be tried in civil courts, the Military Penal Code needs to be further amended so that human rights violations, including forced disappearances, committed by military officers are also investigated and tried under civil jurisdiction.

If this is read bearing in mind that the General Law does not establish criminal responsibilities for hierarchical superiors as the masterminds of the crime of forced disappearance, the failure to amend the Military Penal Code proves the lack of political will to investigate, prosecute and convict military officers for the crime of forced disappearances. Finally, it seems that the draft legislation on internal security, which "would result in the normalization, regulation, and permanence of the armed forces in public security tasks" if approved, will constitute another obstacle to the prevailing impunity for agents of the armed forces involved in cases of human rights violations.[66]

### 2. *Special Prosecutor's Offices ("Fiscalías Especializadas")*

"Impunity arises from a failure by States to meet their obligations to investigate violations" and therefore States "shall undertake prompt, thorough, independent and impartial investigations […] and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished."[67] The United Nations have recognized the "the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights."[68]

Specifically, in the case of forced disappearances, the State is bound to ensure the right "to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation" even when there is no formal complaint.[69]

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[65] Zósimo Camacho, *Cárceles militares: 545 efectivos caídos en desgracia*, *Contralínea.com.mx* (2017), *available at https://www.contralinea.com.mx/archivo-revista/2017/11/07/carceles-militares-545-efectivos-caidos-desgracia/*.

[66] *IACHR Expresses Concern regarding Draft Law on Internal Security in Mexico*, IACHR (2017), *available at http://www.oas.org/en/iachr/media_center/PReleases/2017/200.asp*.

[67] Updated Set of principles, 19. *See also*, Basic Principles, Principle III, 4.

[68] G.A. Resolution 68/165, Right to the truth, Preamble, 1, A/RES/68/165, (Jan. 21, 2014).

[69] International Convention for the Protection of All Persons from Forced Disappearance,

According to Open Societies, "official statistics on killings undercount the true toll: tens of thousands of disappearances, including those of migrants, remain unsolved and hundreds of clandestine and mass graves remain insufficiently investigated."[70] The Committee has also expressed its concern regarding "the impunity surrounding the numerous cases of forced disappearance reported, which is evidenced by the near zero level of convictions for the offence."[71] A Mexican representative stated before the Committee that "according to information available at the federal level, 313 officials had been indicted and 13 had been convicted to [2015]."[72]

As obstacles to the investigation of the crime of forced disappearance in Mexico, the Committee pointed at the lack of prompt and immediate investigations of cases of forced disappearance and the classification of such crimes as other offences. Moreover, it recommended that the State undertake "a thorough and impartial investigation without delay, even if there has been no formal complaint, and that the perpetrators are prosecuted and, if found guilty, are punished in accordance with the grave nature of their acts" encouraging and facilitating "the involvement of the relatives of the disappeared person in the investigations, without conferring upon them any responsibility for providing the evidence necessary for the investigation" and guaranteeing "effective coordination and cooperation between all agencies involved in the investigation", which must ensure "that they have sufficient infrastructures and the technical, expert, financial and human resources to perform their functions expeditiously and effectively."[73]

Due to limitations of length, the present work focuses only on the specific regulations provided by the General Law regarding the investigation, prosecution and punishment of the crimes typified in the law, and not on general criminal procedural rules applicable for every criminal procedure.

In this sense, the General Law characterizes the crime of forced disappearance as permanent or continuous,[74] is not subject to a statute of limitations and shall be prosecuted "*motu propio*" until the whereabouts of the victim have been determined or the victim's remains have been found.[75] In

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Arts. 12.1 and 12.2. *See also*, Radilla Pacheco Case, *supra* note 11, 143, and Concluding observations Mexico, *supra* note 12, 28.

[70] Undeniable Atrocities: Confronting Crimes Against Humanity in Mexico, *supra* note 2, 12.

[71] Concluding observations Mexico, *supra* note 12, 27.

[72] Committee on Forced Disappearances, *Summary record of the 120th meeting*, Preamble, 7, CED/C/SR.120 (Feb. 6, 2015).

[73] Concluding observations Mexico, *supra* note 12, 27, 28, 28.b), and 28.c).

[74] These characteristics have been pointed out by the Inter-American Court of Human Rights since its first judgment of merits regarding forced disappearances to its most recent one. Velásquez Rodríguez Case, *supra* note 5, 158, and Gutiérrez Hernández et al Case, 2017 Inter-Am. Ct.H.R, (ser. C) No. 339, 124 (Aug. 24, 2017).

[75] "The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individu-

addition, it forbids the temporary suspension of the investigation under any circumstances, or any measure of impunity[76] in accordance with Articles VII and VIII of the CFD.

It is important to point out that the Basic Principles and Guidelines on the Right to a Remedy and Reparation forbid the application of statutes of limitations where so contained in international obligations or provided for in treaties.[77] However, even when neither the CED[78] nor the CFD[79] absolutely prohibit such statues of limitations, the General Law establishes that prosecution and sanction of the crime of forced disappearance are imprescriptible and cannot be subject to any statute of limitation of any kind.[80]

On the other hand, the Committee encouraged Mexico "to consider establishing […] a prosecution unit specializing in the investigation of cases of forced disappearances […] to address this criminal scourge from a national and transnational perspective, supports the investigative function, and coordinates its work with other relevant agencies […]."[81]

In response to this recommendation, the General Law binds both federal and state prosecution offices to establish Special Prosecutor's Offices (hereinafter "the Prosecutor's Office(s)") to investigate the crimes of forced disappearance and disappearance committed by private individuals.[82]

The federal Prosecutor's Office is responsible for receiving any criminal complaint related to the crimes typified in the General Law and has jurisdiction over the crimes established in the General Law when: a federal public servant is involved (as a perpetrator or a victim); jurisdiction is conferred to it by another law; there is a ruling issued by an international organization declaring the Mexican State as the responsible party; the Federal Prosecutor takes charge of an investigation from a state Prosecutor's Office; when the alleged perpetrator is a member of a criminal organization; or, when appropriate, the victims so request it. When none of the above circumstances applies, jurisdiction corresponds to state Prosecutor's Offices.[83]

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ally responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains." Velásquez Rodríguez Case, *supra* note 5, 181.

[76] The General Law, Arts. 13 to 15 and 17. In the same sense, Inter-American Convention on Forced Disappearance of Persons, Article X. Regarding the nature of restricting measures on rules of law justified by action to combat impunity, *see* Updated Set of principles, 22-28.

[77] *See* Basic Principles, Principle IV 6.

[78] International Convention for the Protection of All Persons from Forced Disappearance, Art. 8.

[79] Inter-American Convention on Forced Disappearance of Persons, Art. VII.

[80] *See* General Law, Art. 14.

[81] Concluding observations Mexico, *supra* note 12, 29.

[82] *See* General Law, Arts. 68, 69, and 71.

[83] *Id.* at Arts. 70 fraction I, and Arts. 24, and 25.

The federal and the state Prosecutor's Offices should generate specific criteria and methodology to investigate and prosecute the crimes prescribed by the General Law, and liaise with other institutions (i.e. State SPOs, the National Missing Persons Commission and local commissions, the National Citizen Council, the federal and state Executive Committee for Victims Assistance, the Migrant External Support Mechanism and Crime Investigation Unit,[84] police institutions, and other jurisdictional authorities) during the investigation of these crimes. Every authority from every government level, as well as individuals or organizations, are obliged to help and provide information to federal and state Prosecutor's Offices.[85]

Moreover, the Prosecutor's Offices must implement different measures to protect and assist the relatives searching their loved ones[86] in accordance with Article 12.1 of the CED, which binds the State to take the appropriate steps in order to "to ensure that the complainant, witnesses, relatives of the disappeared person and their defense counsel, as well as persons participating in the investigation, are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given."

More specifically, the federal Prosecutor's Office can apply to the "competent jurisdictional authorities" for authorization to perform exhumations in places where there are reasons to believe that a missing or disappeared person's remains might be buried. This Office is also in charge of locating the families of identified deceased persons so as to deliver the corpses or remains. Besides, it must facilitate the participation of family members in the investigation and periodically inform them of the progress made in the investigation.[87]

Finally, when the alleged perpetrator is a public servant, the federal Prosecution Office can apply to a judge to issue precautionary measures (e.g. suspension from office) in order to prevent his or her interference with the investigation[88] as requested by Article 12 of the CED, which binds the States to "ensure in particular that persons suspected of having committed an offence of forced disappearance are not in a position to influence the progress of an investigation by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defense counsel, or at persons participating in the investigation."[89]

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[84] The Committee recommended Mexico to "[…] redouble its efforts to prevent and investigate disappearance of migrants, to prosecute those responsible and to provide adequate protection for complainants, experts, witnesses and defense counsels." Concluding observations Mexico, *supra* note 12, 24.

[85] General Law, Arts. 70, 73, and 75-77. To this regard, *see* International Convention for the Protection of All Persons from Forced Disappearance, Arts. 12.1 and 12.3.a).

[86] *See* General Law, Arts. 153-157.

[87] *Id.* at Art. 70 Sections XVII, XVIII and XX. //XVIII, XVII and XX.

[88] *Id.* at Art. 72.

[89] International Convention for the Protection of All Persons from Forced Disappearance, Art. 12.4. In the same order of ideas, *see* Concluding observations Mexico, *supra* note 12, 28.d).

The effectiveness of the Prosecutor's Offices will largely depend on their funding, the training of their public servants, and the coordination between them, as well as with other institutions. If states fail to achieve even a single one of the minimum standards set out in the General Law, it could create "safe havens" for those responsible for committing the crime of forced disappearances and will impede their proper prosecution and conviction.

## VI. The Right to Know the Whereabouts or Fate of the Disappeared or Missing Persons

### 1. *Search Request Procedure*

In cases of forced disappearances "the family of the direct victim has an imprescriptible right to be informed of the fate and/or whereabouts of the disappeared person and, in the event of decease, that person's body must be returned to the family as soon as it has been identified, regardless of whether the perpetrators have been identified or prosecuted."[90]

In accordance with the aforementioned principle, the General Law recognizes that "[i]rrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate."[91] Such right involves the State's duty to "take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains."[92]

In that sense, the Working Group recommended that Mexico implement a "national search programme for missing persons with an immediate action protocol" and the corresponding guidelines, and that a "specific procedure for finding the disappeared person with the assistance of the relatives of victims should be established."[93] This responds to the fact that "in cases of forced disappearance, the prompt and immediate action of physical and judicial authorities through the order of the timely and necessary measures addressed to the determination of the whereabouts of the victim is essential."[94]

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[90] Updated Set of principles, 34; International Convention for the Protection of All Persons from Forced Disappearance, Art. 24.2; and Radilla Pacheco Case, *supra* note 11, 180.

[91] Updated Set of principles, 4.

[92] International Convention for the Protection of All Persons from Forced Disappearance, Art. 24.3. *See also*, Concluding observations Mexico, *supra* note 12, 41.

[93] Report of the Working Group-2011, *supra* note 12, 102 and 86. The IACHR also recommended to "[e]stablish mechanisms of immediate search for disappeared persons in the entire national territory." The Human Rights Situation in Mexico, *supra* note 13, Recommendation 10.

[94] Radilla Pacheco Case, *supra* note 11, 215, 222, and Osorio Rivera and Family members Case, 2013 Inter-Am. Ct.H.R., (ser C) No. 274, 178 (Nov. 26, 2013).

The General Law creates the National Missing Persons Commission (hereinafter "the National Commission"), which will function as an administrative body that determines, executes and follows up on search actions for missing and disappeared persons. All authorities are obliged to collaborate with the National Commission and every state must create a Local Missing Persons Commission with analogous functions.[95]

More than fifty responsibilities were given to the National Commission regarding missing or disappeared persons, including: to design public policies; to request action from different public agencies and other government authorities; to develop and present reports on the matter as well as diagnostics of the situation; to request information from different authorities; to access any authority's information database platforms and registries without restrictions; to assist the victim's family members in the search of their loved ones and in obtaining reparations; to determine, execute and follow-up on missing or disappeared search actions; to collaborate with prosecutors in the investigation of forced disappearances and their perpetrators; and to coordinate with civil society and national, international, and foreign authorities in the search of missing or disappeared persons.[96]

Also, the National Commission and the local commissions shall be conformed of, at least, a Specialized Search Group ("Grupo Especializado de Búsqueda"), a Context Analysis Area ("Area de Análisis de Contexto"), Information Management and Processing Area ("Área de Gestión y Procesamiento de Información"), and the necessary administrative staff.[97]

The National Commission and local commissions will be in charge of performing the search request procedure, which starts with an investigation that continues until the whereabouts or fate of a missing or disappeared person are known and, if the case, the remains are identified.[98]

Once the National Commission or local commission acknowledges the disappearance of a person, it must immediately register the received information in the National Registry of Disappeared or Missing Persons.[99] This registry must be constantly updated and the commission is required to provide and obtain information from the missing or disappeared person's family members. The National Commission must also start the search for the person and inform the Prosecutor's Office if there is the possibility that a crime was

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[95] *See* General Law, Arts. 50-52.

[96] *See* General Law, Arts. 53, 54, 56, 134.

[97] *Id.* at Arts. 58 and 65-67.

[98] *Id.* at Arts. 2 fractions XIV and XXV, 79, 81, 83-86, 88, and 98.

[99] The Law on National Registry of Disappeared or Missing Persons created the National Registry of Disappeared or Missing Persons. Ley del Registro Nacional de Datos de Personas Extraviadas o Desaparecidas [General Law on the National Registry of Missing or Disappeared Persons], Diario Oficial de la Federación [D.O.], April 17, 2012 (Mex.).

committed, or if 72 hours have passed without news of the missing or disappeared person, or if the person is under 18 years of age.[100]

In order to find the person, the NCMP or the local commission must (with the prosecutors' cooperation if necessary) periodically and exhaustively consult the databases and registries of public and private health clinics, detention centers, forensic medical institutions, the National Registry of Unidentified Deceased Persons, public and private shelters and other social assistance institutions, cemeteries (or any other public or private place, where human remains are deposited), migrant stations, transportation terminals, and other registries and databases. If the person is found dead, the criminal investigation should continue in order to identify, locate and punish those responsible.[101]

The right of the direct victim's next of kin to know the fate and/or whereabouts of the disappeared person and, in the event of decease, to reclaim the disappeared person's remains has also been considered by doctrine and the Inter-American case law as one of the legal goods that should be protected by law.[102] The General Law provides a decent framework to guarantee the abovementioned right; however, it should be pointed out that legally instituting the search request procedure, national and local commissions, and the registry will not succeed in its purposes without political will -or the corresponding resources.

### 2. *The National Missing Persons System ("Sistema Nacional de Búsqueda de Personas")*

The General Law creates a National Missing Persons System (hereinafter "the System"), whose purpose is to design and assess State resources in order to define the general bases, public policies and procedures among the authorities at all government levels to search for, locate and identify victims of forced disappearance and missing persons, as well as to prevent the crimes related to the General Law. In the exercise of its functions, the System will have various tools, including the National Registry of Disappeared or Missing Persons, the National Registry of Unidentified and Unclaimed Deceased Persons, the National Forensic Data Bank, the National Registry of Graves, the Administrative Detention Registry, the Standardized Search Protocol for Disappeared Persons and the Investigation of the Crime of Forced Disappearance, and the Amber Alert, among others.[103]

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[100] *See* General Law, Arts. 87, 89, 91, 92, and 96, Section VI.

[101] *Id.* Arts. 94 and 96, Section V. *See also*, International Convention for the Protection of All Persons from Forced Disappearance, Arts. 12.1 and 12.3.b).

[102] Juan Luis Modolell González, *La Desaparición Forzada de Personas en el Sistema Interamericano de Derechos Humanos*, in Desaparición Forzada de Personas, Análisis Comparado e Internacional 223-226 (Kai Ambos coord. 2009).

[103] *See* General Law, Arts. 44 and 48.

As mentioned before, the Working Group recommended that the "national search programme", rendered as the search request procedure, should be accompanied by an immediate action protocol.[104] In 2015 the Standardized Search Protocol for Disappeared Persons and the Investigation of the Crime of Forced Disappearance ("Protocolo Homologado para la Búsqueda de Personas Desaparecidas y la Investigación del Delito de Desaparición Forzada") was approved and ratified by the National Security Council.[105] The general objective of the protocol is to institute the principles and general procedures for the prosecutors, experts, and police forces in charge of the investigation of the crime of forced disappearance and thus make its investigation effective, locate the victims and sanction those responsible for the disappearance. It also establishes as a measure of non-recurrence.[106]

However, according to the General Law, the System is now in charge of issuing a Standardized Search Protocol for Disappeared and Missing Persons ("Protocolo Homologado para la Búsqueda de Personas Desaparecidas y No Localizadas"), which must include special procedures to search for and locate children and adolescents, migrants, or politically motivated disappearances.[107]

Moreover, the General Law establishes a National Citizen Council ("Consejo Nacional Ciudadano"), as a body made up of the victim's family members, human rights specialists, and representatives of civil society human rights organizations that will act in an advisory capacity to the System and the National Commission in terms of the search for missing and disappeared persons.[108]

### 3. *Registries and Data Banks*

Several recommendations have been issued to Mexico by international organizations, regarding the establishment and maintenance of information databases that can help with the search of missing or forced disappeared persons.[109] In this sense, the General Law modifies the National Registry of Disappeared or Missing Persons and creates the National Registry of Unidentified Deceased Persons and the National Forensic Data Bank.

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[104] Report of the Working Group-2011, *supra* note 12, 102.

[105] Acuerdos del Consejo Nacional de Seguridad Pública, aprobados en su Trigésima Octava Sesión Ordinaria [Agreements approved by the National Public Security Council], Diario Oficial de la Federación [D.O.] October 5, 2015 (Mex.).

[106] Extracto del Protocolo Homologado para la Búsqueda de Personas Desaparecidas y la Investigación del Delito de Desaparición Forzada [Excerpt from the approved Protocol for the Search of Missing Persons and the Investigation of the Crime of Forced Disappearance], Diario Oficial de la Federación [D.O.], September 23, 2015 (Mex.).

[107] *See* General Law, Art. 99.

[108] General Law, *supra* note 12, Arts. 59 to 64.

[109] The Human Rights Situation in Mexico, *supra* note 13, Recommendation 11, and Concluding observations Mexico, *supra* note 12, 18; Report of the Working Group-2011, *supra* note 12, 81 and 103.

First, the National Registry of Disappeared or Missing Persons aims to be an informational tool that organizes and concentrates information regarding missing or disappeared persons on a national database to help with the investigation, location and identification of missing or forced disappeared persons.[110] Second, the National Registry of Unidentified and Unclaimed Deceased Persons, managed by the Office of the Federal Prosecutor and forming part of National Forensic Data Bank, contains updated forensic data on unidentified corpses or human remains, as well as information on the circumstances of their discovery.[111] Finally, the National Forensic Data Bank is part of the System and concentrates and updates federal and state databases, in addition to other databases containing forensic and genetic information relevant to the search and identification of missing or disappeared persons.[112]

The three registries mentioned above are designed in such way that information is permanent, connected, and not duplicated, and allow the use of context analysis tools in order to determine crime patterns, *modus operandi*, criminological maps, and the structure and activities of organized criminal groups, among others. Furthermore, both the Federation and each state are obliged to, at least, have an Administrative Registry of Detentions and the National Registry of Graves.[113]

Apart from the criminal procedure and with all the tools established in the General Law for locating missing or disappeared persons, the search request procedure constitutes a big step forward in terms of the right to truth of the disappeared person's next of kin. However, the authorities in charge of each procedure and the institutions created must efficiently coordinate their efforts and have enough resources to perform their duties properly. If one of those institutions fails, it would affect the whole process.

## VII. The Rights of the Victims and their Next of Kin

### 1. *Right to Full Reparation*

It is worth recalling that the Working Group recommended that the definition of victim should be broad and "not linked to the establishment of the criminal liability and conviction of the accused."[114] In this sense, the General Law defines the victim's next of kin as:

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[110] *See* General Law on the National Registry of Missing or Disappeared Persons, Art. 2, and General Law, Arts. 102-110 and Second Transitory Article.

[111] General Law, Arts. 111-113.

[112] *Id.* at Arts. 4, fraction I, 119 and 124.

[113] *Id*. at Arts. 131, Sections I and II, and Arts. 132 and 133. This systemization will contribute the establishment and implementation of "policies relating to prevention, eradication, investigations, penalties and reparation," as recommended by the Working Group. Report of the Working Group-2011, *supra* note 12, 81.

[114] Report of the Working Group-2011, *supra* note 12, 109.

> [t]hose who, under the terms of the applicable legislation, are related to the disappeared or missing person by consanguinity or affinity, in a direct ascending or descending line without degree limitation; in transversal line up to the fourth degree; the spouse, concubine or, as the case may be, those who are subject to regime of a domestic partnership or similar legal constructs. Likewise, persons who are economically dependent on the disappeared or missing person and can demonstrate it before the competent authorities; […] (Unofficial translation).[115]

That said, "[a]ny human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator."[116] In cases of forced disappearance, the duty to repair is understood in the sense that "[l]egislation must provide that reparation should be proportional to the gravity of the violation and suffering of the victim and his or her family. Provision should be made for restitution, as and when possible, as well as for medical and psychosocial care, satisfaction, compensation and guarantees of non-repetition."[117]

The CED also binds States, and therefore Mexico, to "ensure in its legal system that the victims of forced disappearance have the right to obtain reparation and prompt, fair and adequate compensation" that "covers material and moral damages and, where appropriate, other forms of reparation such as: [r]estitution; [r]ehabilitation; [s]atisfaction, including restoration of dignity and reputation; [g]uarantees of non-repetition."[118]

Since 2013, the rights of the victims of federal crimes or human rights violations is specifically regulated in the General Law for Victims, which binds the three levels of government to ensure victims' protection, and grant them restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition in its individual, collective, material, moral, and symbolic dimensions, considering the seriousness and magnitude of the violation and its specific characteristics.[119] Due to limitations of length, the rights, institutions and procedures established in the General Law for Victims are not addressed in the present work. However, it is worth mentioning that the Committee pointed out that further efforts are needed to achieve its implementation.[120]

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[115] *See* General Law, Art. 4, Section IX.

[116] Basic Principles, 31.

[117] Report of the Working Group-2011, *supra* note 12, 108.

[118] International Convention for the Protection of All Persons from Forced Disappearance, Arts. 24.4 and 24.5. For definitions of restitution, rehabilitation, compensation, satisfaction and guarantees of non-repetition, and what they include, *see* Basic Principles, 19-22.

[119] Decreto por el que se expide la Ley General de Víctimas [Decree for the General Law for Victims], Diario Oficial de la Federación [D.O.], January 9, 2013, Art. 1 (Méx.).

[120] Concluding observations Mexico, *supra* note 12, 38 and 39.

However, the General Law stresses that victims of forced disappearance and the other crimes established therein have the imprescriptible right to full reparation, under the terms of the abovementioned General Law for Victims.[121] The General Law establishes that full reparation for victims of the crimes established in the law include, in addition to the provisions of the General Law for Victims, the Inter-American Court of Human Rights case law and International Law, measures of satisfaction (i.e. memorial monuments; a public apology from the State, the perpetrators of the crime and other persons involved; and the recovery of community meeting places; the recovery of the honor and memory of the disappeared person; and the recovery of practices and traditions that might have been lost due to a victimizing event); and guarantees of non-recurrence (e.g. temporary or definitive suspension of the public servants prosecuted or punished).[122]

Now, the General Law also recognizes the specific rights of both the direct victims of forced disappearance or disappearance committed by individuals,[123] and their family members.[124] The General Law also provides for preventive measures,[125] notwithstanding the provisions of the General Law for the Social Prevention of Violence and Delinquency and the General Law of the National Public Security System, including the installation of security cameras in every official facility where there might be a person deprived of his or her freedom; the administration of statistical databases that include impact of the crimes, the circumstances, vulnerability groups, *modus operandi*, territorial delimitation, high risk routes and areas where the probability of such crimes are high; information campaigns; training for public servants officers on matters of human rights and forced disappearances.

The latter seems to be in accordance with international human rights standards.[126] However, as stated in previous chapters, the effective implementation of the General Law depends on further actions and political will.

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[121] *See* General Law, Art. 150.

[122] *Id.* at Art. 151. In this sense, *see* Principle 36.a) of the Updated Set of principles.

[123] *See* General Law, Arts .137 and 149.

[124] *Id.* at Arts. 138-141.

[125] *Id.* at Arts. 158-159, 160, 161, 167, 168, 172 and 173.

[126] The CFD binds States to "ensure that the training of public law-enforcement personnel or officials includes the necessary education on the offense of forced disappearance of persons." Inter-American Convention on Forced Disappearance of Persons, Art. VIII. The CED also obliges States to "ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of [the CED]." International Convention for the Protection of All Persons from Forced Disappearance, Art. 23.1. *See also* Concluding observations Mexico, *supra* note 12, 37.

2. *Special Declaration of Absence ("Declaración Especial de Ausencia")*

Article 24.6 of the CED establishes the State obligation to "take the appropriate steps with regard to the legal situation of the disappeared persons whose fate has not been clarified, and that of their relatives, in fields such as social welfare, financial matters, family law and property rights," regardless of its duty to clarify the fate of the disappeared person.

In this sense, the Committee recommended Mexico to "take the necessary steps to ensure that legislation […] establishes a procedure for obtaining a declaration of absence due to forced disappearance in order to deal appropriately with the legal situation of disappeared persons whose fate has not been clarified and that of their families."[127]

Accordingly, the General Law states that family members may ask the competent jurisdictional civil authorities for a special declaration of absence of the victim three months after the authority acknowledges having filed a report on the disappearance of a person, and the authority has six months to decide on said declaration.[128] This declaration has only civil effects and therefore does not produce the effects of criminal statute of limitations or evidence in criminal proceedings, and neither does it stops the search of the disappeared person.[129]

The purpose of the declaration of absence is to recognize and protect legal personality of the disappeared person and to grant the proper measures to ensure the broadest possible protection to the family members of the disappeared person.[130]

The establishment of special declaration of absence allows the next of kin of the disappeared or missing person to safeguard their rights as long as his or her whereabouts are unknown. However, considering that only two states provide for such legal figure, and notwithstanding the fact that the General Law establishes a time limit for states to introduce this legal precept in their civil legislation, it will depend largely on the political will of state congresses.

In words of Verástegui González, the declaration of absence would allow the victim, in the event of being found alive, to find similar circumstances with regards to, among other issues, his or her family, job, and property as they were

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[127] Concluding observations Mexico, *supra* note 12, 43. The Working Group also recommended "the declaration of absence following the forced disappearance should be allowed." Report of the Working Group-2011, *supra* note 12, 86.

[128] General Law, Arts. 142 to 144. It is worth noting that at the time of this work, only the states of Coahuila and Querétaro provide for this legal figure in their legal framework. Decreto 490, Ley para la Declaración de Ausencia por Desaparición de Personas del Estado de Coahuila de Zaragoza, May 20, 2014 (Méx.), and Concluding observations Mexico, *supra* note 12, 42. The Ninth Transitory Article of the General Law establishes a period of 180 days for the National Congress and State Congresses to legislate on the matter once the law is in force.

[129] *See* General Law, Arts. 147 to 148.

[130] *Id.* at Arts. 145 and 146.

before his or her disappearance. Verástegui González states that the declaration of absence aims to "freeze" the rights and duties of the victim until he or she is found alive, thus materializing the presumption of life.[131]

Besides, the General Law's express reference to Inter-American Court judgments on matters of reparations, it broadens the scope of possibilities and options for the next of kin of the disappeared or missing person to have a way to be redressed for the violations committed against them and their loved ones, if it is possible to speak of reparation in the case of such an abhorrent crime.

## VIII. Conclusion

The enactment of the General Law is only the first step to prevent the crime of forced disappearances and to investigate, prosecute, and, if applicable, punish those responsible for committing the crime, and grant adequate and full reparation for the victims and their next of kin.

As a legislative measure, the General Law is, to a large extent, in accordance with international human rights standards on the issue. However, the partial compliance with the ruling in the Radilla Pacheco case with regards to military jurisdiction, as well as a lack of clear laws on the responsibility of hierarchal superiors as the masterminds of the crime of forced disappearance, suggest that future amendments to either the General Law or criminal laws are required in order to comply with international standards.

Furthermore, even when the General Law constitutes a significant first step by establishing several different institutions, registries, procedures, and mechanisms that involve not only the federal jurisdiction, but state and municipality jurisdictions as well, enormous political will is needed to provide these new institutions with enough resources (material and human) to achieve the purpose aimed by the law. Political will is also needed to establish the coordination between different authorities and institutions, as stipulated in the General Law as a requirement for its effective implementation.

Along this line, during the enactment ceremony of the General Law, Jan Jařab, a representative of the United Nations Office of the High Commissioner for Human Rights in Mexico, recalled that "it was an international organization[132] the first to recommend the adoption of a general law on forced

[131] Jorge Verástegui González, *La personalidad jurídica en la desaparición forzada*, CNDH 45 (2016), *available at https://archivos.juridicas.unam.mx/www/bjv/libros/10/4852/11.pdf*.

[132] Even when the representative did not mention which organization had issued the recommendation, it can be inferred that it was the Working Group on Forced or Involuntary Disappearances, which, after visiting Mexico from March 18 to 31, 2011, recommended "that the offence of forced disappearance should be included in the criminal codes of all states and that a comprehensive law on forced or involuntary disappearances should be adopted without delay. Under this general law forced disappearance should be defined as an autonomous offence." Report of the Working Group-2011, *supra* note 12, Summary and 86.

disappearances after an official visit to Mexico in 2011" and that even though it is not *the* solution, it is part of one if implemented effectively. He pointed out that the General Law aspires to overcome existing impunity and revictimization patterns and that it adopts the highest international human rights standards.[133]

Also, as the "Movimiento por Nuestros Desaparecidos en México"[134] remarked, it is imperative that the establishment of the institutions created by the General Law is followed by the necessary budget, the participation of the victim's family members, and other legislative amendments.[135] The Nineteenth Transitory Article provides that the Federal Administration and state legislatures must establish the necessary budget for the implementation of the General Law.[136] In the 2018 Expenses Budget, the amount of $186,354,100 (approximately 9,900,000 US dollars) was designated for the implementation of the General Law and $282,592,800 (approximately 15,023,859 US dollars) was earmarked as a subsidy for states to implement the General Law.[137]

The General Law stipulates different terms under which the institutions created shall be established and for the correspondent authorities to make the necessary amendments to their legal framework, to issue guidelines, rules, programs, and protocols, and to take any necessary measures in order to adapt their activities to the regulations established in the General Law.[138]

At this time, it is too soon to determine whether the General Law will, in fact, substantively contribute to eliminating or lowering the high levels of impunity surrounding the crime of forced disappearance and the outrageous number of missing or disappeared persons in Mexico. As a legislative measure, it corresponds to the most international human rights standards in

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[133] Jan Jařab also pointed at the limitations of the law in matters like search procedures and the superior hierarchical responsibility. *Palabras de Jan Jarab para la Promulgación de la ley general de desaparición*, Oficina del Alto Comisionado de las Naciones Unidas en México (2017), *available at http://www.hchr.org.mx/index.php?option=com_k2&view=item&id=1046:palabras-de-jan-jarab-para-la-promulgacion-de-la-ley-general-de-desaparicion&Itemid=395*.

[134] Movimiento por Nuestros Desaparecidos en México is a social movement made up of more than 35 groups of disappeared persons' relatives, and almost 40 organizations that work together to overcome the situation of forced disappearances in Mexico. *See* Movimiento por Nuestros Desaparecidos en México, "Nosotros", website, *available at http://sinlasfamiliasno.org/nosotros/*.

[135] Aprobación de la ley de desaparición es el primer paso, las familias exigimos una implementación eficaz y nuestra participación durante todo el proceso, Movimiento por Nuestros Desaparecidos en México (2017) *available at http://sinlasfamiliasno.org/aprobacion-la-ley-desaparicion-primer-paso-las-familias-del-movimiento-desaparecidos-en-mexico-exigimos-una-implementacion-eficaz-nuestra-participacion-proc/*.

[136] *See* General Law, Nineteenth Transitory Article.

[137] Presupuesto de Egresos de la Federación para el Ejercicio Fiscal 2018, Diario Oficial de la Federación [D.O.] November 29, 2017 (Mex.), at Sixth Transitory Article.

[138] *See* General Law, Transitory Articles Third to Eight, Eleventh to Sixteenth and Twentieth to Twenty-First.

matters of forced disappearances. However, it is reiterated, its effectiveness will depend largely on the political will of the federal and state authorities in charge of implementing, establishing, training, and coordinating the different operators and institutions needed for the proper implementation of the General Law at all government levels.

The situation of forced disappearance has reached a critical point in recent years where neither the government nor society as a whole can deny its impact. It is incontrovertible that the enactment of the General Law, as a legislative measure aimed to ensure and fulfil the rights of justice, truth and reparation of the victims of forced disappearance and their next of kin is an action without precedent, thanks primarily, to the lifelong fight of those whose lives have placed them in one of the worst situations a person can ever find themselves, not knowing the fate of their loved ones.

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# NOTES

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# MEXICO'S RATIFICATION OF ILO CONVENTION NUMBER 98 AND THE FUTURE OF PROTECTION CONTRACTS

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Abstract: *This note reviews and analyzes the impacts of Mexico's September 2018 ratification of International Labour Organization (ILO) Convention 98 on the right to organize and collective bargaining. Specifically, it focuses on what Mexico's ratification of the instrument means for the future of the protection contract system in terms of international law. Mexico's ratification of Convention 98 closes the doctrinal gap on protection contracts which was left by Convention 87, on freedom of association. Although Convention 98 does not cover the armed forces, the police, and public servants employed in state administration, according to international law, its ratification should invalidate much of the Mexican protection contract regime. Convention 98 is not self-enforcing, but ratification of the instrument subjects Mexico to the full scrutiny of the ILO's supervisory system regarding compliance with norms. Moreover, Mexico's domestic jurisprudence governing compliance with ratified international human rights treaties bodes well for effective judicial enforcement of the convention. With the ratification of Conventions 87 and 98, international law mandates the implementation of an authentically democratic labor relations system in Mexico. With the additional ratifications of Convention 29 on forced labor, Convention 100 on equal remuneration, Convention 105 on the abolition of forced labor, Convention 111 on discrimination in employment and occupation, Convention 138 on the minimum age for work, and Convention 182 on the worst forms of child labor, Mexico is bound by international law to comply with all globally recognized core labor standards.*

Keywords: *ILO; collective bargaining agreements; protection contracts; Mexico.*

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Resumen: *Esta nota revisa y analiza la ratificación de México del Convenio 98 de la OIT sobre organización y negociación colectiva que tuvo lugar en septiembre de 2018. Se enfoca específicamente en lo que significa la ratificación del instrumento por parte de México en términos de derecho internacional para el futuro de los contratos de protección. La ratificación del Convenio 98 cierra la brecha doctrinal sobre los contratos de protección dejada por el Convenio 87 sobre la libertad sindical. Si bien el Convenio 98 excluye de su cobertura a las fuerzas armadas, la policía y los funcionarios públicos empleados en la administración del Estado, su ratificación debería invalidar una gran parte del régimen de los contratos de protección con el derecho internacional. El Convenio 98 no se aplica por sí solo, pero la ratificación del instrumento somete a México al control completo del sistema de supervisión de la OIT en relación con el cumplimiento de la norma. Además, la jurisprudencia nacional de México que rige el cumplimiento de los tratados internacionales de derechos humanos ratificados es un buen augurio para la aplicación judicial efectiva de la convención. Con la ratificación de ambos Convenios 87 y 98, el derecho internacional ordena la implementación de un sistema de relaciones laborales mexicano auténticamente democrático. Y con las ratificaciones adicionales del Convenio 29 sobre trabajo forzoso, el Convenio 100 sobre igualdad de remuneración, el Convenio 105 sobre la abolición del trabajo forzoso, el Convenio 111 sobre la discriminación en el empleo y la ocupación, el Convenio 138 sobre la edad mínima para trabajar y el Convenio 182 sobre las peores formas de trabajo infantil, México está obligado por el derecho internacional a cumplir con todas las normas laborales fundamentales reconocidas mundialmente.*

Palabras clave: *OIT; acuerdos colectivos de negociación; contratos de protección, México.*

## Table of Contents



## I. Introduction

In September of 2018, the Mexican Senate unanimously ratified International Labour Organization (ILO) Convention Number 98,[1] which guarantees work-

[1] Convention No. 98 – Right to Organize and Collective Bargaining (1949), *available at*

ers the right to organize, as well as the right to voluntary and authentic collective bargaining.[2] This note examines what Mexico's ratification of the convention means for the future of Mexico's protection contract system in terms of international law.

For many years the rights of Mexican workers to organize trade unions of their own choosing as well as democratically negotiate their own Collective Bargaining Agreements (CBAs) have been limited and repressed. For example, it has been common for employers to sign CBAs with unions without the consent or knowledge of their employees. In many cases, these agreements have been signed prior to a business commencing operations, even before the hiring of the workforce. Such CBAs are known as "employer protection contracts," and "the unions that profit from them by selling 'protection' to employers are called 'protection unions'."[3]

Protection contracts are registered with Local or Federal Conciliation and Arbitration Boards (CABs), and it is believed that they make up the overwhelming majority of collective agreements in Mexico.[4]

## II. The Doctrinal GAP Closed by Mexico's Ratification of ILO Convention 98

Mexico ratified ILO Convention 87, guaranteeing freedom of association for workers and employers, on April 1, 1950.[5] The instrument was never renounced and has been in force in the country ever since its ratification nearly 69 years ago.[6] Convention 87 was signed by the ILO's International Labor Conference (ILC) in 1948.[7]

ILO Convention 98 is a fundamental instrument complementing freedom of association, with an explicit reference to collective bargaining. Convention 98 was adopted by the ILC in 1949 for the purpose of filling the normative

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NORMLEX, International System on International Labour Standards, ILO, *http://www.ilo.org/dyn/normlex*.

[2] *OIT se congratula por ratificación del Convenio 98 en el Senado*, El Universal, *available at http://www.eluniversal.com.mx/nacion/sociedad/oit-se-congratula*.

[3] Maquila Solidarity Network, Labour Justice Reform In Mexico – A Briefing Paper (2017)

[4] María Xelhuantzi López, La democracia pendiente: La Libertad de asociación sindical y los contratos de protección en México, 167 (Sindicato de Telefonistas de la República Mexicana, 2000).

[5] Ratifications for Mexico, NORMLEX – Information System on International Labour Standards, ILO, *available at http://www.ilo.org.dyn/normlex*.

[6] *Ibid.*

[7] Convention No. 87 – Freedom of Association and Protection of the Right to Organize, 1948, NORMLEX- Information System on International Labour Standards, ILO, *available at http://www.ilo.org/dyn/normlex*.

gaps in international labor law regarding the full scope of trade union rights: freedom of association, union organizing and collective bargaining. As Mexican labor lawyer Arturo Alcalde Justiniani has aptly noted, " Both date from seven decades ago; however, our government only ratified 87. Regarding 98, the Senate had suspended its ratification based on corporatist interests and with the intention of maintaining the practice of employer protection contracts being signed behind the workers' backs.".[8]

A close examination of both ILO instruments supports Alcalde's suggestion of a possible doctrinal gap regarding Mexico's protection contract regime prior to the ratification of Convention 98. Convention 87 makes no reference per se to collective bargaining or to collective agreements. The principal focus of Convention 87 is the protection of the autonomy and independence of workers' and employers' organizations from state interference and repression. Articles 2, 3, 4, 7 and 10 of Convention 87 are quite clear in this regard.[9] As the ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) has observed, "The principal objective of Convention No. 87 is to protect the autonomy and Independence of workers' and employers' organizations in relation to the public authorities, both in their establishment and in their functioning and dissolution."[10]

Regarding this key objective of the Convention, the supervisory bodies of the ILO have granted admissibility to complaints alleging acts of omission on the part of the public authorities in relation to trade union rights. In other words, laws and practices on the part of ILO State Members which permit employer interference with or repression of trade union organization have been cognizable under Convention 87 and its principles.[11]

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[8] Maria del Pilar Martinez and Octavio Amador, *Convenio 98 de la OIT sobre negociación colectiva requiere debate amplio*: *analistas*, El Economista, *available at http://www.eleconomista.com.mx/gestion/Convenio-98-requiere-debate-amplio-analistas-20180912-0023.html* (Free translation).

[9] Convention No. 87 – Freedom of Association and Protection of the Right to Organize, 1948, NORMLEX – Information System on International Labour Standards, ILO, *available at www.ilo.org/dyn/normlex*.

[10] *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, Report of the Committee of Experts on the Application of Conventions and Recommendations, delivered to the International Labour Conference, 101*st *Session, Geneva,* ILO Document, 19 (2012).

[11] *See*, for example, ILO Committee on Freedom of Association, *Complaint against the United States*, Case No. 1523, Report No. 284 (1992), NORMLEX – Information System on International Labour Standards, ILO, *available at http://www.ilo.org/dyn/normlex*. Even though the United States has not ratified Conventions 87 and 98, all member states of the ILO are still subject to the review of the ILO Committee on Freedom of Association (CFA) in relation to both conventions, regardless of ratification. This practice does not apply to the other ILO supervisory bodies with jurisdiction over international labor standards, such as the CEACR and the Governing Body.

In addition to protecting the exercise of trade union rights from state interference, Convention 87 has provided the singular implicit protection of the right to strike in the universe of ILO standards. As a matter of fact, there is no ILO convention which explicitly protects the right to strike. As the CEACR has noted:

> In the absence of an express provision in Convention No. 87, it was mainly on the basis of Article 3 of the Convention, which sets out the right of workers' organizations to organize their activities and to formulate their programmes, and Article 10, under which the objectives of these organizations is to further and defend the interests of workers, that a number of principles relating to the right to strike were progressively developed (as was the case for other provisions of the Convention) by the Committee of Freedom of Association as a specialized tripartite body (as of 1952), and by the Committee of Experts (as of 1959, and essentially taking into consideration the principles established by the Committee on Freedom of Association). This position of the supervisory bodies in favour of the recognition and protection of the right to strike has, however, been subject to a number of criticisms from the Employers' group in the Committee on the Application of Standards of the International Labour Conference.[12]

The CEACR has stated that Convention 98 was adopted in 1949 "to supplement certain aspects of Convention No. 87" (emphasis mine)[13] and with three main objectives:

> (i) protection against acts of anti-union discrimination both at the time of taking up employment and in the course of employment, including the termination of the employment relationship; (ii) protection against acts of interference in the internal affairs of workers' and employers' organizations; and (iii) the promotion of collective bargaining.[14]

In terms of international labor law, Mexico's ratification of Convention 98 appears to close all the doctrinal loopholes regarding the protection contract system. In addition to Article 4 of the Convention, which promotes voluntary and authentic collective bargaining, Article 2 states:

> 1. Workers' and employers' organisations shall enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.
>
> 2. In particular, acts which are designed to promote the establishment of workers' organisations under the domination of employers or employers' organisations, or to support workers' organisations by financial or other means,

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[12] *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, op. cit.*, 46.

[13] *Ibid.* at 67.

[14] *Id.*

> with the object of placing such organisations under the control of employers or employers' organisations, shall be deemed to constitute acts of interference within the meaning of this Article.[15]

The Mexican practice of implementing and registering CBAs without the affected workers having any knowledge, consent, or power of authorization, let alone involvement in the collective bargaining process, contravenes the principles of Article 4 of Convention 98. Moreover, Mexico's protection contract regime effectively fosters total employer interference and dominance, making any legitimate, authentic and independent collective expression of worker demands at the bargaining table impossible, in direct contravention of Article 2 of Convention 98.

Admittedly, even before Mexico's ratification of Convention 98 in September of 2018, the Mexican protection contract system was submitted for scrutiny and review by the ILO's supervisory system on standards, pursuant to Convention No. 87. In fact, the protection system was mentioned in the CEACR's Report on Conventions and Standards presented to the 107th International Labour Conference of the ILO in May and June of 2018. The CEACR reports on individual country cases involving the conventions which Member States have actually ratified, the organization stated the following regarding Mexico and Convention 87:

Recalling that the Committee has expressed concern on this matter for a number of years, and that it was highlighted in conclusions of the Committee on the Application of Standards in June 2015, the Committee once again requests the Government, in consultation with the social partners, to take the necessary practical and legislative measures to find solutions to the problems arising out of the issue of protection unions and protection contracts, including in relation to the registration of trade unions. Reiterating that ILO technical assistance remains available and expecting that the implementation of the constitutional reform will provide an opportunity to address these problems, the Committee requests the Government to provide information on any developments in this respect, as well as in relation to the proposed reform of the Federal Labor Law (LFT).[16]

In point of fact, the CEACR engaged in some doctrinal bootstrapping in its 2018 report, which reviewed the protection contract issue under Convention 87. That is because the instrument does not explicitly mention collective bargaining. The key language in the observations of the CEACR regards

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[15] Convention No. 98, Right to Organize and Collective Bargaining, 1949, NORMLEX, International System on International Labour Standards, ILO, *available at http://www.ilo.org/dyn/normlex*.

[16] Observation (CEACR) – adopted 2017, published 107th ILC Session (2018) – Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87) – Mexico (Ratification: 1950), NORMLEX, International System on International Labour Standards, ILO, *available at http://www.ilo.org/dyn/normlex*.

"...the issue of protection unions and protection contracts, including in relation to the registration of trade unions"[17] (emphasis added). Trade union registration practices and procedures have everything to do with the principal objective of Convention 87, as noted above: protecting the autonomy and independence of workers' and employers' organizations *vis-à-vis* public authorities.

## III. Workers Excluded from Coverage under ILO Conventions 87 and 98

It should be pointed out that Conventions 87 and 98 exclude certain categories of workers from direct coverage and protection. Article 9, Paragraph 1 of Convention 87 states that "The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations."[18]

The justification for exempting the armed forces and the police from coverage under Convention 87 is "the responsibility of these two categories of workers for the external and internal security of the State." [19]

Nevertheless, ILO jurisprudence strictly limits the scope of the aforementioned Article 9, Paragraph 1 exclusion. This is important in terms of the right to form trade unions and the right to freedom of association enjoyed by Mexico's security and public safety personnel. The ILO supervisory system on standards has concluded that said exclusion should not apply to the following workers: civilian personnel in the armed forces, fire service personnel, prison staff, customs and excise officials, civilian employees in the industrial establishments of the armed forces,[20] civilian employees in the intelligence services,[21] or security employees of the legislative authority.[22] Moreover, the CEACR has stated the following:

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[17] *Ibid.*

[18] Convention No. 87, Freedom of Association and Protection of the Right to Organize, 1948, NORMLEX, International System on International Labour Standards, ILO, *available at http://www.ilo.org/dyn/normlex*.

[19] *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, op. cit.,*.25.

[20] *See*, for example, *Nigeria* – CEACR Observation, 2011; and *Turkey* - CEACR Observation, 2010. NORMLEX, International System on International Labour Standards, ILO, *available at http://www.ilo.org/dyn/normlex*.

[21] *See*, for example, *Czech Republic* – CEACR, direct request, 2011, NORMLEX, International System on International Labour Standards, ILO, *available at http://www.ilo.org/dyn/normlex*.

[22] *See*, for example, *Cambodia* – CEACR, direct request, 2011; and *United Republic of Tanzania (Zanzibar)* – CEACR, observation, 2011, NORMLEX, International System on International Labour Standards, ILO, *available at http://www.ilo.org/dyn/normlex*.

> In practice, as it is not always easy to determine whether workers belong to the military or to the police, in view of the Committee, workers should be considered civilians in case of doubt. For example, it considers that workers in private security firms and members of the security services of civil aviation companies should be granted the right to establish organizations, in the same way as workers engaged in security printing services and members of the security or fire services of oil refineries, airports and seaports.[23]

ILO Convention 98, Article 5 also exempts the armed forces and the police, and Article 6 exempts "public servants engaged in the administration of the State."[24] The CEACR has made clear that the scope of the armed forces and police exclusion of Convention 87 also must be read narrowly in Convention 98:

> In provisions similar to those contained in Convention No. 87, Convention No. 98 leaves it to national laws or regulations to determine whether its provisions apply to the armed forces and police (Article 5(1)). However, the Committee wishes to recall that civilian personnel in the armed forces enjoy the rights and privileges set out in the Convention and that, even though certain employees in the private or the public sector may carry a weapon in the course of their duties, but are not members of the police or the armed forces, they cannot automatically be excluded from the scope of the Convention.[25]

The CEACR has determined that the the application of Article 5 of Convention 98 must make a distinction "between, on the one hand, public servants who by their functions are directly employed in the administration of the State (for example, in some countries, civil servants in government ministries and other comparable bodies, and ancillary staff), who may be excluded from the scope of the Convention, and, on the other hand, all other persons employed by the government, by public enterprises or by autonomous public institutions, who should benefit from the guarantees provided for in the Convention."[26]

ILO Convention 151 on Labour Relations (Public Service), adopted in 1978,[27] and Convention 154 on Collective Bargaining, adopted in 1981,[28]

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[23] *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, op. cit.*, 25.

[24] Convention No. 98, Right to Organize and Collective Bargaining Convention, 1949, NORMLEX, International System on International Labour Standards, ILO, *available at http://www.ilo.org/dyn/normlex*.

[25] *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice and a Fair Globalization, op. cit.*, p. 69.

[26] *Ibid.* at 69.

[27] Convention No. 151, Labour Relations (Public Service), 1978 – Convention concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service, NORMLEX, International System on International Labour Standards, ILO, *available at http://www.ilo.org/dyn/normlex*.

[28] Convention No. 154 – Collective Bargaining, 1981 – Convention concerning the Pro-

effectively closed the gap created by Convention 98, Article 5. In terms of international law, the ratification of these instruments is designed to guarantee collective bargaining rights for public servants directly employed in the administration of the State.[29] Mexico has not ratified either of these conventions as yet.

Nevertheless, with the ratification of Convention 98, the practice of protection contracts in most of the Mexican economy is now covered by international law and its obligations.

## IV. What does Ratification of ILO Convention No. 98 Actually Mean in Terms of Legal Obligations?

The ratification of an ILO convention means that the member state "accepts the convention as a legally binding instrument."[30] In other words, ratification creates the obligation, according to international law, that a country's legal system and practice be brought into conformity with the norm. Other ILO instruments, such as declarations and recommendations, are not ratified by member states, and therefore do not have the same binding effect. Once it has ratified a convention, a country is subject to the entire ILO supervisory system responsible for ensuring that the instrument is applied.

According to Brazilian jurist Luiz Eduardo Gunther, who has thoroughly has examined ILO normative jurisprudence and its application and significance for his own country, an ILO convention essentially is "a treaty–a law of multilateral caracter."[31] Once an ILO member state ratifies a convention, it binds itself to the full "obligation of the norm,"[32] complying with all of the conditions stipulated in the standard.

Although international law dictates that ILO conventions have a binding effect on the member states that ratify them, there is an obvious challenge: international norms are not self-enforcing, for the most part. Even with the available supervisory machinery available to examine the application and performance of member states vis-à-vis international labor standards, the

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motion of Collective Bargaining, NORMLEX, International System on International Labour Standards, ILO, *available at http://www.ilo.org/dyn/normlex*.

[29] *See* Stanley A. Gacek and Ana Virginia Moreira Gomes, *A Garantia do Direito a Negociação Coletiva no Serviço Público pela Organização Internacional do Trabalho*, in A Convenção No. 151 Da Oit Sobre o Direito de Sindicalização e Negociação na Administracão Pública 22,23 (Editora LTr ed., 2017).

[30] How International Labour Standards Are Created, ILO, Geneva, *available at http://www.ilo.org/global/standards/introduction-to-internatinoal-labour-standards*.

[31] Luiz Eduardo Gunther, A OIT e o Direito do Trabalho no Brasil 50 (Jurua Editora ed., 2011). (Free translation).

[32] *Ibid.* at 50 (Free translation).

ILO has no effective sanctioning power of its own to ensure the compliance of countries with the conventions they have ratified.[33]

The issue of self-enforceability and the lack thereof certainly is not unique to the ILO, but applies to many international law systems, presenting a "Westphalian dilemma" that is especially notable in international human rights law.[34] Concrete compliance with–and enforceability of–ratified ILO conventions depend in great part on how the ratifying member state prioritizes the norm in terms of domestic jurisprudence.

In this respect, recent developments in Mexican jurisprudence regarding human rights instruments may be helpful in assessing the real legal impact of Mexico's recent ratification of ILO Convention 98. One of the principal questions is whether ratified international human rights treaties "are located above federal laws but below the Federal Constitution," or whether such ratified instruments "must be considered at the level of the Constitution."[35]

Citing the Mexican Supreme Court's decision of September 20, 2013, regarding compliance with the judgment of the Inter-American Court of Human Rights in the Radilla Pacheco case, international human rights law expert Christina Cerna notes that "The Supreme Court, however, in its judgment, jettisoned the concept of 'hierarchy,' and by a majority of ten votes, decided that human rights are recognized as a whole as a kind of amalgam, whether they derive from the Constitution or from international treaties to which Mexico is a party."[36]

In any case, it does not appear that the principles and content of ILO Convention 98 are in conflict with the Mexican Federal Constitution, as amended in 2017. Indeed, newly amended Article 123 requires genuine trade union representation of the workers and certainty in the signing, filing and registration of CBAs.[37] Given the conformity of the international norm with the general language of the Mexican constitutional reform, as well as the binding nature of the instrument according to international law, there is no

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[33] For a full discussion of this point, *see* Stanley A. Gacek, *A Declaração sobre Princípios e Direitos Fundamentais no Trabalho da OIT de 1998 Dezesseis Anos Depois – Seu Significado para a Liberdade Sindical e a Negociação Coletiva no Brasil e no Mundo/Comentários Adicionais a Debate Permanente*, in A Declaração de 1998 da OIT Sobre Principios e Direitos Fundamentais no Trabalho 116 - 127 (Editora LTr, ed., 2014).

[34] *Ibid.* at 119.

[35] Christina M. Cerna, *Status of Human Rights Treaties in Mexican Domestic Law*, in ASIL (American Society of International Law) Insights, Vol. 20, ISSUE 4 (2016), *available at http://www.asil.org/insights/volume/20/issue/4/status-human-rights-treateis-mexican-domestic-law*.

[36] *Ibid.* also citing Radilla Pacheco v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Inter-Am Ct. H.R. (ser. C) No. 209 (Nov. 23, 2009).

[37] *See* Labour Justice Reform in Mexico – A Briefing Paper, op. cit., citing *Decree Announcing Reform and Additions to Articles 107 and 123 of the Political Constitution of the United States of Mexico,* Diario Oficial de la Federación (February 24, 2017), *available at http:// www.dof.gob.mx/nota_detalle.php*.

reason why Mexico cannot and should not employ ratified Convention 98 to eliminate the protection contract system by means of all necessary enabling legislation, regulation and judicial action. In having ratified both Conventions 87 and 98, Mexico is required by international law to ensure a genuinely democratic labor relations system.

FInally, it is important to note that with the ratification of Convention 98 in 2018, Mexico has ratified all of the fundamental ILO conventions with regards to labor rights, including: the Forced Labour Convention 29 of 1930 (Mexican ratification in 1934); the Equal Remuneration Convention 100 of 1951 (Mexican ratification in 1952); the Abolition of Forced Labour Convention 105 of 1957 (Mexican ratification in 1959); the Discrimination (Employment and Occupation) Convention 111 of 1958 (Mexican ratification in 1961); the Minimum Age Convention 138 of 1973 (Mexican ratification in 2015); the Worst Forms of Child Labour Convention 182 of 1999 (Mexican ratification in 2000); as well as the Freedom of Association and Protection of the Right to Organize Convention 87 of 1948 (Mexican ratification in 1950). [38]

The norms mentioned above make up the core labor standards of the ILO, and Mexico should be commended for ratifying each and every one of them. This fact also means that Mexico is bound by international law to comply with all of the fundamental labor rights currently recognized by the global community.

[38] *Ratifications for Mexico,* NORMLEX, Information System on International Labour Standards, ILO, *available at http://www.ilo.org/dyn/normlex*.

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# STRUCTURAL TRANSFORMATIONS OF POLITICAL RIGHTS: THE MEXICAN CASE

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Abstract: *This note supports the hypothesis that democratization and openness to international human rights law in Mexico brought about a structural change in its constitutional principles. This was mainly the result of substantially transforming the meaning - and especially the scope - legally given to political rights. The change from prerogatives to rights is not only a matter of nomenclature, but also a 180-degree shift, at both practical and epistemological levels. In addition to this, the project to establish a Ius Constitutionale Commune in the region, based on human rights standards, has been an equally important change as it has placed the human person at the heart of the matter.*

Keywords: *Democratization; Political Rights; Ius Commune.*

Resumen: *En esta nota se sostiene la hipótesis de que la democratización y la apertura al derecho internacional de los derechos humanos, en México, trajo consigo un cambio en las instituciones constitucionales que se puede calificar de estructural. Esto es así porque el significado —y sobre todo los alcances que jurídicamente se daban a los derechos políticos antes y después— se transformó sustancialmente. Lo anterior, significa que el cambio de prerrogativas a derechos no es solo una cuestión de nomenclatura, sino que configura un giro de 180 grados, tanto a nivel práctico como epistemológico. Además, el proyecto de establecimiento de un Ius Constitutionale Commune en la región, a través de las normas en materia de derechos humanos, ha significado un cambio de igual trascendencia que ha puesto a la persona humana en el centro.*

Palabras Clave: *Democratización; Derechos políticos; Ius Commune.*

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## I. Introduction

Undoubtedly, one of the main pillars of Mexican authoritarianism was its medium-intensity control over democratic participation processes. The best example of this is that although elections were held regularly, votes were highly concentrated. Therefore, the Mexican electoral system was seen as belonging to the hegemonic party.

The shift towards democracy has undergone changes in various institutions one of them being political rights. This note argues that the structural transformations that both political power and the State have undergone have conceptually modified the normative meaning of political rights. This path was marked by the change in the conceptual paradigm: from prerogatives to rights and then to the recognition of a new form of assimilation through international human rights law.

The last of these great transformations is represented by the *Ius Constitutionale* project for Latin America, which intrinsically implies two things: 1) belonging to multiple normative spaces and 2) the centrality of the human person.

## II. The Transformation of the State: When the Power is Rational

By abandoning the organic idea of the ancient world, academic thought began to present the modern State as an artifact; that is, as an artificial work, not as a spontaneous product of human nature, but rather as a rational cre-

ation resulting from the voluntary decision to live in society. In other words, it means to leave the State of a pre-contractual nature.[1]

Based on this premise and on contemporary doctrine, the basic models that summarize the explanations about the modern State can be alternatively condensed as: 1) the approach to the rationalization of the juridical-political institutions -which is saying, the system of Law and the State itself; 2) the value given to the unity imposed by the modern political organization -associated with sovereignty and the consequent rise above medieval pluralism; and 3) finally the balance of powers -whose version is not the mechanistic roots of modern thought are hidden.[2] Naturally, the identification and separation of these models[3] is only possible *in theory* as the primacy or exclusivity of any of them can be verified in scholarly works, but very rarely in the facts themselves.

The decades of transition between the nineteenth and twentieth centuries, concerned about the crisis of the liberal State, brought about a myriad of problems related to a wide variety of aspects, one of which was the issues derived from the constitutionalization of parties and unions.[4] It was feared that this constitutionalization might conceal a form of regression towards estates; that is, an element contrary to political unity, which had become a fundamental feature of modern State organization. Moreover, controversies came about by increased bureaucracy towards another of the bastions of modernity, namely, the balance between authority and individuals.[5] Hence, the balance was presumably compromised and damaged because of unsuspected growth. Furthermore, there was the theoretical concern of narrowing the gap between the public and the private spheres, also reputed as modern, because

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[1] José Antonio Maravall, Estado Moderno y Mentalidad Social, Siglos XV a XVII 50 (Alianza 1986).

[2] "The triumph of the modern mentality has been the triumphant emergence of a form of thought that only considers the 'matter' always the same ... shaped by forms that become, in fact, accidental in the only law of the movement of matter. This mentality was underlying Descartes, Galileo and Newton, either as a necessary metaphysical postulate, or as a working hypothesis in Physics, and ended up shaping all modern-contemporary culture": Francisco Carpintero, Historia breve del derecho natural 244 (2000).

[3] 43 Maurizio Fioravanti, *Stato (Storia)*, *in* Enciclopedia del Diritto (Giuffrè 1990).

[4] On the legalization and constitutionalization of political parties in the Latin American context, *see* Bernardino Esparza Martínez, Partidos políticos. Un paso de su formación política y jurídica 50 (Editorial Porrúa, 2005). With regard to the relevance of trade unionism for the definition of institutions, *see* Amaro del Rosal, Los congresos obreros internacionales en el siglo xix. De la joven Europa a la segunda internacional (Editorial Grijalbo 1958).

[5] "Modern techniques have made possible a new intensity of government control, and this possibility has been exploited very fully in totalitarian States. It may be that under the stress of war, or the fear of war, or as a result of totalitarian conquest, the parts of the world where some degree of individual liberty survives may grow fewer, and even in them liberty may become more and more restricted.": Bertrand Russell, Autoridad e individuo 42 (Fondo de Cultura Económica 1995).

of the activity of public administration in terms of dealing with individuals through the figure of the contract.[6]

Because of this historical scenario, the models of the past century traditionally handed down over the years, have been shaped in a problematic climate. They are not exempt from answers, and follow the desire to point at safe paths of political modernization based on prescriptive content. This is to offer criteria that allow to identify everything that could move contemporary society away from the paradigms of modernity, and simultaneously serve as guidelines for action.

Nowadays, the prescriptivism orientation of the models still exists, although it no longer possesses the strength it had at the beginning of the 20th century. This tendency is reflected in the attitude of case law to consider the current conceptual reality during a period of crisis, precisely because of the lack of coincidence between facts and theoretical models. The previous or older paradigm, as Claus Offe describes it, has remained valid and effective until the crisis of the seventies. While the agents or "Subjects of the 'old paradigm' were practically the only institutions (juridical-political), government, parliament, parties -although after them they operated economic corporations and unions more or less integrated organizationally in the system-; the 'actors' of the 'new paradigm' were fundamentally, in their strictest formulations, the new social movements."[7]

However, rather than talking about the crisis of the State institutions themselves, the prevailing perspective gravitates towards the intelligence of the crisis of the model. In other words, it does not seem plausible, for example, to deny the activity of governing bodies all rationality because it does not adapt to the formal elements defining the modern bureaucratic State as pointed out by Weber. Nor it is reasonable to affirm the dissolution of the modern political organization based on broad European pluralist structures, without relating it to the model that focuses its explanation of modernity on the annihilation of the particularisms in medieval society.

This crisis of theoretical models justifies the demand for their review. Consequently, it is only possible to postulate the extinction of the thought state and not of the lived reality. In the words of a contemporary scholar, the State that is dissipating is the imaginary one, and not the one that emerged at the end of the Middle Ages. This model explains the transformation of the paradigmatic.[8] This thesis is based on the inadequacy of interpretive schemes to explain the contemporary legal-political reality, both on the functional level of a dynamic civil society and State, and the structural definition of institutions.

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[6] Fioravanti, *supra*, at 710.

[7] Elías Díaz, *El Nuevo Contrato Social: Instituciones Políticas Y Movimientos Sociales, in* Historia, lenguaje, sociedad. homenaje a Emilio Lledó 363 (Editorial Crítica 1989).

[8] Pietro Costa, Lo Stato Immaginario. Metafore e Paradigmi Nella Cultura Giuridica Italiana Fra Ottocento E Novecento (Giuffrè 1986).

The affirmation that actual historical content coincides with its theoretical systems constitutes the very essence of historiography. As a methodology applicable to legal concepts, it leads science to rethink, in both the public and private spheres, the conceptual paradigms that have been used to interpret and explain matters inherent to them, verifiable data on dogmatic abstraction being preferred today, characterizing this time precisely because of their rejection of excessively ambitious rationalisms, whose limits have already been sufficiently criticized although without incurring in an apology for the irrational, as evidenced by the fact that the notion of a system is still prevalent in more restricted sectors of jurisprudence, of, even with the elementary variants that this epistemological itinerary has supposed.

From the examination of the paradigms that serve as a theoretical explanation of modern political institutions, it may be noted that the crisis of the welfare State does not necessarily lead to the dismissal of all the elements that characterize it, especially because there is a non-identification between the models and the values that the models strive to embody. This disorientation should not be interpreted unfailingly in terms of the exclusive crisis of doctrinal schemes because it is also an issue of " precisely a crisis of legitimation; that is, of cultural and social values, of the concept of the world' with a significant internal philosophical debate (analytical, dialectic, postmodern, etc.)."[9]

All this makes it possible to understand the historicity of political institutions. Indeed, the need to understand their transformations in order to correctly appraise their operation and functions is necessary to be in a position to determine the possibilities of studying political-electoral rights under the current system - in particular those referred to as the active and passive vote, traditionally designated *ius suffragii* and *ius honorum*. Therefore, the results of this analysis will identify the features of a complex and problematic reality, like that of contemporary State organization in Latin America, whose design has its roots in a deeper and more distant time, although structurally modern, and which presents as the heir of a long tradition that finds its original sources in Roman legal thought.

## III. The Integration Project Focused on Human Rights: The *Ius Constitutionale Commune* for Latin America

Among the various normative designs of the right to vote, in both its active and passive aspects, it is possible to identify contextual characteristics in Latin America that have given rise to a minute analysis from the perspective of legal doctrine. Such characteristics can be framed into two processes that have been developed in different, albeit overlapping, time periods, namely, politi-

[9] Díaz, *supra*, at 363.

cal transitions, on the one hand, and State reform processes, on the other. This finds its raison d'etre in which the debate on the reform of the State has usually been aimed at guiding the democratic transition or consolidating the democratic political regime that has just been established.[10]

The Latin American region - like that of Eastern Europe - has provided sufficient empirical evidence on political changes towards democracy for authors like O'Donell and Schmitter who affirmed that a process of political liberalization, centered on the maximization of political rights and prerogatives, has become a reality. Moreover, according to these authors, it has involved the establishment of a principle of citizenship, which, in turn, has resulted in a transformation of the relations between public power and individuals[11] while political freedoms have been presented as the touchstone of the electoral system.

Over time, and entering into the debate on democratic transitions or State reforms, globalization has modified several existing classical conceptions, particularly the notion of sovereignty, and therefore the sources of human rights, among which are the political rights.

A process of global transformation gained momentum in several fields: as occurred in the case of State reform. In addition to having the purpose of modifying political institutions, globalization was intended to introduce changes to the justice system, and to legal systems in general, but it did not stop there; the transformations now included - perhaps incidentally - a different way of thinking about public law.[12]

When describing this phenomenon from a legal perspective, it can be affirmed that with such processes, the classic elements of the State (government, population, laws, territory) do not disappear. The concept of these elements are profiled differently because of a new demand for sharing the responsibilities of security and democratic self-determination, and by creating a kind of interpretive pluralism with weak hierarchical positions, parallel to the exercise of authority.[13] For this reason it has been pointed out that there are currently 'constitutional sites' in the various legal systems that are immersed in processes of public authority because of their essence.[14]

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[10] An interesting work is: José María Serna de la Garza, La Reforma del Estado en América Latina: Los casos de Brasil, Argentina y México, México (UNAM 1998) To document the centrality of electoral reform processes in the process of democratic change, *see* La mecánica del cambio político en México, José Woldenberg *et al.* (Cal y Arena, 2006).

[11] Guillermo O'donell & Philippe Schmitter, Transiciones desde un gobierno autoritario 21-26 (Paidós 1988).

[12] In the case of Mexico, the objective of reforming the organs for the administration of justice was presented as a theme on the agenda to update the constitutional text; *see* Jaime Cárdenas Gracia, Una constitución para la democracia. Propuestas para un nuevo orden constitucional 159 (UNAM 2000).

[13] José María Serna de la Garza, *Soberanía y apertura del Estado: una perspectiva mexicana*, *in* Soberanía y Estado Abierto en América Latina y Europa 57 (UNAM 2014).

[14] *Id*. *Impacto e implicaciones constitucionales de la globalización en el sistema jurídico mexicano*, Serna also uses the term 'legal spheres of a constitutional nature'.

In other words, gradual adherence to human rights regimes has implied a process of constitutionalization in the region, which is certainly not centered on the concept of national sovereignty -in its various meanings,[15] but more properly on the basic notion of constitutionalism as a political idea. Moreover, it functions as the guiding axis of the various forms of government; that is, the constitution as a guarantee of rights, reaching beyond the various forms and specificities that shape such historical documents.

Thus, in an attempt to describe and explain these diverse processes, doctrine has spoken of regional constitutionalism, inter-American constitutionalism, *acquis conventionnel* and *ius constitutionale commune*[16] to refer to a nucleus or core that can be considered constitutional, given its protective vocation derived from human rights. The inter-American *ius constitutionale* also bears the imprint of regional jurisdiction based on the Pact of San José, which offers another aspect for the composition of its object: dialogue among judges who have compiled the case law they have issued.[17]

From the point of view of Von Bogdandy,[18] the *ius constitutionale* constitutes a political, legal and cultural project that, due to its inquisitive and challenging nature, poses great challenges to the science of public law. In this context, Serna proposes a definition of the research agenda that legal science now faces: it is a cross-cutting agenda that uses different approaches, methods, and even branches of legal knowledge, and proposes questions to the general theory of law, the field of comparative law, constitutional theory and, particularly, the history of law.

While comparative law requires the contribution and definition of concepts related to the so-called coexistence clauses of various legal regimes, like those used in federal systems, the theory of law calls for concepts that do not correlate the different rules of a system hierarchically.

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[15] Bogdandy says this as follows: "...without a doubt, the principle of sovereignty continues to have great importance, both in the law of the State and in international law, as well as in the theory of legitimacy. However, following a series of contemporary changes, the structure of public power can no longer be based on this principle alone. Openness and globalization undermine the famous premise of the classical principle of sovereignty according to which states are independent communities. With an image, Eyal Benvenisti clearly describes this paradigm shift: the old sovereignty resembled property over an isolated village on a large piece of land, while the new sovereignty resembles property over an apartment in a building with two hundred units": "*Ius constitutionale commune latinoamericanum. Una aclaración conceptual*", *in* Ius Constitutionale Commune en América Latina. Rasgos, potencialidades y desafíos 6 (UNAM 2014).

[16] Mariela Morales Antoniazzi, *El nuevo paradigma de los órdenes constitucionales, in* Soberanía y Estado Abierto 269.

[17] *Id.* at 271.

[18] Diego Valadés & Luis Raúl González Pérez, *Ius constitutionale commune latinoamericanum. Una aclaración conceptual desde una perspectiva europea, in* El Constitucionalismo Contemporáneo. Homenaje a Jorge Carpizo 44 (UNAM 2013).

On this point, it should be recalled that, in perfect coherence with *Kantian* theses, it was Kelsen who mainly developed the most elaborate and complete concept of positive legal system. According to Kelsen's thesis, the law is an order that constitutes a system insofar as the validity of any norm can refer to a single source as its ultimate foundation.[19] This original source establishes harmony among the plurality of provisions. In other words, law is systematic, not by logical relationship between norms, but by the delegation of its validity. In this way, the relationship between norms are not external, but link their validity with each other since the foundation of a legal proposal is the norm or norms that regulate its or their creation.

In this sense, any rule can prove, or not, its validity to the extent that it was created in accordance with certain directives established by a first authority. Now, it is necessary to establish the hypothesis of a statement declaring that the normative creation of that first legislator is valid: the rule that formulates the hypothesis of validity of these first acts is the founding norm of any positive law.

Therefore, we can speak of 'authority' because the relation/ of the validity of the provisions is equivalent to the power granted to produce them, based on the legislative branch and its legislative faculties. In other words, if there is a hierarchical order between norms, it is because a social organization with an unequal distribution of power is assumed. Therefore, the relationship between norms is not purely logical but expresses a structural relationship between the bodies empowered to create them. In this way, the system can be traced back to its last source.

On the other hand, the validity of legislative acts rests on a foundational norm of a *gnoseological* nature. In fact, it is a theoretical supposition, an *a priori* determination of scientific knowledge, of a principle. Then, the hypothetical norm is not a true norm, but a criterion for delimiting a positive legal order. It is the basic thesis of attribution of validity to the acts of the first legislator. Thus, the hypothetical norm of a positive law is an assertion of the science of law; that is, a theoretical assumption of knowledge and is obviously not a historical norm.

In synthesis, according to the Kelsenian school of thought, a system constitutes an interdependence of elements, an ideal set of factors in which the value of each element is not understood alone, but in function of the counter-value of the others: Law as order - the legal order - is a system of legal norms. A plurality of norms constitutes a unit, a system, an order. Its validity can refer to a single norm as the foundation of this validity. This fundamental norm constitutes, as a last source, cohesion of the plurality of all the laws that constitute an order. And if a provision belongs to a certain order, it is because its validity can be found in its fundamental norm.[20]

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[19] Hans Kelsen, Teoría pura del derecho (Ed. Porrúa 1995).

[20] *La teoría pura del derecho. Método y conceptos fundamentales* 47 Revista de Derecho Privado (1933).

However, this concept is insufficient to explain the work of the contemporary legal operator, whose activity is no longer limited to a formal and axiomatic analysis of the rules, but, on the contrary, preponderantly covers all issues of content, semantics and meanings of the normative propositions to interpret them as best as possible; that is, according to the basic tenets of order. "Beyond logical discourse, whose meaning and scope may still, perhaps, remain in the field of natural and formal sciences, announces and shapes the broadest knowledge, that is understanding, the proper understanding of interpretation... Hence the new hermeneutics, as one of the most original and beneficial elements of contemporary German thought."[21]

Hence, this new vision of public law posits the use of categories of constitutional theory that harmonize the incorporation of international legal regimes. Finally, the history of law uses past experiences of the subsistence of various normative systems in the same geographical area.

On this last point, Serna[22] specifically mentions the case of the coexistence of the so-called *ius proprium* and the *ius commune* on the Europe of the Late Middle Ages, although he omits a fundamental difference in new international law, this is the volitional element, as well as forgetting to refer to the original scheme, taken from the Romanist tradition by the commentators:[23]

> *Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur. nam quod quisque populus ipse sibi ius constituit, id ipsius proprium civitatis est vocaturque ius civile, quasi ius proprium ipsius civitatis: quod vero naturalis ratio inter omnes homines constituit, id apud omnes peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur.*[24]

Having established the theoretical debate in which these lines are inscribed, it is necessary to elaborate on it with further methodological precision. The specific references made in Mexico's case are due to the country's distinctive characteristics. Mexico, unlike other States in the region, has not experienced any military dictatorship. Even within its authoritarianism, elections were held periodically through electoral institutions and political rights were malfunctioning, which was combined with a full reform on human rights issues

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[21] Felice Battaglia, *Introduzione*, *in* Filosofi Tedeschi D'oggi 9 (Il Mulino 1967).

[22] "El concepto de ius commune latinoamericano en derechos humanos: elementos para una agenda de investigación", in *Ius constitutionale*… 212 ss; ID, *Impacto e implicaciones*…, cit., 310 ss.

[23] D. 1.1.9 (Gai., 1 inst.).

[24] "The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. Those rules which a state enacts for its own members are peculiar to itself, and are called civil law: those rules prescribed by natural reason for all men are observed by all peoples alike, and are called the law of nations." *The Institutes of Justinian*, Title II, Paragraph 1.

somewhat late for the subcontinent, the view of what will be expressed in the following pages.[25]

In this context, the analysis will focus on the right to vote, both actively and passively, in regional —inter-American— and national orders. Thereafter, it will be discussed from a theoretical perspective and the conception and functions of political rights in general from a normative perspective —from the prism of positive Mexican law—, to subsequently discuss the right to vote.

## IV. Political Rights

### 1. *A Conceptual Change: Prerogatives and Rights*

According to that which was pointed out at the beginning of this note regarding the crisis of the liberal State, universal suffrage was the trigger for the consolidation of the model of the mass party in the second half of the 20th century. This in itself results in a socialization of politics. Therefore, several fundamental questions on political rights will be analyzed from a theoretical perspective and with a specific emphasis on Mexican normative framework as a system that has undergone the transition in the public law schemes.

First, it must be said that political rights are fundamental rights. This affirmation perhaps might not be necessary in a historical context other than the Mexican one. So, what do we mean by fundamental rights? Among the doctrinaires of *Legal Garantism*, Luigi Ferrajoli defines them as follows:

> All those subjective rights to which 'all' human beings are universally entitled by virtue of having the status of persons, or of citizens, or of persons capable of acting; understanding 'subjective right' as any positive expectation (of benefits) or negative expectation (not to suffer harm) ascribed to a subject by a legal rule; and 'status' as the condition of a subject for which provision is also made by a positive legal norm as a precondition of his suitability to hold entitlement to legal situations and/or be the author of the acts that are their exercise.[26]

Considering fundamental rights as a kind of subjective rights is generally accepted in theory, as in the case of Latin America, in which authors like Carlos Bernal Pulido add to what Ferrajoli calls positive and negative expectations, would be found in a legal situation of duties, attachments and non-competencies.[27] In this sense, it is possible to see how the legal relation-

[25] The constitutional reform that un-controversially integrated international human rights standards into the Mexican legal system took place in September 2011.

[26] Luigi Ferrajoli, Derechos y garantías 37 (5th ed. 2006).

[27] Carlos Bernal Pulido, Los derechos fundamentales en la Jurisprudencia del Tribunal Electoral del Poder Judicial de la Federación 20 (TEPJF 2009). It should be clari-

ship between the authority and the individual is explained in classical terms: through supra-subordination in which the holder of the fundamental subjective right is the governed, and the obligated subjects are the State organs.

According to Ferrajoli, there are four types of fundamental rights, depending on the subject that acts as their owner/holder, namely: human rights, public rights, civil rights and political rights. For him, political rights are: "...those reserved only for citizens with capacity to act, such as the right to vote, passive suffrage, the right to access public office, and, in general, all the optional rights in which political autonomy is manifested and those that are based on representation and political democracy".[28]

In other definitions of the Latin American context, Sonia Picado describes political rights as "entitlements that, taken together, result in the broad exercise of political participation."[29] The point to be highlighted is the terminology of 'political participation', which, although it covers electoral issues, it goes further by including other aspects, such as the creation of public policies.

From the point of view given in this note, political rights have a broader connotation than being merely restricted to the electoral world. Although political participation certainly implies the exercise of the rights to vote and to be voted for, it also includes the possibility of directly influencing the performance of the governing bodies, under the premise of meeting the conditions of both nationality and citizenship.

As noted above, in Mexican legal experience, political rights have not always been considered fundamental rights. This is supported by the ambiguous references that, in this respect, the Mexican Constitution has made to these rights when they were conceived indiscriminately as prerogatives, rights and even obligations.

The original text of Article 35 of the Mexican Constitution made mention of political voting rights, in its active and passive forms, as well as to political association, as 'prerogatives', a term that led to diverse interpretations by the Supreme Court. Based on the first title of the Constitution, which called fundamental rights 'individual guarantees', political rights were excluded from that category because these rights were granted exclusively to citizens and not to men. This was corroborated by classifying these rights as prerogatives, as opposed to guarantees.[30]

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fied that Bernal uses terms like rights, freedoms and competencies to refer to positive expectations, and immunities to refer to negative ones.

[28] Ferrajoli, *supra*, at 37.

[29] *Derechos políticos como derechos humanos*, in TRATADO DE DERECHO ELECTORAL COMPARADO DE AMÉRICA LATINA 48 ( 2nd ed. 2007).

[30] Consequently, political rights were not protected by the *amparo*, *see*: Séptima Época, Pleno, Semanario Judicial de la Federación 71, primera parte, p. 21, tesis aislada. DERECHOS POLITICOS, AMPARO IMPROCEDENTE POR VIOLACION A.

The Supreme Court of Justice of the Nation's argument even refused to consider political rights fundamental rights, based on an argument *sedes materiae,* on the constitutional text, since these rights were not included in the first twenty-nine articles. As to the dogmatic part, these rights were offered under the heading of 'individual guarantees', the nature of which should be considered different from fundamental rights.[31]

This notion of political rights in the interpretation of the Mexican constitutional court subsisted until the end of the 20th century, when in the so-called *'Amparo Camacho'* that distinction between political-electoral rights and the so-called individual guarantees was still upheld.[32]

At this point, the acceptance of international human rights manifested a potentially profound impact on the Mexican legal system as seen in *Amparo Trial* 743/2007. Although the complainant Jorge Castañeda did not obtain federal protection - due to an issue of origin of the *amparo trial* -, in its ruling the Mexican Court became a spokesperson for considering political rights fundamental rights.[33]

Castañeda's decision to continue with the case before the bodies established by the Pact of San José spurred the change of some institutions in Mexican electoral law, along with subsequent legal and constitutional reforms.[34]

Another way in which the Mexican Constitution alluded to political rights in its original wording was one of obligations, when considering that citizens have the duty of holding elected office, an issue that gave rise to the construction of 'mandatory voting' doctrine, especially about the implications of the very concept of fundamental rights, as well as the fact that the legitimacy of the political system must be sought by ways other than the obligatory nature of participation.

Meanwhile, the express acknowledgment of political rights as rights; that is, this term only begins to be used in 2011, in the article that provides for the suspension of rights before a state of emergency.

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[31] Amparo en revisión 5588/73. Derechos politicos, Amparo improcedente por violacion a.

[32] P. LXIII/99. Tesis Aislada. Reforma constitucional, Amparo contra su proceso de creación. Procede por violación a derechos políticos asociados con garantías individuales.

[33] *See*: Ferrer Mac Gregor, Eduardo y Silva García, Fernando, El caso Castañeda ante la Corte Interamericana de Derechos Humanos. La primera sentencia internacional condenatoria contra el Estado mexicano, México, Ed. Porrúa, 2009. For issues of thematic clarity, it is specified that in this case Mexico was found responsible for violating Jorge Castañeda's judicial guarantees, enshrined in Articles 8 and 25 of the American Convention on Human Rights (Pact of San José), and not his rights politicians (article 23 of the same international instrument).

[34] Markedly, the possibility that the Electoral Court of the Federal Judicial Branch could carry out a widespread control of laws in the case submitted to its examination.

2. *A Specific Reference to the Right to Vote*

Latin American doctrine has defended two conceptual positions regarding the right to vote, calling it, on the one hand, a "right of *suffrage*", a term that emphasizes a purely political connotation,[35] and rejecting a distinction between the right to *suffrage* and the right to vote on the other hand.[36]

The position that rejects the distinction between the right to vote and the right to *suffrage* finds justification in the fact that it places the right to vote as a source of *suffrage* because if one speaks of the right to vote as a political right, the reference to said right is clear, one of active *suffrage*.

In this sense, Fix Fierro defines the right to vote as "...the power that the citizen has to express his will in favor of the candidates to hold positions of popular election of all kinds; that is, it allows him to act as a member of the body in charge of the designation."[37] The concept is fitting in terms of restricting the right to vote to the electoral procedures that emanate from the holders of popularly elected offices, which is highlighted on the fact that other definitions, such as Aragon's,[38] the right to active suffrage includes any public consultation, which is confused, for example, with the figure of the referendum.

3. *A Specific Reference to the Right to Hold Public Office*

Mention should now be made to two issues that underlie the right to vote in its passive aspect that arise from Inter-American Court case law: the monopoly of candidacies by political parties and equal access to candidacies in the case of indigenous peoples.

Regarding political parties' monopoly of candidate registration, it was not until 2012 that Mexico presented this issue before the Inter-American Court of Human Rights, which, by applying *the principle of proportionality*, ruled that the exclusivity of candidate registration by political parties was valid when rendered as a suitable way to prop up the course and consolidation of a democracy as the primary objective of electoral reforms.[39] The words of the Court are very eloquent to this regard:

> Regarding whether the measure was adapted to achieving the legitimate objective sought, based on the above the Court finds that, in the instant case, the

[35] Mario Fernández & José Thompson, El voto obligatorio, in NOHLEN 256.

[36] Manuel Aragón, Derecho de sufragio: principio y función, in NOHLEN 162. The position of Aragon is based on premises of privacy: shareholders have the right to vote in the assemblies, which is why it is better to call it 'suffrage', as a way to specify the right to vote in political matters.

[37] Héctor Fix Fierro, Los derechos políticos de los mexicanos 45 (UNAM 2006).

[38] *Ibid*. at 45.

[39] Castañeda Gutman v. Mexico, paragraph 199.

> exclusivity of nomination by political parties to elected office at the federal level is an appropriate measure to produce the legitimate result sought of organizing the electoral processes efficiently in order to hold genuine periodic elections, by universal and equal suffrage and by secret vote that guarantee the free expression of the will of the voters, as established by the American Convention.[40]

With this ruling, the regional body of jurisdiction in the field of human rights gave a vote of confidence to the representative democracy system, whose fundamental component is political parties, which *obiter dictum*, also constitute an expression of political rights, and specifically the right to association.

On the other hand, an additional issue that has captured the attention of the Inter-American Court is the egalitarian character of passive suffrage. In the case of *Yatama v. Nicaragua*, the Court determined that by banning participation in the *Yapti Tasba Masraka Nunh Asla Takanka* (Yatama) regional indigenous political party in municipal elections the Nicaraguan State acted in a discriminatory manner since the burden of participating had been imposed on various indigenous communities through forms of political organization that were not their own. It was pointed out that, although there is freedom of composition in the design of democratic institutions, what is compatible with the international framework on human rights is to open spaces for all persons, including those belonging to indigenous communities. The Inter-American Court put it this way:

> 207. States may establish minimum standards to regulate political participation, provided they are reasonable and in keeping with the principles of representative democracy. These standards should guarantee, among other matters, the holding of periodic free and fair elections based on universal, equal and secret suffrage, as an expression of the will of the voters, reflecting the sovereignty of the people, and bearing in mind, as established in Article 6 of the Inter-American Democratic Charter, that "[p]romoting and fostering diverse forms of participation strengthens democracy"; to this end, States may design norms to facilitate the participation of specific sectors of society, such as members of indigenous and ethnic communities.

## V. A Tentative Conclusion: Belonging to Multiple Normative Spaces and the Person's Centrality

What has been said up to this point raises an interesting panorama. In the *ius constitutionale commune* space, the existence of different normative orders within national States makes their relationship with regional human rights law more complex, but the essence of the purpose remains intact: the protection of the individual.

In its first and ninth articles, the Inter-American Democratic Charter prescribes that the 'peoples' of America have a duty to promote democracy,

[40] *Ibid*. at paragraph 203.

while respecting cultural plurality at all times. This shows that the dominant concept in the application of the *ius constitutionale commune* is that of the maximum protection of the person.

Thus, in the inter-American human rights system, dignity mainly plays the role of limiting any interference, effect, restriction or damage to personal integrity, privacy and freedom. Therefore, there is a set of prohibitions - in matters of slavery or servitude; torture; cruel, inhuman and degrading treatment; as well as arbitrary or abusive interference with private life, family, home or correspondence - which the system expressly protects.[41]

The founding documents of the *ius commune constitutionale* inter-American states that: "All men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another. [...] Inasmuch as spiritual development is the supreme end of human existence and the highest expression thereof, it is the duty of man to serve that end with all his strength and resources."[42]

The legal expression of these ideas in the application of normative materials is found in the interpretative clauses, such as the *pro persona* principle, according to which the protection of inter-American human rights norms is not restricted to this express focus on human dignity. The *pro persona* clause in the inter-American system is expressed in the form of prohibitions, which can be classified into two groups.

First, an interpretation cannot limit or suppress any right contained in the convention itself or in State legal systems that is not valid.

Second, it is not possible to interpret a limitation or exclusion in the rights that: a) are inherent to a human being; b) derive from a democratic and representative form of government; c) come from "other international acts", or d) correspond to the effects of the American Declaration of the Rights and Duties of Man.

To preserve dignity, it is necessary to make an extensive interpretation of the applicable *corpus*, as well as the norms themselves, whether rules or principles, to be applied and incorporated into all the liberties embodied in the human rights system. Because of this, it is necessary to indicate how the *pro persona* clause in the American Convention is comprised.

Regarding the first point, in Advisory Opinion 1/82, the Peruvian State asked the Inter-American Court about the scope of the phrase "or of other treaties concerning the protection of human rights in the American states," contained in Article 64 of the Pact of San Jose. The Court considered that the phrase composed of the expression "other treaties" referred to any treaty in which one of the signatories was also a party to the American Convention.[43] In this way, the *corpus* applicable to a person is extended in that, in the

[41] American Convention on Human Rights art. 5, 6, 11, Nov. 22, 1969.

[42] Preamble to the American Declaration of the Rights and Duties of Man, approved at the Ninth International Conference of American States, Bogota, Colombia, 1948.

[43] Of course, the effects would be produced only in the States that were part of the inter-

case of human rights norms, such treaties are a source of rights protected by the Inter-American Court.

With regard to the second point, perhaps the most relevant criterion is found in Advisory Opinion 5/85, since it broadens the meaning of the provisions of article 29 of the Pact of San Jose, since, as has been pointed out, it conceives the *pro persona* principle as a rule that comprises a series of prohibitions on any interpretation that leads to the limitation or restriction of rights. However, in this case, the Court overruled the text of the rule, extending its meaning and establishing that the *pro persona* interpretation implies that:

> [...] if in the same situation both the American Convention and another international treaty are applicable, the rule most favorable to the individual must prevail. Considering that the Convention itself establishes that its provisions should not have a restrictive effect on the enjoyment of rights guaranteed in other international instruments, it makes even less sense to invoke restrictions contained in those other international instruments, but which are not found in the Convention, to limit the exercise of the rights and freedoms that the latter recognizes.[44]

In this way, yet another aspect of the interpretation clause in question becomes valid: that of selecting the most favorable provision and not simply that regarding the prohibition of restrictive interpretations.

In view of the above, *ius commune* can also be understood as a political and legal project that is legitimized through the concept of inclusion, which conveys another echo of Roman thought and culture, bearing in mind the legal sources in which Rome is referred to as the common homeland.[45]

If one of the above-mentioned implications is the achievement of equitable national societies, the *ius commune* is presented as the ideal instrument to accomplish this project, setting aside the formal consideration that corresponds to the preservation of the hierarchy of a normative system, according to the terms of Kelsenian thought as explained above, or of Weber's theses in which objective rationality and the modern State are compatible, and in whose context "[j]uridical formalism enables the legal system to operate like a technically rational machine. Thus it guarantees to individuals and groups within the system a relative maximum of freedom, and greatly increases for them the possibility of predicting the legal consequences of their actions."[46]

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American system: the dimension is important, by virtue of the multilateral treaties in which countries not belonging to the region can participate.

[44] Advisory opinion 5/85.

[45] Emblematic: D. 50.1.33 (Mod., l. sing. de manum.): Roma communis nostra patria est [Rome is our common native country.]; and *see*: D. 27.1.6.11 (Mod., 2 excus., in Greek); D. 48.22.18.pr.

[46] Max Weber, Economía y sociedad 146 (Fondo de Cultura Económica 1944).

A 'technically rational machine' with ample space for 'predicting the legal consequences'; that is, the relinquishment of casuistic, episodic, arbitrary systems through the institutionalization of legal-rational procedures. In fact, for Weber and those who follow his doctrine, the historical process of modernization is equivalent to the rationalization and institutionalization of power, which happens when power systems/structures that are unable to act in a continuous, regulated and objective manner are overcome/ended. In modernity, we can affirm the existence of a public subject, the State, which has seized all the material means suitable for achieving its ends. This reflects the real transformation that has taken place on a historical level because it is not mainly due to the replacement of various political subjects for the reality, but more so due to the advent of an especially qualified subject; that is, through an institutionalized act.

In Grossi's words, "the State is a notion that possesses a specific historical niche [...] the time territory that corresponds to this subject is undoubtedly the modern one, which represents perhaps the most striking and undoubtedly also the most expressive outcome."[47] Naturally, the incorporation of the material into its sphere of power is the result and a factor of the appropriation of the administrative activity of individual behaviors and economic goods, canceling out the previous associative-subjective context, and placing the institutional dimension and bypassing the centrality of the person as its central axis.

By taking a certain distance from the enshrined explanations of the doctrine on the modern State, inter-American law draws on concepts that justify the adherence to regional human rights regimes, namely supra-Statehood, multilateralism, voluntariness, collective hegemony, not only in terms of legitimacy, but also of practical convenience.[48]

In other words, in this new model, many of the concepts of modernity regarding State monopoly of the public power are overcome, and instead turns to a longstanding tradition of the Roman matrix system by reshaping the need for multilevel cooperation within the context of the centrality of the human person as its cardinal element and center of its entire classical legal thought.[49]

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[47] Paolo Grossi, *Un derecho sin Estado. La noción de autonomía como fundamento de la constitución jurídica medieval*, in Anuario mexicano de historia del derecho 167-178 (1997), now in Derecho, sociedad, Estado, Mexico, El Colegio de Michoacán – Escuela Libre de Derecho – Universidad Michoacana de San Nicolás de Hidalgo 19 (2004).

[48] Armin Von Bogdandy, *La protección de los vulnerables: un ejemplo de gobernanza posnacional*, *in* Hacia un nuevo derecho público. Estudios de derecho público comparado, supranacional e internacional 341 (UNAM 2012)

[49] D. 1.5.2 (Hermog., 1 iuris epit.): … Hominum causa omne ius constitutum est. [Every law has been created for the sake of men.]

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