

Constitutionalized Human Rights Law in Mexico: Hope for Central American Refugees?

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ABSTRACT

The number of individuals fleeing drug and gang-related violence in Central America's Northern Triangle (El Salvador, Guatemala, and Honduras) has increased exponentially in recent years. Mexico (with financial assistance from the United States) has apprehended and detained many of these refugees on their way to the United States. As a result, the number of asylum applications filed by Central Americans in Mexico increased by a factor of ten between 2014 and 2017. At the same time as these events have been unfolding, Mexico has been adding numerous human rights provisions to its national Constitution, including the right to asylum. Its Constitution has also broadened the scope of refugee protection to include not only the five grounds permitted under the 1951 Refugee Convention (persecution based on race, religion, nationality, political opinion, and membership in a particular social group) but also flight from armed conflict, massive violations of human rights, and "other circumstances which have severely disturbed the public order." On paper, at least, Mexico is in the vanguard of the ever-expanding number of countries which have recently constitutionalized the right to asylum.

This Article analyzes whether Mexico's recent constitutional amendments are mere words on parchment or the means for greater protection for refugees from Central America and elsewhere. It is the first empirical study of lawyers' efforts to use constitutionalized human rights law on behalf of refugees in Mexico and how those efforts have been received by Mexican courts. Based on judicial decisions and interviews with lawyers involved in recent strategic litigation challenging the Mexican government's policies and practices toward refugees, it identifies those circumstances under which constitutionalized human rights law is more likely to result in positive outcomes for non-citizens seeking relief from persecution.

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INTRODUCTION

The number of individuals fleeing Central America's so-called Northern Triangle (El Salvador, Guatemala, and Honduras, hereinafter "Northern Triangle") has increased exponentially in recent years.¹ This exodus has been fomented by a marked rise in gang and drug-related violence in the region that has caused tens of thousands of people, including children, to leave their homes.² According to United States Citizenship and Immigration Services, more refugees from the Northern Triangle sought asylum in the United States ("U.S.") between 2013 and 2015 than in the previous fifteen years combined.³ While their ultimate destination is frequently the U.S., with increasing frequency Central Americans are being apprehended by Mexican law enforcement (which has received funding from the U.S. for this purpose) and sent back home.⁴ Indeed, between 2014 and 2017, Mexico deported 176,000 more Northern Triangle citizens than the U.S. did.⁵

1. According to the United Nations High Commissioner for Refugees ("UNHCR"), as of February 2017, more than 500,000 people cross the border from Central America into Mexico each year. See *Mexico Fact Sheet*, UNHCR (Feb. 2017), <http://reporting.unhcr.org/sites/default/files/Mexico%20Fact%20Sheet%20-%20Februrary%202017.pdf> [https://perma.cc/X33U-C949]. Since the early 2000s, citizens from the Northern Triangle have constituted over 85 percent of all undocumented persons traveling through Mexico. See LUIS ALFREDO ARRIOLA VEGA, POLICY ADRIFT: MEXICO'S SOUTHERN BORDER PROGRAM 2 n.1 (2017), <https://www.bakerinstitute.org/media/files/files/fa7ac127/MEX-pub-Fronter-aSur-062317.pdf> [https://perma.cc/2QY3-GH2F].

2. In El Salvador alone between 2006 and 2016, an estimated 150,000 persons were killed. This is an average of 50 homicides per 100,000 people, which is three times higher than the rate in Mexico and ten times the U.S. rate. Andrea Villasenor & Elba Coria, *Protection Gaps in Mexico*, 56 FORCED MIGRATION REV. 6, 6–8 (2017). The number of children under the age of 20 who are murdered in El Salvador and Guatemala is higher than in any other country in the world. *Id.*

3. See Maureen Meyer & Elyssa Pachico, *Fact Sheet: U.S. Immigration and Central American Asylum-Seekers*, WOLA (Feb. 2018), <https://www.wola.org/analysis/fact-sheet-united-states-immigration-central-american-asylum-seekers/> [https://perma.cc/DH5Q-PZ3U].

4. For many years, the U.S. has exerted pressure on Mexico to prevent access to the U.S. border for those fleeing violence in Central America. See AMNESTY INT'L, FACING WALLS: USA AND MEXICO'S VIOLATIONS OF THE RIGHTS OF ASYLUM-SEEKERS (2017), <https://www.amnestyusa.org/reports/facing-walls-usa-mexicos-violation-rights-asylum-seekers/> [https://perma.cc/DP8E-SN5N]. See also Sonja Wolf, *Migration Detention in Mexico*, in DETAINING THE IMMIGRANT OTHER 67, 67–78 (Rich Furman et al. eds., 2016). By 2008, Mexican and U.S. leaders formalized their joint efforts in the Plan Mérida, which gave Mexico access to increased resources and training. See SIN FRONTERAS, DETENCIÓN SIN EXCEPCIÓN 70 (2016), <https://sinfronteras.org.mx/docs/inf/inf-detencion-sin-excepcion.pdf> [https://perma.cc/NP23-BCCN]. See also U.S. DEP'T OF STATE, MÉRIDA INITIATIVE (2017), <https://2009-2017.state.gov/j/inl/merida/index.htm> [https://perma.cc/8YQ8-KEV2]. From 2008 through March 2017, the U.S. contributed \$1.6 billion to Plan Mérida, whose objectives include fortifying Mexico's southern border with Guatemala. See CLARE RIBANDO SEELKE & KRISTIN FINKLEA, U.S.-MEXICAN SECURITY COOPERATION: THE MÉRIDA INITIATIVE AND BEYOND, CONGRESSIONAL RESEARCH SERVICE R41349, 1 (June 29, 2017), <https://fas.org/sgp/crs/row/R41349.pdf> [https://perma.cc/F2UV-YA8E]. One of the most significant aspects of Mexico's policy is the Integrated Southern Border Program, which increased the number of immigration officials at the Guatemala-Mexico border, contributing to a marked increase in the number of migrant apprehensions. See Esmeralda Lopez & Melissa Hastings, *Overlooked And Unprotected: Central American Indigenous Migrant Women In Mexico*, 48 N.Y.U. J. INT'L L. & POL. 1105, 1118 (2016).

5. From 2014 to 2017, Mexico deported 506,484 Central American citizens while the U.S. deported 330,767. See *Bdcm Estadístico 2017*, SECRETERÍA DE GOBERNACIÓN, (2014–2017) <http://www>

As a result of Mexico's increased apprehension of Central Americans, refugees from that region are now applying for asylum in Mexico in record numbers. The number of such applications increased from 1,296 in 2013 to 14,596 in 2017, a more than tenfold upswing.⁶ This trend is likely to continue to increase for the foreseeable future, given the Trump Administration's recently enacted or proposed policies of (1) bringing criminal charges against those who cross the U.S.–Mexico border without documentation; (2) separating parents and children in the process; (3) making it virtually impossible for asylum-seekers to prevail on claims based on domestic violence or gang violence; (4) preventing would-be asylum-seekers from even entering the U.S.; and (5) making it more difficult and expensive for asylum-seekers to apply for asylum in the U.S.⁷ These policies, long favored by many in the Trump Administration, were likely accelerated into implemen-

.politicamigratoria.gob.mx/es_mx/SEGOB/Boletín_Estadístico_2017 [https://perma.cc/C54D-4LKW]; *ICE Enforcement and Removal Operations Reports, Fiscal Years 2014–2017* (2014–2017), U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT De. 13, 2017, https://www.ice.gov/removal-statistics/2017 [https://perma.cc/MME3-2L35].

6. José Olivares, *Trump's Attacks on Migrant Caravan Underscore How the U.S. Outsources Immigration Enforcement to Mexico*, THE INTERCEPT (Apr. 5, 2018), https://theintercept.com/2018/04/05/migrant-caravan-mexico-border-immigration/ [https://perma.cc/WYN4-7F4W]; see also Francesca Fontanini, *Greater Cooperation Needed to Protect Refugees in Central America*, UNHCR SAYS, UNHCR (Mar. 10, 2017), http://www.unhcr.org/en-us/news/latest/2017/3/58c2636f4/greater-cooperation-needed-protect-refugees-central-america-unhcr-says.html. [https://perma.cc/HJH8-3NCF]; Villaseñor & Coria, *supra* note 2, at 7. The asylum grant rate during between 2013 and 2016 for Northern Triangle citizens in Mexico was 31.2 percent; in the U.S. during the same period it was 4.1 percent (the grant rate for all asylum applications in the U.S. during this period was 14.8 percent). See *Estadísticas 2013–2017*, COMAR (2017), https://www.gob.mx/comar/articulos/estadisticas-2013–2017 [https://perma.cc/P3PB-ANKQ]; *Asylum Statistics FY 2012–2016*, U.S. DEP'T OF JUSTICE (2017), https://www.justice.gov/eoir/file/asylum-statistics/download [https://perma.cc/RQ5K-8925]. However, the asylum grant rate in Mexico declined from 35 percent in 2016 to 12 percent in 2017. See AMNESTY INT'L (Feb. 22, 2018), http://www.refworld.org/docid/5a9938b3a.html [https://perma.cc/4B6V-4CC7].

7. See Miriam Jordan & Ron Nixon *Trump Administration Threatens Jail and Separating Children From Parents for Those Who Illegally Cross Southwest Border*, N.Y. TIMES (May 8, 2018), https://www.nytimes.com/2018/05/07/us/politics/homeland-security-prosecute-undocumented-immigrants.html [https://perma.cc/H8B8-H9CM]; Dara Lind, *Trump wants to make asylum seekers' stay in the U.S. harder—and shorter*, VOX, Apr. 30, 2019, http://www.vox.com/2019/4/30/18523990/trump-asylum-border-new. Under previous U.S. policy and practice, those crossing the border without documentation are placed in civil deportation proceedings rather than criminally prosecuted. *Id.* Although President Trump signed an Executive Order on June 20, 2018 to end the policy of separating children from their parents at the border, it remains unclear how the Administration will reunite those family members already separated. And in any event, the Administration plans to continue detaining asylum-seekers, regardless of their age, perhaps indefinitely. See Julia Ainsley et al., *Trump's Order Could Mean Families Will be Together in Detention Purgatory Indefinitely. But Where Will They Stay?*, NBC NEWS (June 20, 2018), https://www.nbcnews.com/storyline/immigration-border-crisis/trump-s-order-could-detain-families-together-indefinitely-where-will-n885151 [https://perma.cc/ZW8J-JBS3].

See also Matter of A-B, 27 I&N Dec. 316, 320 (A.G. 2018) (“Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”) See also Katie Rogers & Sheryl Stolberg, *Trump Calls for Depriving Immigrants Who Illegally Cross Border of Due Process Rights*, N.Y. TIMES (June 25, 2018), https://www.nytimes.com/2018/06/24/us/politics/trump-immigration-judges-due-process.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region®ion=top-news&WT.nav=top-news [https://perma.cc/GH4A-AM4J] (“When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came.”).

tation by the first of the so-called “caravans” of asylum-seekers from Central America who traveled across Mexico and reached the U.S. border in April 2018.⁸ The explicit purpose of these policies is to deter further Central American migration to the U.S.⁹

These changes in migration patterns and governmental policies to combat them make recent amendments to Mexico’s Constitution purporting to protect the rights of refugees and other non-citizens all the more important. These amendments broaden the scope of protection provided by the 1951 Convention relating to the Status of Refugees to include flight from armed conflict, “massive violation of human rights,” and “other circumstances which have severely disturbed the public order” as a basis for receiving asylum.¹⁰ The question, of course, is whether these new constitutional provisions will have any impact or if they are mere words on parchment.

Cause lawyers in Mexico representing Central American refugees are attempting to make that parchment meaningful.¹¹ They are pursuing strate-

8. See Elliot Spagat, *Central American Asylum Seeking Caravan Reaches US Border*, AP NEWS (Apr. 26, 2018), <https://apnews.com/35f8d54da8e1462096a73eac4b0f7557> [https://perma.cc/GCS7-XE4M]. In response to the caravan, President Trump tweeted that he had issued orders “not to let these large Caravans of people into our Country. It is a disgrace.” *Id.*

9. In announcing the “zero tolerance” policy which resulted in the separation of non-citizen children from their parents, former Attorney General Jeff Sessions stated: “If you are smuggling a child then we will prosecute you, and that child will be separated from you as required by law . . . If you don’t like that, then don’t smuggle children over our border.” *Id.* Previously, in remarks to Immigration Judges in October 2017, Sessions stated that, “We . . . have dirty immigration lawyers who are encouraging their otherwise unlawfully present clients to make false claims of asylum providing them with the magic words needed to trigger the credible fear process.” *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, U.S. DEP’T OF JUSTICE (Oct. 12, 2017), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-executive-office-immigration-review-legal> [https://perma.cc/93BC-DN9F]. Basing immigration policy on deterrence has been struck down by U.S. courts in the past. Most recently, the U.S. District Court for the District of Columbia held that the Obama Administration’s policy of summarily detaining asylum-seekers in order to deter others from crossing the border violated the Due Process Clause of the U.S. Constitution. See *R.I.L.-R et. al. v. Johnson*, 80 F. Supp. 3d 164 (D.D.C. 2015). In announcing this “No Release” policy, the U.S. Government had declared, “If you come, it is likely you will be detained and sent back.” See Julia Preston, *Judge Orders Stop to Detention of Families at Borders*, N.Y. TIMES (Feb. 20, 2015), <https://www.nytimes.com/2015/02/21/us/judge-orders-stop-to-detention-of-families-at-borders.html> [https://perma.cc/WF25-PP4W] (quoting former U.S. Secretary of Homeland Security Jeh Johnson). Despite such jurisprudence prohibiting deterrence as a matter of immigration policy, Attorney General Sessions’ decision in *A-B* will likely convince many victims of domestic violence and gang violence to refrain from seeking asylum in the U.S., knowing that there is virtually no chance for them to succeed on their claim.

10. Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter “Refugee Convention”]. The Refugee Convention defines a refugee, in part, as one who has a well-founded fear of persecution based on “race, religion, nationality, membership of a particular social group or political opinion.” *Id.* art. 1(A)(2). The expanded grounds for refugee protection in Mexico are the result of 2016 amendments to the Mexican Constitution, which require that the right to asylum be interpreted according to Mexico’s obligations under international law.

11. “Cause lawyers” are lawyers who advocate on behalf of individual clients as well as larger causes. See STUART SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM AND CAUSE LAWYERING 1–3 (2004) [hereinafter “SCHEINGOLD & SARAT 2004”]. Scheingold and Sarat conclude that “at its core, cause lawyering is about using legal skills to pursue ends and ideals that transcend client service—be those ideals social, cultural, political, economic, or, indeed, legal.” *Id.* at 3. Those causes can be on either the left or the right of the political spectrum, though most scholarship on the subject focuses on cause lawyers on the left. See, e.g., CAUSE LAWYERING: POLITICAL COMMITMENTS

gic litigation that invokes the newly minted constitutional right to asylum and other human rights protections. The results in those cases will help to determine (1) the usefulness of constitutionalized asylum law in Mexico, and (2) illustrate the conditions under which it improves human rights outcomes for non-citizens.¹²

In order to investigate these questions empirically, this Article analyzes three examples of such strategic litigation currently pending in Mexican courts. It is divided into six parts. Part I sets out a theoretical framework and explains how the research on which it is based will contribute to scholarship on human rights treaty effectiveness. Part II describes the methodological approach of this article. Part III provides background information on the current refugee situation in Mexico as well as the Mexican constitutional and statutory reforms purporting to protect such refugees. Part IV analyzes three examples of recent strategic litigation in Mexico that invoke those reforms in an attempt to improve human rights outcomes for Central American refugees. Part V puts the Mexican case in comparative context, analyzing whether the circumstances under which constitutionalized human rights law has improved human rights outcomes in other national contexts are present in Mexico. This article ends with a series of conclusions.

I. THEORETICAL FRAMEWORK: CONSTITUTIONALIZED INTERNATIONAL HUMAN RIGHTS LAW

Scholars have analyzed the effectiveness of constitutionalized human rights law for the past half-century.¹³ Such studies have proliferated in con-

AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998); CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., 2001). For a more detailed account of scholarship on cause lawyering, see Stephen Meili, *The Human Rights of Non-Citizens: Constitutionalized Treaty Law in Ecuador*, 31 GEO. IMMIGR. L. J. 347, 355–56 (2017).

12. “Constitutionalization” of human rights generally refers to one of several processes through which national governments incorporate into their constitutions human rights provisions contained in international human rights treaties or other instruments. See Manuel Góngora-Mera, *The Block of Constitutionality as the Doctrinal Pivot of a Ius Commune*, in TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA 235, 237 (Armin Von Bogandy et al. eds., 2017). In some cases, this involves explicit reference to particular treaties within the national constitution. In other cases, it involves a more general reference to all of the international human rights instruments which the country has ratified or otherwise acceded to. And in still other cases it involves adopting certain provisions from particular human rights treaties rather than the entire treaty. *Id.* at 237–38.

13. See Zachary Elkins, Thomas Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT’L L.J. 61 (2013); Linda Camp Keith, *Constitutional Provisions for Individual Human Rights (1977–1997): Are they More than Mere Window-Dressing?*, 55 POL. RESEARCH Q. 111 (2002); John Boli-Bennett, *The Expansion of National States, 1870–1970* (1976) (Ph.D. dissertation, Stanford University); Kathleen Pritchard, *Comparative Human Rights: An Integrative Explanation*, 15 POL’Y. STUD. J. 110, 110–28 (1986); Gerard Blasi & David Cingranelli, *Do Constitutions and Institutions Help Protect Human Rights?*, in HUMAN RIGHTS AND DEVELOPING COUNTRIES 223–37 (David Cingranelli, ed., 1996); Christian Davenport, *Constitutional Promises and Repressive Reality: A Cross National Time Series Investigation of Why Political and Civil Liberties are Suppressed*, 58 J. POL. 627 (1996); Frank Cross, *The Relevance of Law in Human Rights Protection*, 19 INT’L

cert with the exponential increase in human rights provisions in national constitutions over that same period.¹⁴ Most of this literature consists of large-n studies analyzing statistically significant associations (or the lack thereof) between constitutionalized human rights law (typically either civil and political rights or social and economic rights) and improved human rights performance by states. For example, Zachary Elkins, et al. and Wayne Sandholtz have found a strong statistical association between the constitutional status of the International Convention on Civil and Political Rights and improved state human rights behavior.¹⁵ James Melton found that the civil and political rights most affected as a result of constitutionalization are those related to expression, association, religion and movement.¹⁶ Elizabeth Kaletski, et al. found a positive correlation between enforceable law and a country's fulfillment of constitutional rights to education, health, and food.¹⁷ Many studies have also found that constitutionalized human rights provisions are more likely to be effective in states with independent judiciaries and strong civil societies.¹⁸

On the other hand, several quantitative studies take a dimmer view of the effectiveness of constitutionalized human rights provisions. For example, Adam Chilton and Mila Versteeg conclude that the constitutionalization of individual rights (such as the rights to freedom of expression, association, religion, and movement) is not associated statistically with improved human rights behavior by states.¹⁹ They did, however, find that the constitutionalization of organizational rights (such as the right to form political parties and unions) is associated with improved state behavior.²⁰ In a subsequent study, the same authors conclude that there is no evidence that constitutional prohibitions outlawing torture have reduced that practice in a statistically significant or substantively meaningful way.²¹

The constitutionalization of human rights law, as well as the scholarship analyzing it, has been particularly prominent in Latin America over the past

REV. L. & ECON., 87 (1999). The literature on the effectiveness of constitutionalized human rights law is a subset of the much larger literature on human rights treaties more generally. For a recent summary of that literature, see Meili, *supra* note 11, at 351 n.17.

14. See *Constitution Ranicings*, COMPARATIVE CONSTITUTIONS PROJECT, <http://comparativeconstitutionsproject.org/> [https://perma.cc/Z5JY-PLR8].

15. See Elkins, et al., *supra* note 13; Wayne Sandholtz, *Treaties, Constitutions and Courts: The Critical Combination*, in *THE POLITICS OF THE GLOBALIZATION OF LAW* 29–46 (Alison Brysk, ed., 2013).

16. James Melton, *Do Constitutional Rights Matter? The Relationship between De Jure and De Facto Human Rights Protection* (2014) (unpublished working paper) (on file with author).

17. See Elizabeth Kaletski et al., *Does Constitutionalizing Economic and Social Rights Promote their Fulfillment?*, 15 J. HUM. RTS. 433 (2016). On the other hand, these authors found no positive correlation between constitutional provisions on social and economic rights as mere directive principles (as opposed to enforceable law) and a country's fulfillment of such rights. *Id.*

18. Sandholtz, *supra* note 15, at 37; Melton, *supra* note 16.

19. Adam Chilton & Mila Versteeg, *Do Constitutional Rights Make A Difference?*, 60 AM. J. POL. SCI. 575, 586 (2014).

20. *Id.*

21. Adam Chilton & Mila Versteeg, *The Failure of Constitutional Torture Prohibitions*, 44 J. L. STUD. 417 (2015).

two decades.²² Democratic regimes in the region seeking to distance themselves from their authoritarian past and hold state actors accountable have incorporated entire human rights treaties, as well as specific human rights protections, into their constitutions.²³ This process of constitutionalizing human rights law is a subpart of a larger trend known as Transformational Constitutionalism (*Ius Constitutionale Commune*) whose purposes include the diffusion of human rights standards in post-authoritarian Latin America.²⁴ Another factor likely underlying the constitutionalization of human rights law in Latin America is the realization that domestic court judges in the region more frequently rely on international human rights law when it is incorporated into domestic law and particularly when it is incorporated into a nation's constitution.²⁵

Most of the scholarship on the constitutionalization of human rights law in Latin America is a critique of the constitutionalization of rights more generally, rather than the kind of quantitative studies that characterize the literature on constitutionalized human rights law outside the region. Thus, for example, G. Leite Conçalvez and Sérgio Costa assert that despite its good intentions and cognizable political benefits, global constitutionalization suffers from severe theoretical and practical deficits as an export of the U.S. and Western Europe.²⁶ In their view, because globalized human rights law fails to take into account the regional imbalance in the creation of human rights law, it risks reinforcing inequalities between regions of the world.²⁷ The authors also criticize the globalization of human rights law for focusing on disputes between individuals and states for violations of particular rights, rather than on historic struggles against colonialism.²⁸

However, Conçalvez and Costa also acknowledge that constitutionalized human rights law has the potential to hold state actors accountable for violations, depending on favorable conditions within the three branches of government, as well as the presence of social actors willing and able to press

22. The Comparative Constitutions Project ranks the world's constitutions by a number of factors, including the number of human rights provisions they contain. Five of the ten nations with the highest number of human rights provisions in their constitutions are in Latin America (Ecuador (99), Bolivia (88), Venezuela (82), Mexico (81), and Brazil (79)). See Comparative Constitutions Project, *supra* note 14. For comparative purposes, the U.S. Constitution contains 35 human rights provisions. *Id.*

23. Daniel M. Brinks & Abby Blass, THE DNA OF CONSTITUTIONAL JUSTICE IN LATIN AMERICA 1–8 (2018) ("Latin America is one of the areas with the most active constitutional experimentation in the world." *Id.* at 12).

24. Góngora-Mera, *supra* note 12, at 236.

25. See Niels Goet & Ezequiel Gonzalez-Ocanto, International Law and Domestic Judicial Power: Strategic Citation in the Jurisprudence of Colombia's Constitutional Court, 35–36 (2018) (paper presented at the annual meeting of the Latin American Studies Association, Barcelona May 2018). This preference for domesticized human rights law is not limited to Latin America. See, e.g., Stephen Meili, *Do Human Rights Treaties Help Asylum-Seekers?: Lessons from the United Kingdom*, 48 VAND. J. TRANSNAT'L L. 123 (2015).

26. G. Leite Gonçalves & Sérgio Costa, *The Global Constitutionalization of Human Rights: Overcoming Contemporary Injustices or Juridifying Old Asymmetries?*, 64 CURRENT SOC. MONOGRAPH 311 (2015).

27. *Id.* at 312.

28. *Id.* at 316.

for compliance.²⁹ In order for that potential to be fulfilled, they believe that advocates of global constitutionalism should focus on a more systemic approach to power imbalances between different groups within society, such as indigenous communities, sexual minorities, and other marginalized populations.³⁰ In this way they view constitutionalized human rights law as one of several means to an end rather than an end in itself.³¹

Octavio Ferraz argues that the litigation which often follows the constitutionalization of social and economic rights is sometimes detrimental to the very rights such constitutionalization was designed to protect.³² Focusing on litigation to enforce the constitutional right to health care in Brazil (which, he finds, only benefits those individuals able to access lawyers and courts, rather than the poor), Ferraz concludes that social rights would be better protected if they were taken out of the hands of the courts, even (and perhaps especially) when those courts assert their protective function aggressively.³³

Roberto Gargarella argues that although many Latin American countries have developed more socially robust constitutions in recent years, the results have been disappointing because the reformers focused more on the creation of new rights rather than on the organization of power within society, which has made those rights virtually meaningless.³⁴ In his view, such preferencing of rights over power has kept what he calls the “engine room” of constitutions closed off, leaving the inequitable balance of power in the region unchanged. While the horizontal plane of constitutional rights has surely expanded, the vertical political organization enshrined in constitutions (in which the majority has little power) remain unchanged.³⁵

On the other hand, several recent studies take a somewhat more optimistic view of the constitutionalization of human rights law in Latin America, focusing on three main points: the potential impact of strategic litigation; the importance of dialogue on human rights law between domestic and regional courts; and the factors that influence the impact of judicial decisions on social and economic rights. Thus, Manuel Eduardo Góngora-Mera argues that litigation utilizing constitutionalized human rights is an effective way to overcome legal and political flaws in the region, including the weak rule of law, mistrust of political parties among the public, poor civil liberties regimes, marginalization of a broad spectrum of the population,

29. *Id.* at 325–26.

30. *Id.*

31. *Id.*

32. Octavio Luiz Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 TEX. L. REV. 1643 (2011).

33. *Id.* at 1646–47, 1667–68.

34. Roberto Gargarella, *Latin American Constitutionalism, 1810–2010: The Problem of the ‘Engine Room’ of the Constitution*, in LAW AND POLICY IN LATIN AMERICA: TRANSFORMING COURTS, INSTITUTIONS, AND RIGHTS 213–16 (Pedro Fortes et al. eds., 2017).

35. *Id.*

limited citizen control of governmental organizations, and extreme inequality and poverty.³⁶

Eduardo Ferrer Mac-Gregor notes that increased constitutionalization has encouraged a human rights law dialogue between judges from different courts that is both horizontal (between regional courts, most notably the Inter-American Court of Human Rights, the European Court of Human Rights and the International Court of Justice) and vertical (between the Inter-American Court and those countries in Latin America that are parties to the American Convention on Human Rights).³⁷ In his view, this dialogue has facilitated the diffusion of human rights law around the world, as courts from different regions increasingly rely on each other for the interpretation of terminology, restrictions, and requirements.³⁸

Finally, César Rodríguez Garavito and Diana Rodríguez Franco examine the impact of judicial activism in the wake of the expansion of social and economic rights in constitutions in Latin American and other parts of the Global South over the past decade.³⁹ They identify three factors that influence the impact of judicial decisions on constitutionalized socio-economic rights: (1) the nature of the right recognized in the judgment; (2) the type of remedy handed down by the court; and (3) the nature of any monitoring mechanisms that the court employs in order to ensure compliance with its ruling. As to the latter factor, the authors assert that judicial decisions on socioeconomic rights are more likely to have a lasting impact through so-called “dialogic” decisions, through which courts engage in ongoing conversations with parties to the dispute, including government officials, in order to monitor compliance.⁴⁰

In my research on the constitutionalization of human rights law in Latin America, I conducted a qualitative study in Ecuador in order to show how cause lawyers have utilized constitutionalized human rights treaty law to advocate on behalf of non-citizens whose right to asylum had been restricted by the host government.⁴¹ That study was, in part, a response to Beth Simmons’ call for more empirical research investigating how domestic and transnational non-state actors (whom she calls “principled agents”) utilize constitutionalized treaty law to attempt to alter state behavior.⁴² In that

36. Góngora-Mera, *supra* note 12, at 235–53.

37. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; see Eduardo Ferrer Mac-Gregor, *What do we mean when we talk about Judicial Dialogue?: Reflections of a Judge of the Inter-American Court of Human Rights*, 30 HARV. HUM. RTS. J. 89, 89–90 (2017).

38. Mac-Gregor, *supra* note 37.

39. CÉSAR RODRÍGUEZ GARAVITO & DIANA RODRÍGUEZ FRANCO, RADICAL DEPRIVATION ON TRIAL: THE IMPACT OF JUDICIAL ACTIVISM ON SOCIOECONOMIC RIGHTS IN THE GLOBAL SOUTH (2015).

40. *Id.* at 194.

41. Meili, *supra* note 11.

42. Beth Simmons, *Treaty Compliance and Violation*, 13 ANN. REV. POL. SCI. 273, 291 (2010). In Simmons’ view, non-state actors in “middle states” have a greater need to press for compliance with human rights treaty law than their counterparts in repressive or fully democratic states. In the former,

study, which consisted of interviews with lawyers involved in Constitutional Court litigation which succeeded in partially overturning a Presidential Decree limiting the rights of Colombian refugees, I identify four factors which contributed to the effective utilization of constitutionalized human rights provisions: (1) the presence of domestic and transnational cause lawyers who are able to navigate the local legal and political landscape in order to maximize positive outcomes for their clients; (2) the state's global reputation for protecting non-citizens; (3) the degree to which a constitutional challenge on behalf of non-citizens threatens key state actors; and (4) whether the state has other means to accomplish its objectives short of violating the rights of non-citizens.⁴³ In Part V of this article, I apply these factors to the Mexican context.

This article will contribute to scholarship on human rights treaty effectiveness because it represents one of the few qualitative empirical studies of how constitutionalized human rights law is actually utilized on the ground.⁴⁴ The large-n studies in the treaty effectiveness literature to date have been categorized as the "first generation" of empirical international legal studies by Goodman and Jenks.⁴⁵ The study discussed in this Article will contribute to a newly emerging "second generation" of such studies, which aim to clarify the social mechanisms for influencing state practice.⁴⁶ In doing so, it identifies those circumstances under which constitutionalized human rights law is likely to improve human rights outcomes for non-citizens, in this case Central American refugees in Mexico. To the extent that these circumstances mirror those I have found applicable in other national contexts, most notably Ecuador and the European Union, it will further the notion that these circumstances are generalizable to other parts of the world.⁴⁷

The effectiveness of constitutionalized human rights law in the refugee context has become an increasingly important issue at a time when nation-

such advocacy carries a significant risk of repression; in the latter, advocates may rely on domestic law to resolve their grievances. *Id.*

43. Meili, *supra* note 11, at 385. In a more recent study on the constitutionalization of asylum law in the European Union, I conclude that these factors are generalizable in at least two national contexts (France and, to a lesser extent, Italy) given the nature of the constitutional right to asylum in those countries, the independence of their judiciaries, their robust civil societies, and their public attitudes toward refugees. Stephen Meili, *The Constitutional Right to Asylum: The Wave of the Future in International Refugee Law?*, 41 *FORDHAM INT'L L.J.* 383 (2018).

44. One of the most significant empirical studies of judicial accountability in transitional democracies identified several factors that may influence high court willingness to hold state actors accountable for violations of constitutional rights. *See, e.g.*, SIRI GLOPPEN ET AL., *COURTS AND POWER IN LATIN AMERICA AND AFRICA* (2010). These factors include a deferential judicial culture, short renewable terms for judges, a political context with a dominant party/excessively strong president, a liberal rights-based constitution, and professional competence in the upper courts. *Id.* at 34, 152–76. That study did not, however, focus on the impact of the constitutionalization of human rights provisions in particular.

45. RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* 3 (2013).

46. *Id.* at 4.

47. *See* Meili, *supra* note 11; *see also* Meili, *supra* note 43.

alism, anti-globalization and xenophobia are on the rise. These phenomena have emboldened many states, particularly in the Global North, to devise an assortment of ways to avoid accepting refugees.⁴⁸ As a result, some scholars have recently suggested that international refugee law has failed to meet its objectives and thus outlived its utility.⁴⁹ Much of this recent scholarship reads a bit like the end of times for refugee law.⁵⁰ This Article will help determine whether such reports of refugee law's demise are premature.

II. METHODOLOGY

This Article is a case study of some of the circumstances under which the constitutionalization of international human rights law may increase the likelihood of positive rights outcomes for non-citizens. This Article focuses on Mexico because it features some of the characteristics which, according to the relevant literature reviewed in the previous section, are associated with improved human rights performance following treaty ratification: an increasingly independent judiciary,⁵¹ an active civil society,⁵² and constitutionalized treaty law.⁵³ For this reason, this Article qualifies as a "crucial case study" because it can confirm or challenge the theory that the constitutionalization of human rights law leads to better human rights outcomes. If constitutionalized human rights law can improve rights outcomes for non-citizens in Mexico, it is possible that it will do so elsewhere.

Moreover, this Article analyzes strategic litigation on behalf of refugees from the Northern Triangle of Central America in order to identify factors relevant to the effective utilization of constitutionalized human rights norms by cause lawyers. Three specific cases were selected after a series of interviews my research assistant and I conducted with several key informants in the refugee law community in Mexico.⁵⁴ These cases, which are described in more detail below, exemplify both the possibilities and the challenges facing lawyers and other advocates seeking to utilize constitutionalized human rights law in order to achieve positive human rights outcomes for refugees. In this way, this Article answers the call for more nuanced studies of so-called "principled actors" (here, cause lawyers) seeking such outcomes for marginalized individuals and groups.⁵⁵

48. See David James Cantor, *The End of Refugee Law?*, 9 J. HUM. RTS. PRAC. 203 (2017); Kirsten McConnachie, Richard Carver & Martin Jones, *The End of Refugee Protection?*, 9 J. HUM. RTS. PRAC. 175 (2017); DANIEL GHEZELBASH, *REFUGEE LOST* (2018).

49. See Cantor, *supra* note 48; McConnachie et al., *supra* note 48; GHEZELBASH, *supra* note 48.

50. See STEPHEN HOPGOOD, *THE ENDTIMES FOR HUMAN RIGHTS* (2014).

51. See *infra* Part V.A.

52. See *infra* Part V.B.

53. See *infra* Part III.

54. See GLOPPEN ET AL., *supra* note 44, at 23.

55. See Elkins et al., *supra* note 13; Simmons, *supra* note 42, at 292.

The empirical data for this Article consists of a series of semi-structured interviews, both in person and via Skype, with eleven lawyers and other activists at NGOs, law school clinical programs, and a private law firm who have worked on, or are otherwise familiar with, strategic litigation on behalf of asylum-seekers from Central America.⁵⁶ Key informants in Mexico helped identify lawyers that fit these criteria.⁵⁷ These interviews were included in the study in order to analyze how lawyers engaged in strategic litigation over the state's treatment of refugees have compelled state actors (i.e., the Mexican judiciary) to comply with constitutionalized human rights treaty law. The lawyers' views about how to bring about a positive rights outcome in that litigation contextualizes this study's other findings regarding the legal and political context surrounding the recent increase in Central Americans seeking asylum in Mexico. Because the lawyers in this study all have the same professional specialization and detailed knowledge of the strategic litigation being analyzed, the number of interviews planned for this study is sufficient to reach thematic saturation, i.e., the point at which no new themes are likely to emerge.⁵⁸

III. BACKGROUND CONTEXT: THE MEXICAN CONSTITUTION AND INTERNATIONAL HUMAN RIGHTS LAW

Although Mexico has been a party to the 1951 Convention Relating to the Status of Refugees ("Refugee Convention") and its 1967 Protocol since 2000,⁵⁹ it was not until 2011 that it adopted legislation fully incorporating the Refugee Convention into domestic law. That legislation (the Law on Refugees and Complementary Protection⁶⁰) expanded the scope of refugee

56. These interviews took place either in person in Mexico or via Skype between February 2017 and April 2018.

57. See GEOFFREY PAYNE & JUDY PAYNE, *KEY CONCEPTS IN SOCIAL RESEARCH* 135 (2004) ("A key informant is simply someone who, by virtue of his [sic] particular position in the society, knows a great deal about the subject of the research. It may be that his expertise is to know who knows, so that he refers the research worker to others more knowledgeable than himself.")

58. See Greg Guest et al., *How Many Interviews Are Enough?: An Experiment with Data Saturation and Variability*, 18 *FIELD METHODS* 59, 64–65 (2006) (defining "[t]heoretical saturation" as the point at which "all of the main variations of the phenomenon have been identified and incorporated into the emerging theory"). Guest et al. conclude that for studies with a high level of homogeneity among the studied population, a sample of as few as six interviews may suffice to enable development of meaningful themes and useful interpretations. *Id.* at 78.

59. See Refugee Convention, *supra* note 10. See also Protocol Relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267. Mexico was the last country in Latin America to ratify the Refugee Convention. See Luisa Feline Freier, *A Liberal Paradigm Shift?: A Critical Appraisal of Recent Trends in Latin American Asylum Legislation*, in *EXPLORING THE BOUNDARIES OF REFUGEE LAW* 123 (Jean-Pierre Gauci et al., eds., 2015).

60. Ley Sobre Refugiados y Protección Complementaria Mexico [Law on Refugee and Complementary Protections] [LRPC], Diario Oficial de la Federación [DOF] 27-01-2011, últimas reformas DOF 30-10-2014 (Mex.), <http://www.ordenjuridico.gob.mx/Documentos/Federal/pdf/wo57819.pdf> [<https://perma.cc/3MHF-TZSA>]; see also México: ACNUR aplaude adopción de ley sobre refugiados [Mexico: UNHCR applauds the adoption of refugee law], UNITED NATIONS NEWS (Jan. 28, 2011), <https://news.un.org/es/story/2011/01/1209671> [<https://perma.cc/2QGC-UUHB>]. "Complementary protection" refers to a series

protection beyond the confines of the Refugee Convention, recognizing persecution based not only on race, religion, nationality, membership of a particular social group and political opinion, but adding “general violence, foreign aggression, internal conflicts, large-scale human rights violations, or other circumstances that have severely disturbed the public order” as bases for receiving refugee protection.⁶¹ These protections for asylum-seekers mirror those contained in other international instruments, most notably the Cartagena Declaration of 1984, a non-binding agreement to which Mexico was an original signatory.⁶² Article III (3) of the Cartagena Declaration states, in relevant part:

Hence 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, of freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have severely disturbed public order.⁶³

The Law on Refugees and Complementary Protection also created a procedure for a migrant to request recognition of refugee status and codified certain rights and guarantees, including a right of access to counsel, a right to notice of receipt of a claim for protection, a written decision within forty-five days of the initial application, and access to one’s file.⁶⁴ It also requires any government agency that knows of a migrant’s desire to seek asylum to notify the proper agency within seventy-two hours.⁶⁵

of international agreements that provide protection from harm to those not covered by the Refugee Convention. *See generally* JANE MCADAM, *COMPLEMENTARY PROTECTION IN INTERNATIONAL REFUGEE LAW* (2007). It is grounded on the international law principle of non-refoulement, which prohibits a country from returning a non-citizen to a territory where she is likely to face torture or cruel, inhuman, or degrading treatment or punishment. *See generally* GUY GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* (2007); JAMES HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* (2005).

61. Ley Sobre Refugiados y Protección Complementaria Mexico, *supra* note 60, art. 13.

62. Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, *Cartagena Declaration on Refugees* (Nov. 22, 1984), <http://www.refworld.org/docid/3ae6b36c.html> [<https://perma.cc/EAT6-3HTL>].

63. *Id.* at art. III (3).

64. Ley Sobre Refugiados y Protección Complementaria, *supra* note 60. *See also* SIN FRONTERAS, *EVOLUCION Y RETOS DEL ASILO EN MEXICO [EVOLUTION AND CHALLENGES OF ASYLUM IN MEXICO]* 33–35 (2016), https://web.archive.org/web/20170715020217/http://sinfronteras.org.mx/wp-content/uploads/2017/06/InformeAsilo_2016_WEB_02.pdf [<https://perma.cc/V3GH-TS3L>].

65. Ley Sobre Refugiados y Protección Complementaria Mexico, *supra* note 60. *See also* SIN FRONTERAS, *supra* note 64. The agency responsible for deciding asylum and refugee claims is the Mexican Refugee Assistance Commission (“COMAR”), while the agency responsible for enforcement within the immigration system, including detention of migrants, is the National Institute of Migration (“INM”).

Mexico won high praise for its Law on Refugees and Complementary Protection. The United Nations High Commissioner for Human Rights (“UNHCR”) stated that it reflected best practices in this area.⁶⁶ Moreover, in her 2015 comparative analysis of asylum legislation throughout Latin American, Freier asserted that Mexico (together with Argentina) was in the vanguard of human rights-based asylum legislation in the region.⁶⁷

Also, in 2011 Mexico amended Article 11 of its Constitution to include the right to seek asylum.⁶⁸ The relevant portion of Article 11 was amended to read:

[I]n the case of persecution for political reasons, everyone has the right to seek asylum; for humanitarian reasons they will receive refuge. The law will regulate their origins and exceptions.⁶⁹

This constitutional right to asylum suffered from two limitations that arguably rendered it *less* protective than the refugee definition under both the Refugee Convention and the Cartagena Declaration. First, it limits protection to those suffering persecution for “political reasons,” thus ruling out asylum for those persecuted for reasons of race, religion, nationality, and membership in a particular social group (as permitted under the Refugee Convention) and those fleeing situations such as armed conflict and massive human rights violations (as permitted under the Cartagena Declaration).⁷⁰ Secondly, the final sentence of the amendment constitutes an “escape clause” under which the scope of constitutional asylum can be limited by domestic law.⁷¹ While Mexico’s refugee and complementary protection law expanded

66. *México: ACNUR aplaude adopción de ley sobre refugiados, supra* note 60.

67. Freier, *supra* note 59, at 140. As Freier notes, however, while Mexico’s asylum law is expansive and based on the country’s human rights obligations, many of the procedures associated with that law are restrictive. *Id.* at 139. One of the most significant of these procedures is the requirement that an asylum-seeker file her application within 30 days of entering Mexico. *Id.* Neither the Refugee Convention nor any other international instrument impose a deadline for the filing of asylum applications. For comparative purposes, the deadline in the United States is one year. See 8 U.S.C. § 1158(a)(2)(B).

68. See Víctor Manuel Collí Ek, *Improving Human Rights in Mexico: Constitutional Reforms, International Standards, and New Requirements for Judges*, 20 HUM. RTS. BRIEF 7, 10 (2012). Mexico is certainly not alone in constitutionalizing the right to asylum. Approximately 36 countries have done so over the past several decades. See also Lucas Kowalczyk & Mila Versteeg, *The Political Economy of the Constitutional Right to Asylum*, 102 CORNELL L. REV. 1219 (2017). Moreover, as María-Teresa Gil-Bazo has noted, countries whose legal tradition is linked to Spain, France, and Portugal “largely recognize a right of individuals to be granted asylum of constitutional rank.” María-Teresa Gil-Bazo, *Asylum as a General Principle of International Law*, 27 INT’L J. OF REFUGEE L. 3 (2015). Indeed, the constitutions of most Latin American countries (Argentina, Bolivia, Brazil, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Peru, and Venezuela) contain a right to asylum. *Id.* at 10. Only Chile, Panama and Uruguay lack a constitutional right to asylum.

69. Constitución Política de los Estados Unidos Mexicanos, CP, Art. 11, Diario Oficial de la Federación [DOF] 05-02-1917, últimas reformas DOF 10-02-2014 (Mex.) [hereinafter “CONSTITUTION OF MEXICO”].

70. UNHCR noted that this provision was inconsistent with both international standards and Mexican domestic law. Freier, *supra* note 59, at 141.

71. See Meili, *supra* note 43, at 419. Thanks to my University of Minnesota colleague Christopher Roberts for this characterization. These legislative escape clauses are commonplace in constitutionalized asylum provisions in the EU. In many cases they limit the scope of asylum to the same five grounds of

the refugee definition beyond the limits of the Refugee Convention, there is no guarantee that this definition might not be constricted in future legislation.

These shortcomings were addressed, at least in part, by amendments to Article 11 promulgated in 2016. Those amendments require that the right to asylum be implemented and administered according to Mexico's international obligations.⁷² The relevant part of Article 11 now reads:

The recognition of refugee status and the granting of political asylum will be carried out in conformity with international treaties. The law shall govern its origins and exceptions.⁷³

On the one hand, the Constitution's previous limitation of *asylum* to those seeking protection from persecution for political reasons (as opposed to race, religion, and other grounds enumerated by the 1951 Refugee Convention) remains.⁷⁴ However, for the first time, Mexico included *refugee status* as part of its Constitution.⁷⁵ As a result, refugee status (which in Mexico includes not only persecution on account of the five Refugee Convention grounds but also the expanded scope of harm under the Cartagena Declaration) is a constitutional right under Mexican law. While Article 11 retains a domestic law "escape clause," any such law that is inconsistent with Mexico's obligations under international human rights law would be nullified.⁷⁶

Mexico's 2011 constitutional reforms included other human rights provisions that—as we will see later in this Article—have been used in strategic litigation on behalf of refugees.⁷⁷ For example, Article 1 of the Constitution was amended to prohibit discrimination based on, among other things, "so-

the Refugee Convention. *Id.* Mexico's domestic law implementing its constitutionalized asylum is unusual—and expansive—in linking the right to asylum to the broad parameters of the Cartagena Declaration.

72. Decreto por el que se Reforma el Párrafo Segundo del Artículo 11 de la Constitución Política de los Estados Unidos Mexicanos, Diario Oficial de la Federación [DOF] 15-08-2016 (Mex.), http://www.dof.gob.mx/nota_detalle.php?codigo=5447903&fecha=15/08/2016 [<https://perma.cc/M4BD-CZ4W>] ("El reconocimiento de la condición de refugiado y el otorgamiento de asilo político, se realizarán de conformidad con los tratados internacionales. La ley regulará sus procedencias y excepciones.").

73. CONSTITUTION OF MEXICO, *supra* note 69, art. 11.

74. *Id.*

75. *Id.*

76. According to Article 1 of the Mexican Constitution, any limitation on the human rights enshrined in the Constitution must be established by the Constitution itself: "In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights. Such human rights shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution itself." CONSTITUTION OF MEXICO, *supra* note 69, art. 1.

77. As Brinks and Blass note, Mexico has a long tradition of including social and economic rights in its Constitution, having first done so in its 1917 Constitution. BRINKS & BLASS, *supra* note 23, at 42. Mexico's recent constitutional amendments are significant, the authors assert, because they have "brought Mexico's Constitutional justice mechanism more into line with its social constitutional impulses." *Id.*

cial status” or “any other form” (including, presumably, migration status).⁷⁸ Article 1 also incorporates those human rights treaties which Mexico has signed.⁷⁹ As such, the rights to equal protection, a prompt judicial remedy for violations of human rights, and freedom from discrimination, all of which are enshrined in the American Convention on Human Rights (“ACHR”), are now part of the Mexican Constitution.⁸⁰ Perhaps even more important, the decisions of the Inter-American Court on Human Rights are now binding precedent under Mexican domestic law, unless they contradict the Constitution.⁸¹ Similarly, national and subnational judges must ignore domestic laws which contradict the Constitution and international human rights treaties.⁸²

These constitutional amendments are significant for refugees and other non-citizens because granting constitutional status to international human rights treaties (such as the ACHR) renders those treaties potentially more effective advocacy tools. Empirical research in a variety of national contexts, including in Mexico, has shown that lawyers and domestic court judges are much more likely to reference human rights provisions in domestic laws (including the national constitution) than international law.⁸³ In Mexico, this preferencing of domestic law over international human rights law has been further encouraged by the principle of conventionality review, an Inter-American System mandate requiring judges to verify the harmonization of domestic law with Inter-American human rights law.⁸⁴ Therefore, it is likely that as these constitutional provisions become more familiar to lawyers and judges throughout Mexico, they will begin to play more of a role

78. Article 1 of the Mexican Constitution provides, in relevant part, that “Any form of discrimination, based on ethnic or national origin, gender, age, disabilities, social status, medical conditions, religion, opinions, sexual orientation, marital status, or any other form, which violates the human dignity or seeks to annul or diminish the rights and freedoms of the people, is prohibited.” CONSTITUTION OF MEXICO, *supra* note 69, art. 1.

79. *Id.*

80. Article 24 of the ACHR provides that “All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.” Organization of American States, American Convention on Human Rights art. 24, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. Art. 25.1 of the ACHR provides that, “Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.” *Id.* at art. 25.1. Article 1.1 of the ACHR provides that “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.” *Id.* at art. 1.1.

81. Azul Aguiar-Aguilar, *Harmonizing National Law with Inter-American Human Rights Law: Evidence from Mexico*, 15 J. HUM. RTS. 477, 477–478 (2016).

82. *Id.*

83. *Id.* at *passim*; see also Meili, *supra* note 25; Stephen Meili, *When Do Human Rights Treaties Help Asylum-Seekers? A Study of Theory and Practice in Canadian Jurisprudence Since 1990*, 51 OSGOODE HALL L.J. 627 (2014) [hereinafter Meili, *Human Rights Treaties*].

84. Aguiar-Aguilar, *supra* note 81, at 477.

in litigation on behalf of refugees and asylum-seekers. As that process begins to take hold, judges are likely to start seeing them less and less as “foreign” law imposed on Mexico from abroad and more like Mexican domestic law.

Of course, the law on the books is far different than what actually happens on the ground.⁸⁵ This disconnect may be particularly acute in the context of Mexican refugee law and practice. One of the lawyers I interviewed described that disconnect as follows:

In Mexico the refugee framework is really well done. I mean, we have the law, we have the rules of procedure, we have Article 11 of the Constitution . . . and it includes Cartagena, a really progressive framework. The problem is more in the operation of that framework from the institutions. We have the INM [The National Institute of Migration, which enforces Mexico’s immigration laws], which is super bad. They don’t even understand the difference between a person who is migrating and a person who is seeking asylum. And you also have COMAR [the Mexican Refugee Assistance Commission], which is in charge of processing applications for asylum and other forms of refugee protection]. It’s really small. They only have about six people to analyze all the cases, which is insane, because they don’t have time to actually analyze everything . . . They make mistakes all the time. They issue resolutions with typos and without the grounds [for the decision].⁸⁶

This lawyer’s observation about the lack of enforcement of Mexico’s refugee law is exemplified by the conduct of the Comisión Mexicana de Ayuda a Refugiados (“COMAR”), which, as noted above, processes asylum applications. Even before a September 2017 earthquake in Mexico City damaged its offices in the capital, COMAR had struggled to keep pace with the spike in asylum applications resulting from Mexico’s increased apprehension of Central Americans fleeing their homeland.⁸⁷ Indeed, the general consensus

85. See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910); see also Christine Rothmayr Allison, *Law in Books Versus Law in Action: A Review of the Socio-legal Literature*, in *BEHIND A VEIL OF IGNORANCE?: POWER AND UNCERTAINTY IN CONSTITUTIONAL DESIGN* 35 (Louis M. Imbeau & Steve Jacob eds., 2015). (“[F]ormal constitutional change is not the primary focus of socio-legal scholarship as this is only one aspect of the understanding of constitutions in action.”); Michael D. Gilbert, Essay, *Insincere Rules*, 101 VA. L. REV. 2185, 2185 (2015) (“As Roscoe Pound wrote a century ago, a lawmaker may ‘put his views of all the details of legal . . . administration into sections and chapters,’ but ‘the law upon the statute books will be far from representing what takes place actually.’”) (citing Pound, *supra*); Jean-Louis Halpérin, *Law in Books and Law in Action: The Problem of Legal Change*, 64 ME. L. REV. 45, 47 (2011) (considering “legal change in its historical context in order to give empirical content to the tension between black-letter law and rules ‘in action.’”).

86. Interview 5, via Skype in Mexico City, Mexico (Apr. 30, 2018).

87. Kirk Semple, *A Flawed Asylum System in Mexico, Strained Further by U.S. Changes*, N.Y. TIMES (Aug. 5, 2017), <https://www.nytimes.com/2017/08/05/world/americas/mexico-central-america-mi-grants-refugees-asylum-comar.html> [https://perma.cc/NG3M-KMX4]. See also Fontanini, *supra* note 6;

is that Mexico's initial response to the increase in asylum applications has been woefully inadequate and arguably in violation of its obligations under both international and domestic law.⁸⁸ Examples of this legally inadequate response include long delays, due process failures, obstacles to accessing the asylum process, lack of information about rights in immigration centers, administrative detention of migrants, and a lack of access to attorneys for those who do apply for asylum.⁸⁹ Many migrants from the Northern Triangle are unaware of the availability of asylum and are not informed of their right to apply for it after they are arrested by the Mexican authorities.⁹⁰

Detention of migrants is another ignominious feature of the Mexican asylum system. The Government has interpreted Mexico's refugee and complementary protection law to allow for the automatic detention of asylum-seekers.⁹¹ From 2012 (the year after enactment of that law) to 2016, the number of immigrant detainees in Mexico increased by over 100 percent, from 88,501 to 188,595.⁹² The vast majority of these detainees (92 percent in 2012 and 81 percent in 2016) are from the Northern Triangle and are returned to their home countries without being given the opportunity to apply for asylum.⁹³ While detained, asylum-seekers, especially those from

see also Rebecca Galemba, Katie Dingeman & Kaelyn DeVries, "The Box is a Mockery": *Suspending Migrant Human Rights Abuses between Humanitarian Reason and Necropolitics at the Mexico-Guatemala Border* 4 (paper presented at the annual meeting of the Latin American Studies Association, Barcelona, May 2018 ("Mexico prioritizes resources towards the deterrence and deportation of migrants while the humanitarian infrastructure remains inadequately staffed and funded.")).

88. Semple, *supra* note 87.

89. Semple, *supra* note 87; SIN FRONTERAS, *supra* note 64. While the Mexican refugee law requires asylum applications to be ruled on within 45 days (with a possible 45-day extension), claims are now taking at least a year to process. Interview 1, via Skype between Mexico City and Minneapolis, MN (Mar. 23, 2018).

90. This lack of information about the right to apply for asylum is of particular consequence in the context of migrants from the Northern Triangle because they typically have low levels of schooling and are economically vulnerable. *See* Villasenor & Coria, *supra* note 2, at 7.

91. *See Universal Periodic Review: Mexico*, UN HIGH COMMISSIONER FOR REFUGEES 5 (2013); Interview 1, *supra* note 89. *See also* Ley de Migración [LM], art. 99, Diario Oficial de la Federación [DOF] 05-25-2011, ultima reforma DOF 04-21-2016 (Mex.): "It is of public order the [appearance/presentation/turning in] of foreigners in migratory stations or in places authorized to do so, while determining their migratory status in national territory." *See also* Reglamento de la Ley Sobre Refugiados y Protección Complementaria [RLRPC], Art. 65, Diario Oficial de la Federación [DOF] 02-21-2012 (Mex.): "In cases in which the attention required by the applicants is of a temporary nature or the situation of vulnerability has been overcome, the Coordination and the Institute will jointly determine their transfer to a migratory station."

92. *Mexico Immigration Detention*, GLOBAL DETENTION PROJECT (2018), <https://www.globaldetentionproject.org/countries/americas/mexico> [<https://perma.cc/4JJP6-7AJE>]; FACING WALLS, *supra* note 4.

93. FACING WALLS, *supra* note 4. The slight decline in the proportion of NTCs in Mexico's detention centers during this period is partly the result of the marked increase in Venezuelans fleeing their home country during that same time. *See* Stephanie Eschenbacher, *Venezuelan asylum-seekers in Mexico surge as crisis deepens*, REUTERS (Aug. 5, 2017), <https://www.reuters.com/article/us-mexico-venezuela-migration-idUSKBN1AL0QC/> [<https://perma.cc/G6ZV-ZMH8>]. *See also* ELEANOR ACER & B. SHAW DRAKE, DANGEROUS TERRITORY: MEXICO STILL NOT SAFE FOR REFUGEES 5 (July 2017), <http://www.humanrightsfirst.org/sites/default/files/HRF-Mexico-Asylum-System-rep.pdf/> [<https://perma.cc/E64P-5KQ2>] (reporting that only 5 percent of the 130,000 Central Americans apprehended in Mexico in 2016 applied for asylum).

Central America, are often persuaded to abandon their claims by Instituto Nacional de Migración (“INM”) and COMAR officials who tell them their applications will likely be rejected.⁹⁴ Those who do pursue claims usually remain in detention for at least three months and face logistical difficulties in pursuing their claims.⁹⁵ Detention centers have also been criticized by human rights organizations for their intolerable conditions, including beating, threats, humiliation and insults to detainees, overcrowding, lack of beds, banning visitors, and failure to separate children and female detainees from male detainees.⁹⁶

Whether the recent changes to Mexico’s Constitution and other domestic laws will actually have an impact on these and other problems associated with Mexico’s refugee policy and practice is a question of increasing importance given the recent rise in asylum-seekers from the Northern Triangle. The next section of this Article considers three recently initiated legal challenges to that policy and practice, based on the Constitution and the international human rights law which it incorporates.

IV. STRATEGIC LITIGATION UNDER THE MEXICAN CONSTITUTION

In the past two years Mexican cause lawyers working at NGOs, law school clinics, and on a pro bono basis at private law firms have begun to invoke Mexico’s recently enacted constitutional provisions and refugee law in strategic litigation on behalf of refugees from the Northern Triangle.⁹⁷ Since none of the litigation using recently constitutionalized human rights provisions has yet produced a precedential court decision, it is too early to gauge their long term impact on state behavior toward refugees.⁹⁸ Instead, this Article will analyze why the lawyers litigating these cases chose to fight these particular battles, which constitutional provisions they invoke, and what they see as the opportunities for and obstacles to effective use of constitutionalized human rights law. Their thoughts on these issues provide

94. DANGEROUS TERRITORY, *supra* note 93, at 7–8.

95. *Id.* at 5.

96. *Id.* at 8. See also U.N. Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Mendez, *Addendum: Mission to Mexico*, U.N. Doc. A/HRC/28/68/Add.3, ¶¶72–73 (Dec. 29, 2014). On the other hand, unlike the U.S. and Canada, Mexico does not use criminal prisons for the detention of asylum-seekers and other undocumented persons; rather, it has constructed specially designed detention facilities. See GLOBAL DETENTION PROJECT, *supra* note 92.

97. For further discussion, see *infra* Parts IV(A)–(C).

98. See *infra* cases discussed in Parts IV(A)–(C). According to Mexican procedural rules, the only way a case can become precedent is if (1) five appellate tribunals (the level between trial courts and the Supreme Court) have reached the same result in similar cases; or (2) a split in decisions between at least two appellate tribunals allows the case to be decided by the Supreme Court. See Ley de Amparo [Protección Law], *Diario Oficial de la Federación* [DOF] 2-4-2013, *Oltimas reformas 17-06-2016* (Mex.), <http://www.dof.gob.mx/nota-detalle.php?codigo=5441763&fecha=17/06/2016> [<http://perma.cc/UQQ9-5VQP>]; Interview 2 in Mexico City, Mexico (Mar. 13, 2018); Interview 3 in Mexico City, Mexico (Mar. 13, 2013).

a first-hand account of how “principled agents,” in Beth Simmons’ parlance, utilize constitutionalized human rights law on the ground and, therefore, provide clues as to the circumstances under which such law is more likely to improve human rights outcomes for refugees.⁹⁹ They will also allow for comparisons with other national and transnational contexts in which cause lawyers have successfully used constitutional human rights protections on behalf of refugees.¹⁰⁰ Such comparisons will suggest the extent to which the factors contributing to the effectiveness of constitutionalized human rights law in certain contexts are generalizable.

A. *Deportation of Guatemalan asylum-seeker*

In August 2017, a Guatemalan man fleeing drug violence in his home country was apprehended and detained by INM. He applied for asylum in September 2017 and a Mexico City law firm agreed to represent him pro bono. While in detention, he became increasingly fearful of retribution by other detainees from Guatemala who knew of his role identifying drug dealers in that country. He was convinced by immigration officials to abandon his asylum claim so that he could leave the detention facility. He was then deported to Guatemala, in October 2017, without notice to his attorneys. His lawyers have not heard from him since he was released from detention and have no idea as to his whereabouts. The Government has refused his lawyers’ requests to view their client’s file.

As a result, in March 2018, his lawyers filed an *amparo* in which they claimed that the deportation amounted to a forced disappearance by the Mexican Government.¹⁰¹ The *amparo* alleged several violations of the Mexican Constitution and the ACHR, including its provisions related to due process and the right to seek asylum.¹⁰² The two theories are closely inter-

99. Simmons, *supra* note 42, at 43.

100. See, e.g., Meili, *supra* note 11 (regarding cause lawyers’ use of constitutionalized human rights law in opposing a presidential decree limiting the rights of asylum-seekers in Ecuador).

101. See *Juicio de Amparo 1452/2017* (Apr. 30, 2018) (Juan Pablo Gómez Fierro, Juez Cuarto de Distrito en Materia Administrativa) [hereinafter *Decision 1452/2017*]. An *amparo* is a legal challenge to governmental action that allegedly has violated one or more constitutional rights of the aggrieved party. It is similar to a common law request for an injunction. See Rodrigo Camarena González, *From Jurisprudence Constante to Stare Decisis: The Migration of the Doctrine of Precedent to Civil Law Constitutionalism*, 7 *TRANSNAT’L LEGAL THEORY* 257, 262 n.28 (2016); see also IMMIGRATION AND REFUGEE BOARD OF CANADA, RESPONSES TO INFORMATION REQUESTS: MEXICO 102670 1 (2008), <https://www.justice.gov/sites/default/files/eoir/legacy/2013/11/07/MEX102670.FE.pdf> [<https://perma.cc/E8RA-Y65Y>]. (“For an *amparo* lawsuit to be founded, a government authority that is legally recognized or that has public power by virtue of de facto circumstances must be responsible for violating rights guaranteed under the constitution”).

102. The lawyers argued that the government had violated the following articles of the Mexican Constitution: Article 1 (which incorporates all international treaties to which Mexico is a party); Article 11 (right to seek and receive asylum and refugee status); Article 14 (right to judicial process); Articles 16 and 17 (right to due process and access to justice); and Article 5 (the right to practice one’s chosen profession). They also argued that the government had violated the following articles of the ACHR: Article 8 (due process) and Article 25 (judicial protection). See *Decision 1452/2017*, *supra* note 101, at 7.

twined: the lawyers argued that the violations of due process violated the right to asylum. Indeed, as one lawyer told me regarding strategic litigation on behalf of refugees generally, “It’s not about refugee rights; it’s about due process, all the time.”¹⁰³ This last point suggests that asylum law may exemplify the theory positing a lack of distinction between procedural and substantive rights; that is, procedural rights are simply components of substantive rights with no independent status.¹⁰⁴ In asylum law, the right to asylum is meaningless absent the due process components (such as the right to a hearing, access to counsel, and the like) that allow it to be realized in individual cases.

Perhaps the most innovative legal theory in the case was the assertion that the Government had violated the attorneys’ constitutional right (under Article 5) to practice their profession without undue governmental interference.¹⁰⁵ The basis for this claim was the Government’s denial of access to their client’s file. The NGO Sin Fronteras, which advocates on behalf of refugees in Mexico, and the refugee law clinic at Universidad Iberoamericana Ciudad de México filed an amicus brief on behalf of the claimant.¹⁰⁶

In a decision issued on April 30, 2018, the district judge granted nearly all aspects of the *amparo*.¹⁰⁷ He held that the Government violated the claimant’s right to due process under both the Mexican Constitution (Articles 16 and 17) and the ACHR (Articles 8 and 25).¹⁰⁸ Those due process violations included: the Government’s failure to notify the claimant that it was processing his asylum claim and that a decision on that claim was required within forty-five days; the Government’s failure to provide for the claimant’s security during his detention; and the Government’s failure to notify the claimant’s attorneys of his release from detention and subsequent

103. Interview 5, *supra* note 86.

104. See Larry Alexander, *Are Procedural Rights Derivative of Substantive Rights?*, 17 L. & PHIL. 19, 19 (1998).

105. Article 5 of the Constitution of Mexico reads, in relevant part, “No person may be prevented from performing the profession, industry, business or work of his choice, provided that it is lawful. This right may only be banned by judicial resolution, when third parties’ rights are infringed, or by government order, issued according to the law when society’s rights are infringed.” CONSTITUTION OF MEXICO, *supra* note 69, art. 5. The author is unaware of another example of this kind of constitutional argument, in Mexico or elsewhere.

106. Interview 5, *supra* note 86. The judge did not accept the amicus brief into the case file, as there is no provision for amicus briefs for this variety of *amparo* claim under Mexican law. Decision 1452/2017, *supra* note 101. However, the lawyer representing the claimant believes that the fact that these well-known organizations supported the claimant’s argument in this case had an impact on the judge. Interview 5, *supra* note 86.

107. See Decision 1452/2017, *supra* note 101. Under Mexican law, an *amparo* is first heard by a district judge within the administrative court system. That judge’s opinion can be appealed to the Tribunal Colegiado de Circuito, a three-judge appellate panel. Decisions of the Tribunal Colegiado can be appealed to the Mexico Supreme Court. Jorge Vargas, *Introduction to Mexico’s Legal System*, U. SAN DIEGO SCH. L. LEGAL STUD. RES. PAPER SERIES 37 (2008); Interview 5, *supra* note 86.

108. Decision 1452/2017, *supra* note 101, at 38–39. As noted earlier in this article, Article 1 of the Mexican Constitution incorporates all international human rights treaties signed by Mexico. See CONSTITUTION OF MEXICO, *supra* note 69, art. 1.

deportation.¹⁰⁹ The judge also ruled that these due process violations resulted in a violation of the claimant's human right to seek and receive asylum, which is guaranteed under both the Mexican Constitution (Article 11) and international law.¹¹⁰ On the other hand, the judge rejected the argument that the Government's conduct had violated the claimant's attorneys' right to practice their chosen profession, under Article 5 of the Constitution.¹¹¹ Here, the judge ruled that the harm created by the Government's conduct was suffered by the claimant, rather than by his attorneys.¹¹²

After declaring his ruling on the claimant's various legal arguments, the judge ordered the Government to restart the asylum process for the claimant, with all necessary due process rights accorded.¹¹³ COMAR has indicated that it will appeal the judge's decision to the federal appeals court.¹¹⁴

While not binding precedent at this point, the judge's decision—and the lawyering strategy that led to it—is nonetheless significant for several reasons relevant to this Article. First, it demonstrates that the Constitution, in addition to being the vehicle for the protection of certain rights of asylum-seekers contained within it (such as the right to asylum under Article 11), can also protect rights contained in international human rights instruments that are incorporated in its Article 1.¹¹⁵ The judge in this case held the Mexican Government accountable under the Mexican Constitution for violations of due process and the right to seek and receive asylum under both domestic and international human rights law. This case underscores that both sets of rights are now part of Mexican constitutional law, able to be utilized by Mexican domestic court judges to vindicate the rights of refugees against the government. Whether any particular judge elects to do so is, of course, a different question, particularly given the current lack of jurisprudential precedent on this point.

Second, this case demonstrates that some cause lawyers in Mexico are beginning to realize the potential power of constitutionalized human rights law and willing to utilize it in strategic litigation on behalf of refugees. They also seem willing to make unconventional human rights-based arguments (such as asserting the right of lawyers to practice their chosen profession) without fear of “overegging the pudding.”¹¹⁶ They are aware of the

109. Decision 1452/2017, *supra* note 101, at 38–46.

110. *Id.* at 47. The judge had identified several sources of the right to asylum in international law, including the 1951 Refugee Convention, the American Declaration of the Rights and Duties of Man, the ACHR, and the Cartagena Declaration. *Id.* at 27.

111. Decision 1452/2017, *supra* note 101.

112. *Id.* at 50.

113. *Id.* at 66–67. As a practical matter, it is unclear how the government will resume the asylum process, given that neither the government nor the claimant's attorney know of the claimant's whereabouts.

114. See description of the Tribunal Colegio, *supra* note 106. See also Interview 5 (June 2018) (follow-up via email message to author).

115. CONSTITUTION OF MEXICO, *supra* note 69.

116. In my 2015 study on the impact of international human rights treaties on asylum jurisprudence in the U.K., one of the lawyers whom I interviewed noted that lawyers who include superfluous

potential benefit of utilizing well-known and respected domestic NGOs to articulate human rights-based arguments.

Third, and of particular note for refugee lawyers in Mexico and elsewhere, the decision holds that refugees are due particular protection under international human rights law (and thus, the Mexican Constitution) because of their especially vulnerable position.¹¹⁷ While refugees have historically been either scapegoated for a society's ills or rendered invisible for political purposes because of their lack of citizenship status and inability to vote,¹¹⁸ this decision asserts that refugees should be accorded a *higher* level of due process protection than either citizens or non-citizens with some modicum of immigrant status.¹¹⁹ This is not an entirely novel idea, as the Inter-American Court of Human Rights has held that particular attention must be paid to ensure that migrants, given their particularly vulnerable situations, are afforded their due process rights in full.¹²⁰

Finally, this decision suggests the tentative beginning of a trend within the Mexican judiciary toward acceptance of what is known as the human rights approach to asylum law. Under this approach, advanced most prominently by refugee scholar James Hathaway, domestic courts must adjudicate asylum claims in accordance with international human rights norms as well

human rights-based arguments on behalf of asylum-seekers risk "overegging the pudding" and alienating the judge hearing the case. See Meili, *supra* note 25, at 155.

117. Decision 1452/2017, *supra* note 101, at 41 (citing the Inter-American Court decision in *Dorzema v. Dominican Republic* for the proposition that due process protections are particularly important for those rendered vulnerable because of their lack of familiarity with the legal system of the country they have entered). This part of the opinion is also notable as a concrete example of the principle of conventionality review, which, as noted earlier in this Article, requires domestic court judges to ensure that their rulings adhere to Inter-American Court of Human Rights precedent. See *supra* note 76. The judge in this case goes even further, relying on an Inter-American Court Advisory Opinion in asserting that non-citizens are a particularly vulnerable group in society. See Decision 1452/2017, *supra* note 101, at 30 ("It is important to keep in mind that [non-citizens] are a vulnerable group") (citing Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (Sept. 17, 2003)). Inter-American Court Advisory Opinions are non-binding, although the Court has sometimes attempted to use them to impose obligations on individual states. See Julie Calidonio Schmid, *Advisory Opinions on Human Rights: Moving Beyond a Pyrrhic Victory*, 16 DUKE J. COMP. & INT. L. 415 (2006). In this case, the Advisory Opinion referenced by the judge stated that the vulnerability of non-citizens is the result of ideological and cultural practices (the latter of which include ethnic prejudice, xenophobia and racism) and is maintained through discriminatory laws that cement inequalities between non-citizens and citizens and results in unequal access to public resources for the two groups. Advisory Opinion OC-18/03, ¶¶112–13.

118. See ALISON BRYSK, *THE FUTURE OF HUMAN RIGHTS* (2018).

119. Decision 1452/2017, *supra* note 101, at 41.

120. See Nadege Dorzema et al. v. Dominican Republic, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser.C) No. 251, ¶148 (October 24, 2012) (stating that "migrants are in a situation of real inequality which may result in due process being impaired unless special measures are adopted to compensate for their defenseless"). This judgment has been interpreted to mean that migrants, particularly those with irregular status, should be afforded certain rights, such as the right to be informed of the charges against them and the opportunity to defend against those charges. See Theodore Nguyen, *Nadege Dorzema et al. v. Dominican Republic*, 37 LOY. L.A. INT'L & COMP. L. REV. 1629, 1644; see also Dorzema ¶166. And in the case of detained migrants, it has been interpreted to mean that the following rights must be ensured: (1) the right to be informed of their rights under the Vienna Convention; (2) the right to have access to communication with a consular official; (3) the right to consular assistance. *Id.*

as domestic law.¹²¹ While that approach has been accepted by an increasing number of countries, it has not been particularly prevalent in Mexico, most likely because Mexican domestic courts have historically been reluctant to cite international or foreign law.¹²² But the decision in this case embraces the concept, albeit only because Mexico has incorporated human rights law into its Constitution. In this case, the judge explicitly states that the right to asylum in Mexico must be interpreted in conjunction with other recognized human rights (including, in this context, the right to due process). Accordingly, the judge equated the denial of due process with the denial of the right to asylum. This link between asylum and human rights law was facilitated by the constitutionalization of human rights law, including the right to asylum, in Mexico. Going forward, such a link may make it easier for judges to hold the government accountable for violations of international human rights law.

B. COMAR's delayed processing of asylum claims

In late October 2017, following an earthquake in Mexico City a month earlier, COMAR announced that it was suspending its normal deadlines for processing asylum applications.¹²³ COMAR's justification for this suspension was that the earthquake had damaged the offices where it holds interviews of asylum applicants in order to determine the validity of their claims for protection.¹²⁴ The uptick in asylum applications over the past few years, as well as the impact of the earthquake on COMAR's operations, meant that COMAR was not coming close to meeting the forty-five-day deadline in most cases.¹²⁵ Over 7,000 applications filed in 2017 remained unresolved.¹²⁶ Many of these applications were abandoned by asylum-seekers lacking the wherewithal to endure such delay.¹²⁷ In those cases, a delayed decision is effectively a negative decision.

121. JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 194 (2d ed. 2014).

122. For a comprehensive summary of the increasing acceptance of the human rights approach by courts, decision-makers, the UNHCR, and human rights scholars, see *id.* at 196–208. For a discussion of the reluctance of Mexican courts to rely on international and foreign law, see Aguiar-Aguilar, *supra* note 81. See also Jorge A. Vargas, *Mexican Law in California and Texas Courts and the (Lack of) Application of Foreign Law in Mexican Courts*, 2 MEX. L. REV. 45, 63–64, 69 (2009).

123. Maya Averbuch, *Mexico Can't Handle Your Tired, Poor, and Huddled Masses*, FOREIGN POLICY (July 30, 2018), <https://foreignpolicy.com/2018/07/30/mexico-cant-handle-your-tired-poor-and-huddled-masses/> [<https://perma.cc/R2L5-HX6H>]. As noted above, Mexican law requires COMAR to issue an initial decision on an asylum claim within 45 days of its submission. See Ley Sobre Refugiados y Protección Complementaria Mexico, *supra* note 60.

124. See Averbuch, *supra* note 123. COMAR processes asylum applications in three locations in Mexico: Mexico City, Tapachula (in the state of Chiapas, near the Guatemalan border), and Acayucan (in the state of Vera Cruz).

125. See Averbuch, *supra* note 123; see also Lily Folkerts, *Behind the Caravan: Seeking Asylum Isn't Easy, Especially in Mexico*, LAT. AM. WORKING GROUP (2018), <https://groups.google.com/forum/#!topic/frontera-list/51eWoEcNsc8> [<https://perma.cc/DN8K-T86E>].

126. See Folkerts, *supra* note 125.

127. See Averbuch, *supra* note 123.

Soon after COMAR announced its suspension of normal operations, the Mexico City office of a large international law firm, working pro bono, filed an *amparo* in Mexico City challenging COMAR's suspension of timelines for reaching decisions on asylum claims.¹²⁸ The claimants in that case were a Salvadoran mother and her three children who had fled violence, sexual assault, and other forms of persecution in their home country. The lawyers representing the family asserted several claims under the Mexican Constitution, including the right to asylum under Article 11, the right to access to justice under Article 17, and the right to due process under Article 14, as well as several claims under the ACHR.¹²⁹

In a decision issued in April 2018, the judge halted COMAR's suspension of timelines for issuing decisions in asylum claims.¹³⁰ In doing so, the judge held that the suspension amounted to a denial of the right to effective justice under the Mexican Constitution and the ACHR.¹³¹ More generally, the judge held that the right to international protection under both Mexican and international law is meaningless without an effective procedure for processing asylum applications in a timely manner.¹³² In this way, the judge ruled that the 45-day deadline was necessary in order for the Mexican Government (acting through COMAR) to comply with Articles 11 and 17 of the Constitution.¹³³ As such, a purely administrative requirement (an

128. Interview 5, *supra* note 86.

129. CONSTITUTION OF MEXICO, *supra* note 69, art. 17. Article 17 of the Constitution of Mexico states in relevant part: "The Mexican Congress shall enact laws to regulate collective actions. Such laws shall establish the cases in which each law applies." CONSTITUTION OF MEXICO, *supra* note 69, art. 17. Article 14 of the Constitution of Mexico reads, in relevant part: "No one can be deprived of his freedom, properties or rights without a trial before previously established courts, complying with the essential formalities of the proceedings and according to those laws issued beforehand." CONSTITUTION OF MEXICO, *supra* note 69, art. 14.

130. See *Juicio de Amparo* 1700/2017 (March 13, 2018) (Rodrigo de la Peza López Figueroa, Juez Noveno de Distrito en Materia Administrativa en el Distrito Federal) [hereinafter "Decision 1700/2017"].

131. *Id.* at 22 (citing art. 17 of the Constitution of Mexico and arts. 8 and 25 of the ACHR). The ACHR describes an effective remedy or recourse as one that protects against violations of one's fundamental rights, including violations committed by those acting under the color of law. Loretta Ortiz Ahlf, *¿Es el Amparo un Recurso Efectivo para la Protección de los Derechos Humanos?*, in *EL JUICIO DE AMPARO A 160 AÑOS DE LA PRIMERA SENTENCIA* 192 (Eduardo Ferrer Mac-Gregor & Rubén Sánchez Gil eds., 1st ed., Mexico: Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas 2011) (citing Article 25 of the ACHR). Sometimes, an effective recourse is also described as one that guarantees conventional rights in a simple and fast manner. *Id.* at 200. Effective recourse has been interpreted more broadly under the ACHR than the Mexican Constitution. For example, under the ACHR, it has been interpreted to mean the right to assistance of counsel and an interpreter, when necessary (so as to render a formal right an effective one), while under the Mexican Constitution it does not. *Id.* at 209. See also Hennebel Ludovic, *The Inter-American Court of Human Rights: The Ambassador of Universalism*, *QUE. J. INT'L L.* 57, https://www.persee.fr/doc/rqdi_0828-9999_2011_hos_1_1_1433 [<https://perma.cc/6MXY-9Z65>] (noting that the Inter-American Court of Human Rights has interpreted an effective recourse to be one that facilitates (1) the ascertainment of whether a violation has taken place, and (2) whether remedies may be implemented).

132. Decision 1700/2017, *supra* note 130, at 22.

133. *Id.*

arbitrary deadline for rendering a decision on an asylum claim) has become a judicially recognized prerequisite for satisfying constitutional rights.¹³⁴

In another noteworthy aspect of this case, the judge ruled that the due process protections at issue were especially important because asylum-seekers, particularly those in detention, are in a position of vulnerability.¹³⁵ This part of the holding mirrors that of the case involving the detained Guatemalan applicant who was deported without notice to his attorneys.¹³⁶ In this case, the judge was particularly concerned that three of the four claimants were children and thus particularly vulnerable.¹³⁷

And finally, it is noteworthy that the judge recognized the constitutional right to asylum both through the provision of the Constitution that explicitly creates that right (i.e., Article 11) and through international treaties that Mexico has signed (in this case, Articles 8 and 25 of the ACHR).¹³⁸

Of course, given Mexico's rules on judicial precedent, the decision's application of constitutional protections to administrative procedures affecting asylum-seekers does not reach beyond the contours of this particular case.¹³⁹ Since the government is unlikely to appeal the decision, there will be no opportunity for a higher court to issue a ruling that would be another step on the way to creating a precedent.¹⁴⁰ Nevertheless, the decision is critical in at least three ways. First, on a practical level, it makes it more likely (though of course not certain) that future asylum-seekers will receive initial decisions more quickly, given that it orders COMAR to abide by statutorily-mandated deadlines for making such decisions.¹⁴¹ Second, it demonstrates a judicial willingness to engage with constitutionalized human rights law on behalf of refugees, and to link constitutional due pro-

134. This evolution in the significance of due process rights is reminiscent of the development in due process protections under U.S. law, beginning before passage of the Fourteenth Amendment, which guaranteed such protections on the constitutional level. Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT. 339, 340–42 (1987) (analyzing the history of U.S. procedural due process arising from English common law principles before passage of the Fourteenth Amendment); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1267–68 (1975) (describing how in U.S. law, procedural due process requires a hearing to protect constitutional rights in administrative law cases).

135. Decision 1700/2017, *supra* note 130, at 23.

136. Decision 1452/2017, *supra* note 101, at 41.

137. Decision 1700/2017, *supra* note 130, at 23.

138. Decision 1700/2017, *supra* note 130, at 22.

139. See Ley de Amparo [Protection Law], *supra* note 891, arts. 222, 223, 224; see also Camarena González, *supra* note 101, at 263–65 (pointing out that in order for a decision on an *amparo* to become precedential, typically there must be five similar decisions at different courts. In other situations, however, the Supreme Court can declare a lower case as precedential, even if it has not been reiterated by another court).

140. *Id.* The decision is unlikely to be appealed because it effectively tells COMAR to abide by the deadlines in the law governing its conduct. The Government might not want to risk its larger holding linking due process and the right to asylum to become precedent.

141. Of course, the court's ruling does not guarantee favorable decisions on individual asylum claims and says nothing about how COMAR should interpret the legal standards for determining such claims. It calls for a more efficient process, but not necessarily one that will result in the granting of more asylum claims.

cess with the right to asylum. The judge here declared that the constitutional right to asylum (under Article 11) requires the state to provide certain aspects of due process (such as timely decisions on applications), without which such a right would be rendered meaningless. Third, this decision holds that refugees, and particularly refugee children, are to be accorded special due process protections under the Mexican Constitution.

In sum, this decision is another example of the willingness of certain judges to hold state actors accountable for violations of the rights of asylum-seekers now enshrined in the Mexican Constitution. While those rights have been available through international instruments such as the ACHR for some time, it is the domestic Constitution—and the lawyers filing claims pursuant to it—that has enlivened those rights. In the past, those rights were mostly words on parchment. It would appear that Mexico is at the beginning stages of making them more meaningful.

C. CURP card (*Clave Unica de Registro Población*)

The CURP card is an identity document issued by the Mexican Government to Mexican citizens and residents, and to certain visitors.¹⁴² It is required in order to access a variety of economic rights and benefits, including work, health care, and education.¹⁴³ While visa holders who are visiting Mexico for various reasons receive a CURP card, asylum-seekers are not eligible to receive one.¹⁴⁴ One refugee lawyer in Mexico City cited this discrepancy as an example of the way that rights have been expanding for many categories of migrants in Mexico, but that things are going in the opposite direction for refugees.¹⁴⁵ Indeed, as this lawyer told me, “Without [the CURP] the asylum-seekers are non-existent to the authorities.”¹⁴⁶

As a result, lawyers working at the law clinic at the Universidad Iberoamericana Ciudad de México and with a large law firm in Mexico City have instituted strategic litigation in order to challenge the inability of asylum-seekers to apply for CURP cards. In doing so, they are invoking several human rights-based provisions in the Mexican Constitution, most notably the prohibition against discrimination in Article 1 of both the Constitution and the American Charter on Human Rights, and the equality

142. See *Getting a CURP Number for Foreigners with Residency in Mexico*, MEXLAW, <https://mexlaw.ca/getting-curp-number-foreigners-residency-mexico/> [<https://perma.cc/NT8W-A3SU>].

143. *Id.*

144. Asylum applicants do receive a photo identification document, but it does not provide a right to services or benefits. Interview 3, *supra* note 98. Refugees and successful asylum-seekers are entitled to basic social services, education, and health. See Freier, *supra* note 59, at 139 (citing Ley sobre Refugiados y Protección Complimentaria, *supra* note 60, art. 44, [http://www.acnur.org/fileadmin/Documentos/BDL/2010/8150](http://www.acnur.org/fileadmin/Documentos/BDL/2010/8150.pdf?file=fileadmin/Documentos/BDL/2010/8150) [<https://perma.cc/6GKV-NSYA>]).

145. Interview 2, *supra* note 98. This discrimination against refugees in matters of benefits is at odds with the court decisions noted above, which assert that refugees should be accorded greater rights because of their vulnerable position. See Decision 1700/2017, *supra* note 130, at 23; Decision 1452/2017, *supra* note 101, at 41.

146. Interview 2, *supra* note 98.

principle in Article 24 of the ACHR.¹⁴⁷ The lawyers also claim that the denial of CURP cards to asylum-seekers violates the Constitution's right to identity.¹⁴⁸ The first of these challenges, brought by an individual asylum-seeker ineligible for a CURP card, is currently pending before a judge in Mexico City.¹⁴⁹

This litigation illustrates the procedural hurdles facing the expansion of rights for asylum-seekers even when the law on the books (in this case the Constitution and the human rights laws it incorporates) would seem to protect it. First, although the Mexican Constitution recognizes class actions, it also stipulates that the legislature shall determine the procedure for such collective litigation.¹⁵⁰ The relevant law limits class actions to disputes over the environment and the consumption of goods and services.¹⁵¹ These restrictions make it difficult to challenge the Government policy regarding the CURP card on a collective basis.¹⁵² Instead, an individual asylum-seeker unable to receive a CURP card would need to endure the many stages and long delays of the litigation process, which can take as long as three years, in order to see a case to fruition and thus have any impact on future cases.¹⁵³ Most asylum-seekers lack the financial resources and necessary time to see such a process through.¹⁵⁴ This is particularly the case for detained asylum-

147. Interview 5, *supra* note 86 (for reasons of confidentiality, the name of the law firm has been omitted from this Article). CONSTITUTION OF MEXICO, *supra* note 69, art. 1. Article 1 of the ACHR reads: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." American Convention on Human Rights, *supra* note 80, art. 1.

148. Interview 5, *supra* note 86. The right to identity is contained in Article 4 of the Mexican Constitution, which reads, in relevant part: "Any person has the right to identity and to be registered immediately after their birth." CONSTITUTION OF MEXICO, *supra* note 69, art. 4.

149. Interview 5, *supra* note 86.

150. See CONSTITUTION OF MEXICO, *supra* note 69, art. 17 ("The Mexican Congress shall enact laws to regulate collective actions. Such laws shall establish the cases in which each law applies.").

151. See CÓDIGO FEDERAL DE PROCEDIMIENTOS CIVILES [FEDERAL CODE OF CIVIL PROCEDURE], art. 578, <http://www.diputados.gob.mx/LeyesBiblio/pdf/6.pdf> [<https://perma.cc/8FNB-E3UB>] ("The defense and protection of collective rights and interests shall be exercised before the courts of the Federation with the modalities indicated in this title, and may be promoted only in relation to the consumption of goods or services, public or private, and environment.").

152. A Mexican NGO is pursuing litigation in order to allow lawsuits by NGOs that have a "legitimate interest" in challenging governmental practices or laws. If successful, that litigation would obviate the need to find an individual who has been harmed by that practice or law. Interview 2, *supra* note 98.

153. Interview 1, *supra* note 89; Interview 4, in Mexico City, Mexico (March 13, 2018). Mexico's collective action law provides standing to NGOs, which obviates the need for named plaintiffs who might abandon protracted litigation. See David P. Vincent, *Group Litigation Reaches Mexico: Revisiting Mexico's System of Collective Actions as a Vehicle to Ensure Efficient Implementation of Environmental Justice*, 5 MEX. L. REV. 401, 418 (2012). However, the law applies only to specifically enumerated types of collective actions, including those involving environmental protection, consumer protection, economic competition, urban development, and cultural property. *Id.* Immigration or refugee disputes are not among those enumerated actions.

154. See *U.S. to Start Returning Asylum Seekers to Mexico on Friday: Report*, AL JAZEERA (Jan. 24, 2019), <https://www.aljazeera.com/news/2019/01/start-returning-asylum-seekers-mexico-friday-report->

seekers. As one lawyer told me, “People who stay detained for the duration of their case end up giving up a lot of times.”¹⁵⁵ As a result, such clients are deported to their home countries.

Second, the most likely way for such a case to proceed to the level of the judicial system in which a precedential decision might be issued is if the individual applicant is denied the benefit by lower administrative tribunals and courts.¹⁵⁶ Challenges to the denial of a state benefit program that are successful at those early stages in the litigation process will not generate precedential jurisprudence. Third, as noted above, the process through which a lower court opinion achieves precedential status is protracted and expensive.¹⁵⁷ To the extent that this process involves a number of decisions in different district courts reaching the same result but on slightly different facts, it is often difficult for the lawyers collaborating on those various cases to maintain a single strategy. As one lawyer put it with respect to the litigation over the CURP card:

In these cases there is a case-by-case analysis by [COMAR], so even though the resolutions by COMAR are mostly the same, they analyze specific things about the claimant, so it’s a little harder to have a unified strategy with all of our allies.¹⁵⁸

Another hurdle with this type of litigation in Mexico is the lack of interest or expertise in human rights law within a large portion of the Mexican judiciary. As one lawyer put it, “Many judges are not confident about the role of judicial power with respect to asylum-seekers.”¹⁵⁹ As such, Mexican cause lawyers often find themselves in the role of educating judges about human rights law.¹⁶⁰

On the other hand, lawyers whom we interviewed found that many administrative judges who hear individual cases are more excited about apply-

190124202651059.html [https://perma.cc/4DNK-UKHA] (noting that asylum-seekers in Mexico are escaping poverty and crime in their home countries); see also *Key facts about the Migrant and Refugee Caravans Making their Way to the USA*, AMNESTY INT’L (Nov. 16, 2018), <https://www.amnesty.org/en/latest/news/2018/11/key-facts-about-the-migrant-and-refugee-caravans-making-their-way-to-the-usa/> [https://perma.cc/C7MA-GW6U] (noting that poverty is a motivating factor for many asylum-seekers from the Northern Triangle).

155. Interview 6 in Mexico City, Mexico (March 12, 2018).

156. The Government would be unlikely to appeal an adverse ruling at this stage, as it would have no precedential value. See Camarena González, *supra* note 101, at 262 (“Thus, in civil law, in contrast to common law, single precedents were considered irrelevant, and even when reiterated their role was subordinated to that of legislation.”) There is therefore no guarantee that another asylum seeker who had the means to retain an attorney would receive the same result.

157. See *supra* note 98.

158. Interview 2, *supra* note 98.

159. Interview 3, *supra* note 98. Another lawyer indicated that most lawyers do not think that the Mexican Supreme Court understands human rights law. Interview 2, *supra* note 98.

160. I noticed this same phenomenon during my research on the impact of human rights treaties on asylum jurisprudence in Canada between 1990 and 2012. As one lawyer whom I interviewed put it, “I don’t think that most of the federal court judges are very open to novel arguments using the international law.” Meili, *Human Rights Treaties*, *supra* note 83, at 648.

ing human rights law to those cases than the appellate level judges who are in a position to create precedent. One lawyer attributed this to the compelling nature of asylum cases compared to the normal tax and government benefit-related issues that take up the balance of an administrative judge's docket.¹⁶¹ A decision on an asylum-seeker's application is likely to have a far more long-lasting and important effect on an individual's survival than a ruling on a tax claim. But while helpful to individual asylum-seekers requesting protection from deportation, this contextual difference has little benefit for those lawyers seeking to create far-reaching judicial precedent through strategic litigation. The rulings of administrative judges on individual asylum claims have no precedential value.¹⁶²

An additional hurdle related to the lack of awareness of human rights law within the judiciary is the reluctance of many judges to rule on constitutional issues.¹⁶³ This is known as the legality principle, and is connected to Mexico's civil law tradition, under which courts will only consider a legal challenge if it is governed by the Civil Code.¹⁶⁴ As such, many judges will rule on the legality of a particular practice under the Civil Code but not on its constitutionality.¹⁶⁵ One of the lawyers working on the CURP litigation acknowledged that the legality principle will make it "a tough litigation . . . We need [the judges] to approach the case as a constitutional claim."¹⁶⁶

Overall, then, the cases analyzed in this article provide striking examples of the potential of, and obstacles to, the diffusion of human rights norms within Mexican legal culture through strategic litigation. Whether such diffusion will hold, and whether it will make a difference in the lives of refugees and asylum-seekers remains to be seen; the decisions in these cases are recent, and the courts are just becoming familiar with constitutionalized human rights law. What is more likely is that Mexican cause lawyers will continue pressuring courts to hold state actors accountable under these new constitutional provisions and the international human rights law that they incorporate.¹⁶⁷

161. Interview 5, *supra* note 86. A federal judge's docket is more varied, such that the opportunity to rule on the appeal of an asylum adjudication would not tend to stand out.

162. See Axel Garcia, *International Refugee Law in Mexico*, 31 FORCED MIGRATION REV. 71 (2008), <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/climatechange/garcia.pdf> [https://perma.cc/J7VV-GRXX].

163. Interview 2, *supra* note 98. This reluctance is similar to the principle of constitutional avoidance in U.S. jurisprudence. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.").

164. See Vargas, *supra* note 122, at 27–28.

165. Interview 2, *supra* note 98.

166. Interview 2, *supra* note 98. If the dispute over the CURP card is decided on constitutional grounds rather than based on the Civil Code, it is likely to have a much broader impact, as it will be tied into constitutional provisions regarding equality and identity.

167. The lawyers whom we interviewed were eager to test the parameters of newly constitutionalized human rights provisions through strategic litigation. See Interview 2, *supra* note 98; Interview 3, *supra* note 98; Interview 4, *supra* note 153; Interview 5, *supra* note 86.

V. ANALYSIS OF POSSIBLE IMPACTS OF STRATEGIC LITIGATION

Given the early stages of the strategic litigation analyzed in this Article, it is useful at this point to discuss the likelihood that these cases will have a lasting impact according to the factors which I, and others, have previously identified as being conducive to the effective utilization of constitutionalized human rights law. Each of these factors is discussed below in the Mexican context.

A. *An independent judiciary willing to challenge the other branches of government*

According to the World Justice Institute's Rule of Law Project, Mexico's civil justice system is ranked ninety-second out of 113 countries globally and twenty-fifth out of thirty in Latin America.¹⁶⁸ These rankings include factors such as undue influence from other branches of government, effective enforcement, and undue delays (only Nicaragua, Honduras, Guatemala, Bolivia, and Venezuela fare worse regionally).¹⁶⁹ On the other hand, several scholars have noted that the Mexican judiciary has become more independent in the past two decades.¹⁷⁰ Indeed, some of the lawyers I interviewed for this Article stated that there are some progressive judges willing to engage with human rights-based arguments raised in strategic litigation.¹⁷¹ Additionally, many administrative law judges are interested in asylum cases because they present more compelling factual situations than the typical administrative matters which come before them.¹⁷² The new provisions in the Constitution have greatly expanded the toolkit through which cause lawyers can present such arguments, and compelling fact patterns, to judges. The next few years of strategic litigation on behalf of refugees in Mexico will determine the extent to which that toolkit is effective.

The results in two of the three cases analyzed in this Article bear out that in at least these individual cases, judges in Mexico are willing to hold state officials accountable for violations of the constitutional rights of refugees. Whether those decisions will be upheld on appeal and whether they become precedential is another question, and will take longer to determine. Even if they become precedential, the question of whether that precedent results in

168. WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2017–18 20–24 (2018), https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf [https://perma.cc/UHC2-4F5W].

169. *Id.*

170. See, e.g. Julio Ríos Figueroa, *Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994-2002*, 49 *LATIN AM. POL. & SOC'Y.* 31, 49 (2007) (arguing that Mexico's judiciary became more independent and thus increasingly effective because of increased fragmentation in the elected branches of government at the end of the twentieth century); Karina Ansolabehere, *More Power, More Rights? The Supreme Court and Society in Mexico*, in *CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA* (Javier Couso ed., 2010); BRINKS AND BLASS, *supra* note 23.

171. Interview 2, *supra* note 98; Interview 3, *supra* note 98.

172. See *supra* note 98.

improved human rights outcomes for refugees will take many years and many cases to determine. However, given the cases analyzed above, Mexico appears to be at the beginning stages of a movement beyond a legal framework for refugees that is merely progressive on paper to one in which constitutionalized human rights provisions provide actual protection to refugees.

B. The presence of domestic and transnational cause lawyers able to navigate the local legal and political landscape in order to maximize positive outcomes for their clients

Mexico has a small but active cadre of civil society organizations and law school clinics dedicated to the cause of refugee rights.¹⁷³ Based on the interviews conducted for this article, these organizations are keenly aware of the potential for constitutionalized human rights law to advance that cause.¹⁷⁴ Indeed, they may see it as the only plausible means to that end. According to one of the lawyers I interviewed for this Article, “we don’t have another option” in protecting the rights of asylum-seekers but to pursue strategic litigation based on constitutionalized human rights law.¹⁷⁵ As this lawyer put it, “the problem is that we have to move forward with the law, and try to make the institutions and the public change and conceive of the law in a different way in the case of asylum-seekers . . . We don’t have standards or rationality or substance for developing the law . . . particularly in this area.”¹⁷⁶ Another lawyer stated that

[strategic litigation] is not an easy way; we have to fight [against] a lot of practices, with a lot of traditions, but sometimes you have a lucky strike and results are made. Strategic litigation

173. See, for example, the organizations listed in Fundación Para La Justicia, *Organizations That Help Immigrants*, <http://fundacionjusticia.org/organizaciones-que-apoyan-a-migrantes/> [https://perma.cc/D77A-BSLH]. As of 2011 (the last year for which such data are available), Mexico had between 20,000 and 35,000 civil society organizations (“CSOs”) focused on a variety of social and political activities and causes. Lorena Cortés Vázquez et al., *A SNAPSHOT OF CIVIL SOCIETY IN MEXICO: ANALYTICAL REPORT ON THE CIVICUS CIVIL SOCIETY INDEX* (2011). However, there is much more civic engagement in social CSOs than those devoted to political issues. *Id.* at 33–35. CSOs themselves perceive that they have a limited impact on state policy, while the stakeholders they attempt to influence feel that they have a slightly greater impact. *Id.* at 53–57.

174. Interview 1, *supra* note 89; Interview 2, *supra* note 98; Interview 3, *supra* note 98; Interview 4, *supra* note 153; Interview 5, *supra* note 86. Interview 6, *supra* note 155.

175. Interview 3, *supra* note 98.

176. *Id.* This comment underscores the notion that strategic litigation in Mexico has at least two main purposes: the first, and most obvious, is to remedy the deprivation of rights which state action has brought about. The second, and more subtle, is to educate the judiciary, and the public generally, about the potential for the Constitution, as recently amended, to protect those rights. As one of the lawyers I interviewed indicated, the Mexican legal culture does not trust human rights standards and does not view human rights law as Mexican law. Interview 1, *supra* note 89. According to this lawyer, there is a need for bottom-up change in the legal culture that consists of strategic litigation, education in the schools, and encouraging lawyers to invoke constitutionalized human rights law in their challenges to state conduct. *Id.*

has changed a lot of subjects. I think it is definitely way better than nothing. But there is a lot to be done. For example, we need to improve the structural approach of judges.¹⁷⁷

One of the ways that cause lawyers in Mexico are attempting to maximize the potential offered by constitutionalized human rights law is to work together on strategic litigation. Thus far, they have done so in a number of ways. In some situations, they co-counsel litigation, corraling their resources and making it less difficult for any particular NGO to work on the case.¹⁷⁸ In other situations, one or two sets of lawyers serve as principle counsel while others file amicus briefs.¹⁷⁹ Given the procedural requirement that there be five separate lower tribunal decisions reaching the same result before that result becomes binding precedent, it has been helpful for different NGOs to take on similar cases simultaneously or in rapid succession.¹⁸⁰ In addition to helping the lawyers handle the formidable time commitment and expense that litigation entails, these collaborations also have a strategic motive. As one private attorney who works with a law school clinic in Mexico City told me, partnering with an NGO on a case demonstrates the importance of the underlying issue.¹⁸¹ The strategic partnering with NGOs on litigation suggests that cause lawyers in Mexico are well aware of the local political and legal context relevant to such litigation.¹⁸²

On the other hand, it became apparent during my interviews that while Mexican cause lawyers in different organizations typically collaborate with each other on strategic litigation and other forms of advocacy, there is little, if any collaboration between them and international and/or transnational NGOs.¹⁸³ One of the attorneys I interviewed attributed this to some of the procedural quirks in Mexican law, which make the disputes very country-specific.¹⁸⁴ Another believed that some of the strategic litigation (such as the challenge to the denial of the CURP card to asylum-seekers) concerns issues (in this instance public benefits for asylum-seekers) for which Mexico's laws are already superior to other countries in the region.¹⁸⁵ In such

177. Interview 2, *supra* note 98.

178. See, e.g., the litigation regarding the CURP card, *supra* Part IV(C).

179. See, e.g., the litigation regarding the Guatemalan asylum-seeker who was returned to his home country without notice to his lawyers in Mexico, *supra* Part IV(A).

180. Interview 3, *supra* note 98.

181. Interview 3, *supra* note 98. This view is supported by public opinion data, discussed later in this Article, indicating that a majority of Mexicans, including those in leadership positions, have a generally positive view of human rights NGOs, whether they operate exclusively in Mexico or internationally.

182. See GLOPPEN et al., *supra* note 44, at 153 ("understanding superior courts' exercise of accountability functions requires an in-depth understanding of the local political and legal context and the interrelations between institutional, sociopolitical, and actor variables.").

183. This observation is consistent with data on Mexico's civil society organizations more generally, which indicates that "although Mexico houses multiple international organizations, in the sphere of CSOs there seems to be a low level of international linkages. . ." See Vázquez et al., *supra* note 173, at 44.

184. Interview 2, *supra* note 98.

185. *Id.*

instances, the input from other countries would have limited impact on Mexican judges. As this lawyer put it:

We have to acknowledge that Mexico has a pretty good law [regarding socioeconomic rights for asylum-seekers]. And we are privileged in that sense.¹⁸⁶

Whatever the reason, there appears to be less coordination between advocates within and outside Mexico than I have seen in other national contexts.¹⁸⁷ This is surprising, given that advocates in other national contexts in the region, as well as relevant scholarship, emphasize that domestic courts pay more attention to constitutional challenges to state behavior when they know that “the world is watching.”¹⁸⁸

Another obstacle to cause lawyers’ effective use of constitutionalized human rights law on behalf of refugees is a legal culture that, as one attorney mentioned “does not trust the human rights standards.”¹⁸⁹ According to this lawyer:

There is a whole process of changing the legal culture in Mexico The asylum procedure is part of this process, because human rights tends to be looked upon as international ideas that are not part of the Mexican legal system as such So it’s been a challenge; the Mexican Supreme Court has issued a decision which states that international legal standards for human rights are applicable in Mexico unless the Constitution says otherwise Human rights standards are second to the Constitution. This tends to trickle down throughout the whole legal culture. And what is happening now is there is a push from the bottom-up to change the legal culture. And it’s happening slowly; it’s taking time. But you have to consider that human rights reforms are only seven years old in Mexico. So it’s a process that I think will take ten to fifteen years to fully complete itself and really see a modified panorama of the way that judges and adjudicators are going to be deciding cases.¹⁹⁰

According to this lawyer, this bottom-up change in the legal culture must come from two sources: (1) law schools need to disseminate the idea of the

186. *Id.*

187. In contrast, domestic and transnational cause lawyers worked collaboratively on many aspects of the recent strategic litigation challenging a Presidential decree limiting the rights of asylum-seekers in Ecuador. See Meili, *supra* note 11.

188. See *id.* See also GLOPPEN et al., *supra* note 44, at 171 (“the combination of a strong civil society and consistent international attention serving as protective constituencies goes a long way toward explaining the relatively strong performance of the South African Constitutional Court in the context of a dominant single-party system”).

189. Interview 1, *supra* note 89

190. *Id.*

culture of rights; and (2) strategic litigation: “There has to be much more litigation on rights claims.”¹⁹¹

Another lawyer made a similar observation about the impediments of a legal culture that does not recognize the importance of human rights: “It is at the Supreme Court that there is a discussion of international precedent But the judges below, where most of the cases occur, it just doesn’t make its way there.”¹⁹² Contributing to this difficulty in making human rights law more acceptable within all levels of the judiciary is that many lawyers are similarly unaware of that law. As one lawyer noted:

The main reason why most of the lawyers don’t try to reach the Supreme Court [or federal circuit courts] is because there is a lack of sensitivity about these [human rights] issues They don’t know anything about these issues.¹⁹³

In Mexico, then, a large part of the difficulty in navigating the political and legal landscape is battling a legal culture (including lawyers and judges) that is, at best, ignorant of international human rights and their applicability in the asylum context. Such difficulty is exacerbated when certain elements of that legal culture (i.e., certain judges) are hostile to human rights and view them as not having any role in Mexican jurisprudence.

C. The state’s global reputation for protecting non-citizens

Mexico has a long history of accepting non-citizens fleeing foreign conflicts and persecution dating back to the nineteenth century.¹⁹⁴ The first two examples of large scale migrations of this sort were from the United States. Following the American Civil War, many southerners from the Confederate States sought asylum in Mexico.¹⁹⁵ Not long thereafter, in response to the Chinese Exclusion Acts,¹⁹⁶ many Chinese immigrants from the United States sought refuge in Mexico, where, among other things, they were able to become naturalized citizens.¹⁹⁷

During the mid-twentieth century, Mexico accepted over 20,000 refugees fleeing the Spanish Civil War and the Franco dictatorship and about 1,500 Jews from Germany and Austria during World War II.¹⁹⁸ After

191. *Id.*

192. Interview 6, *supra* note 155.

193. Interview 2, *supra* note 98.

194. ANDREW ROLLE, *THE LOST CAUSE: THE CONFEDERATE EXODUS TO MEXICO* 9–10 (1965).

195. *Id.*

196. 1882 Chinese Exclusion Act, Sess. I, Chap. 126; 22 Stat. 58.47th Congress; Approved May 6, 1882.

197. JULIA MARIA SCHIAVONE CAMACHO, *CHINESE MEXICANS: TRANSPACIFIC MIGRATION AND THE SEARCH FOR A HOMELAND, 1910-1960* 23–26 (2012).

198. Most of the refugees from the Spanish Civil War had initially fled to France, but conditions in the internment camps where they were housed were intolerable. See Jaime Rubio Hancock, *When Spaniards were the Refugees*, *EL PAIS* (Sept. 9, 2015), https://elpais.com/elpais/2015/09/03/inenglish/1441275302_272830.html [<https://perma.cc/R4QL-3P52>]; Yetlaneci Alcaraz, *De los campos nazis a*

World War II, many exiles from the United States fled to Mexico during the McCarthy era.¹⁹⁹ In the 1980s, Mexico accepted thousands of refugees fleeing the armed conflict in Guatemala.²⁰⁰

On the other hand, Mexico has a conflicted attitude towards refugees and asylum-seekers. As one lawyer I interviewed noted, “We hate them and we love them.”²⁰¹ Another lawyer stated that the Mexican public views Central Americans refugees as criminals, which will make it difficult for them to be integrated into Mexican society.²⁰² Two lawyers indicated that much of the public does not differentiate between refugees and migrants, which means they do not draw a distinction between those individuals fleeing persecution and those coming to Mexico for economic opportunity.²⁰³

Despite these somewhat negative assessments, quantitative data tracking Mexican public opinion toward Central American migrants over the past decade shows a gradually increasing positive attitude, even in recent years when the size of that population has increased dramatically. According to a recent study by the Centro de Investigación y Docencia Económicas (“CIDE”), in 2006 46 percent of the Mexican population viewed Central American migrants either very favorably or somewhat favorably, whereas 44 percent viewed them either very unfavorably or somewhat unfavorably.²⁰⁴ The “favorable” proportion reached its highest point (63 percent) in 2016, the last year for which data were available.²⁰⁵ Interestingly, although public opinion toward Central Americans as reflected in this survey is generally positive, it was far less so when the question concerned a particular country rather than the region as a whole. In 2014, 56 percent of Mexicans had a favorable view of Central Americans generally, but only 28 percent reported having a good or very good opinion of Guatemalans living in Mexico.²⁰⁶

México, PROCESO (Jan. 7, 2013), <https://www.proceso.com.mx/329741/de-los-campos-nazis-a-mexico> [<https://perma.cc/9LZQ-D6FN>]. See also ALICIA ALTED VIGIL, *LA VOZ DE LOS VENCIDOS: EL EXILIO REPUBLICANO DE 1939* (2005).

199. REBECCA MINA SHREIBER, *COLD WAR EXILES IN MEXICO: U.S. DISSIDENTS AND THE CULTURE OF CRITICAL RESISTANCE* (2008).

200. Rojas Wiesner, Martha Luz & Hugo Ángeles Cruz, *Gendered Migrations in the Americas: Mexico as Country of Origin, Destination, and Transit*, in *NEW PERSPECTIVES ON GENDER AND MIGRATION: LIVELIHOOD, RIGHTS, AND ENTITLEMENTS* (Nicola Piper ed. 2008) 191, 209–11.

201. Interview 3, *supra* note 98.

202. Interview 4, *supra* note 153.

203. Interview 3, *supra* note 98; Interview 5, *supra* note 86. This failure to differentiate between types of migrants suggests a lessening of public support for refugees, which have traditionally been perceived in a sympathetic light. See Helen Dempster & Karen Hargrave, *Understanding Public Attitudes towards Refugees and Migrants* 10 (Chatham House Working Paper 512 (2016) (“... people tend to be more favorably disposed towards those recognized as refugees than they are towards asylum-seekers and other migrants”).

204. GERARDO MALDONADO et al., *CIDE, MEXICO, THE AMERICAS, AND THE WORLD 2004-2014: TEN YEARS OF PUBLIC OPINION AND FOREIGN POLICY* 110 (2016). The researchers for this project conducted the same survey questions on attitudes toward Central Americans biennially between 2006 and 2014.

205. *Id.*

206. *Id.* On the other hand, 24 percent of Mexicans had a bad or very bad opinion of Guatemalans living in Mexico in 2014, and 42 percent had an unfavorable impression of Central American migrants

Nevertheless, the public's increasing acceptance of Central American migrants, at a time when their numbers are rising, suggests that a majority of Mexicans may be receptive to the types of changes in public policy toward refugees that strategic litigation—such as that described in this Article—is intended to produce.

A related factor which may be conducive to the effective utilization of constitutionalized human rights law in Mexico is the positive public attitude toward domestic and international human rights NGOs, especially among those whom the CIDE survey categorizes as “leaders.”²⁰⁷ In 2014, 49 percent of the general public, and 71 percent of leaders, responded that they trusted Mexican human rights organizations “very much” or “somewhat.”²⁰⁸ The view of international human rights organizations was even more positive: while a similar 49 percent of the general public felt they could trust such organizations, a full 84 percent of leaders expressed that feeling.²⁰⁹ This public support for human rights NGOs, particularly among leaders and particularly for international NGOs, suggests that Mexican cause lawyers conducting or contemplating strategic litigation should consider seeking the assistance of such NGOs and making that assistance known to the judges hearing that litigation, as well as the general public. In addition to conveying the message that “the world is watching,” such support is likely to receive a positive public reaction. These lawyers should also remind state actors and the general public about Mexico's history of openness toward refugees, as well as the opportunity to establish a distinction between Mexico and the U.S. when it comes to respecting refugee rights.²¹⁰

generally. *Id.* The authors of the CIDE study attribute the discrepancy in positive attitudes between the two groups to a well-known phenomenon in which the evaluations of a collectivity differ markedly from evaluations of a particular member of that collectivity. *Id.* at 111.

207. Leaders surveyed in the CIDE study included Mexicans with managerial or directive positions in five sectors: governmental, political, private sector, media and academia/university, and occupational-social. *Id.* at 132.

208. *Id.* at 119.

209. *Id.*

210. It became apparent during interviews for this Article that the current geopolitical conflict between Mexico and the U.S. regarding immigration may encourage a more expansive view of the rights of non-citizens within both the judiciary and the general public in Mexico. As I heard from several of the lawyers whom I interviewed for this Article, the Mexican Government (which, of course, includes its judiciary) wants to show that it is more accommodating toward non-citizens than the increasingly restrictive, discriminatory, and xenophobic United States. Whether that desire translates into judicial decisions and policy reforms remains to be seen, but it may be a contributing factor to an increased effectiveness of constitutionalized human rights law in Mexico. As I learned during my research on Colombian refugees in Ecuador, worsening geopolitical relations between Colombia and Ecuador in the early 2000s contributed to Ecuador's more receptive approach (at least temporarily) toward Colombians entering Ecuador to escape the armed conflict in their home country. See Meili, *supra* note 11. Of course, refugees have long been pawns in foreign policy disputes between sovereign states.

D. The degree to which a constitutional challenge on behalf of non-citizens threatens key state actors

Of the three examples of strategic litigation analyzed in this Article, the challenge to COMAR's post-earthquake policy changes would seem to be the least threatening to state actors. The court's rejection of a slowdown in the processing of asylum applications will likely create budgetary pressures and bureaucratic headaches, but it does not pose an existential threat to governmental agencies or the officials who run them. It requires those officials to abide by the due process requirements related to their positions; it tells them that they need to conduct their jobs according to the letter of the law (that is, both the Mexican Constitution and domestic statutes, as well as international law). It does not, however, guarantee asylum or complementary protection; it only guarantees that applications for such relief are processed expeditiously. In fact, it could result in more, rather than fewer, denials of protection. That is, a mandate for a more rapid decision-making process could result in government officials investigating asylum and refugee applications less thoroughly than they otherwise might, and in doing so, could overlook or fail to unearth evidence that would strengthen such applications.

The litigation on behalf of the Guatemalan asylum-seeker is similar to the COMAR case in its demand for proper due process procedures rather than a substantive benefit. The initial decision in the case tells the relevant governmental agencies that they can no longer simply deport refugees without informing them of their rights and allowing them to see the asylum process through to its conclusion. Like the COMAR decision, it may result in significantly more bureaucratic processing and governmental expenditures, particularly as the number of asylum-seekers and refugees in Mexico continues to grow. But it does not direct them to grant asylum or complementary protection in any particular case. However, if fully implemented, it will result in a significant change to a longstanding government practice (i.e., the summary deportation of refugees), as opposed to a return to the status quo ante, as in the COMAR decision.²¹¹ In this sense, the decision is a greater threat to government officials than the COMAR decision.

Unlike the first two cases, the strategic litigation over the CURP cards seeks a tangible social benefit rather than due process rights. And because it does so at a time of increasing pressure on state resources, a successful lawsuit might pose a significant challenge to those in power. In addition to requiring greater state expenditures on public benefits, a ruling in favor of asylum-seekers might result in hostility toward the Government for provid-

211. In this respect, the decision in the COMAR deadline case resembled the Ecuadoran Constitutional Court's 2014 decision overturning (in part) a Presidential Decree limiting the rights of refugees. See Meili, *supra* note 11. In that decision, the Court reinstated parts of Ecuadorian law that the Decree had restricted (such as the applicability of the Cartagena Declaration and deadlines for applying for asylum). *Id.*

ing enhanced benefits to non-citizens at a time when nearly half of all Mexican citizens live in poverty.²¹² Thus, for both economic and political reasons, the CURP card litigation is most likely more threatening to government officials than either of the other two cases analyzed in this Article.

E. Whether the state has other means to accomplish its objectives short of violating the rights of non-citizens

This factor would seem to present a clearer path to success in the case of the COMAR deadline litigation, less so in the case of the deported Guatemalan asylum-seeker, and even less in the CURP card litigation. In the COMAR litigation, the Government can simply return to implementing the deadlines for decisions it had followed previously (though its track record in this regard was wanting, even before the 2017 earthquake). Indeed, as suggested above, it is possible that the Mexican Government would welcome a court-mandated return to the status quo, as that might provide leverage to request additional funding in order to meet the requisite deadline for processing asylum applications. Such funding would permit the Government to fulfill its stated objectives: processing asylum applications without violating the rights of asylum-seekers.

In the case of the deported Guatemalan asylum-seeker, the only way that the Government can avoid violating the rights of future asylum applicants in similar positions is to cease its practice of summarily deporting such applicants. Here again, a judicial precedent ordering the relevant agencies to accord full due process rights to asylum and refugee status applicants (and not summarily deport them) might embolden those agencies to seek additional funding and influence within the Mexican bureaucracy. Whether those due process protections would result in more applicants receiving asylum or complementary protection is an entirely different question. Assuring procedural due process does not guarantee substantive outcomes.²¹³

However, short of a huge infusion of funds (and the acquisition of significant political courage), it is difficult to imagine any circumstances under

212. According to the World Bank, as of 2016 Mexico's official poverty rate was 43.6 percent. See WORLD BANK GROUP, COUNTRY POVERTY AND EQUITY BRIEF: MEXICO (2018), https://databank.worldbank.org/data/download/poverty/33EF03BB-9722-4AE2-ABC7-AA2972D68AFE/Global_POVEQ_MEX.pdf [<https://perma.cc/4TUZ-395W>].

213. One area where greater due process and access to justice protections might result in greater success for asylum applicants is in the area of right to counsel. Studies in the U.S. have demonstrated that asylum applicants are far more likely to succeed if they are represented by counsel. See Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 384 (2007) (indicating that unrepresented affirmative asylum applicants in U.S. immigration court succeed at a rate of 16 percent, while represented applicants win at a rate of 46 percent). While Mexican law does not guarantee asylum-seekers the right to counsel, it does require that they be advised of their right to obtain counsel on their own. See *Ley Sobre Refugiados y Protección Complementaria Mexico*, *supra* note 60. Assuming that such notice will increase the number of asylum-seekers able to retain counsel, it is likely that it will also result in a higher grant rate for asylum-seekers.

which the Government might be willing to provide the social and economic benefits to asylum-seekers available through a CURP card.²¹⁴

In sum, a few of the factors which have influenced the way cause lawyers have been able to successfully utilize constitutionalized human rights laws to accomplish their rights objectives in other national contexts are present in the Mexican cases analyzed in this Article, while others are not. Mexico's judiciary has become more independent over the past two decades, and has at least some individual judges who are willing to take on the state's immigration and refugee bureaucracy. It has a relatively active civil society on refugee matters whose members act cooperatively and strategically in devising litigation to challenge state violations of the constitutional rights of non-citizens. But for the most part that cooperation is limited to domestic actors; there seems to be little engagement with transnational NGOs. Mexico has a reputation for assisting refugees, though public opinion appears to be split on receptivity toward Central American refugees in particular. The three examples of litigation analyzed in this Article present different levels of threat to state officials and alternatives to achieving governmental objectives. Time will tell whether those factors conducive to the effective utilization of constitutionalized human rights law which are present in the Mexican context will be sufficient to help bring about positive human rights outcomes through the strategic litigation analyzed in this Article.

CONCLUSIONS

This Article has analyzed two interrelated phenomena in Mexico which suggest that scholarly reports of the demise of refugee law—at least in the Mexican context and perhaps elsewhere in Latin America—may be premature.²¹⁵ The first of these phenomena is the increased and very conscious use of constitutionalized human rights law by cause lawyers representing refugees from Central America. The second is the willingness of isolated lower court judges to engage with international human rights law through the Mexican Constitution and to hold state actors accountable for violating it.

With respect to the cause lawyers, this Article has demonstrated that they are pursuing carefully orchestrated strategic litigation based on recently enacted constitutional reforms. Among other things, these reforms have conferred constitutional status on the right to asylum and refugee status, as well as the panoply of rights contained in those human rights instruments to which Mexico is a party. The lawyers' strategic approach includes focusing on cases which feature sympathetic plaintiffs, such as single mothers and their children, and collaborating with other cause lawyers, law clinics, and NGOs. These collaborations permit cause lawyers not only to

214. As noted above, the CURP card entitles those who hold it a variety of government-funded benefits, including the right to work, health care, and public education. See *supra* Part IV(C).

215. See *supra* note 49.

share the significant costs and other burdens of strategic litigation, but also to raise the visibility and credibility of the case in the eyes of the judiciary and the public. In some cases, these lawyers are willing to push the envelope of legal argument, such as with the (thus far unsuccessful) claim that the Government's failure to supply lawyers with their client's government file constituted a denial of their constitutional right to pursue their chosen profession without government interference. While such arguments might antagonize some traditional judges, they might appeal to more progressive elements in the Mexican judiciary.

On the other hand, at least in the cases analyzed in this Article, Mexican cause lawyers have not collaborated with transnational cause lawyers. While there may be perfectly reasonable strategic reasons for doing so, this Article has suggested that such collaborations might assist domestic lawyers, given the high esteem in which international human rights NGOs are held by the Mexican public generally, and leaders in particular. Such collaborations would most likely lend additional credibility to strategic litigation on behalf of refugees.

Moreover, the judges who have issued rulings in the cases analyzed in this Article were willing to hold state actors accountable for violations of the constitutional rights of refugees and asylum-seekers. In doing so, these judges acted in ways that might have seemed extraordinary to observers of the Mexican judiciary in the past. For example, their rulings are based not only on the Mexican Constitution, but also on international human rights instruments, as well as on the jurisprudence and advisory opinions of the Inter-American Court of Human Rights. Such reliance on both the documents and jurisprudence of international human rights is striking evidence of the diffusion of human rights norms through at least some parts of the Mexican judiciary.

In addition, these courts have recognized two concepts critical to the effectiveness of the constitutional right to asylum. First, such a right is meaningless without effective due process and access to justice protections such as reasonable deadlines for issuing decisions on asylum applications, meaningful notice about the status of one's asylum application, a guarantee of safety while in detention, and reasonable access to one's lawyers. Courts in Mexico have explicitly linked these procedural protections to the substantive right to asylum.

Second, these courts have recognized that refugees are a particularly vulnerable group, rendering any proposed denial of their due process rights subject to additional judicial scrutiny. Furthermore, that recognition of vulnerability is particularly justified when the refugee is a child. At a time when many states around the world are endeavoring to limit or eliminate the rights of refugees (including refugee children), judicial opinions holding that refugees are entitled to *greater* protection than citizens are extremely noteworthy.

Of course, this Article has highlighted only a select few cases, none of which have reached the point where judicial decisions have attained precedential status. But any one of them could go on to become the “lucky strike” that cause lawyers envision and hope for.²¹⁶ If that happens, Mexico will be in the vanguard of countries that have adopted the constitutional right to asylum.

Circling back to the theoretical framework of this Article, there can be little dispute that the examples of strategic litigation it has analyzed focus on protecting individual rights rather than on contesting the historic struggles over colonialism.²¹⁷ The lawyers interviewed for this Article would likely acknowledge this distinction, and perhaps even embrace it. Further, this litigation does not address the root causes of migration from Central America or elsewhere. On the other hand, as Conçalvez and Costa note, strategic litigation based on constitutionalized human rights law is the means to an end, rather than an end in itself.²¹⁸ In the cases analyzed in this Article, those ends are access to the asylum adjudication process (as in the Guatemalan deportee and COMAR litigation) or greater access to social and economic benefits (as in the CURP litigation). Again, access to such processes or benefits does not challenge the causes of cross-border migration of Central Americans into Mexico or the poverty and marginalization of many who undertake such a journey. But it does, at the very least, attempt to address some of the more egregious ramifications of these problems, and provide protections from persecution and other harms that the receiving state (here, Mexico) would otherwise be unwilling to afford.

Moreover, this Article has suggested an additional factor in the calculus of the effectiveness of constitutionalized human rights law: procedural barriers to legal enforcement of that law. Mexico sports many of them: restrictive class action requirements; restrictions on the ability of human rights NGOs asserting claims on behalf of those individuals for whom they advocate; and burdensome limitations on judicial decisions becoming precedent. Indeed, on the latter point, the civil justice system itself can be a barrier to effective enforcement of constitutionalized human rights law, given its aversion to *stare decisis* generally.²¹⁹

The limits that such procedural hurdles impose on strategic litigation might be seen as part of Gargarella’s constitutional “engine room” that Mexican reformers left untouched while adding a plethora of rights provi-

216. See Interview 2, *supra* note 98.

217. See Conçalvez & Costa, *supra* note 26.

218. *Id.*

219. On the other hand, while many scholars assume that courts in civil law countries demand less accountability from state actors for rights violations than do courts in common law countries, Gloppen et al., found that this is not necessarily the case. See GLOPPEN ET AL., *supra* note 44, at 151, 172 (discounting the importance of legal system in understanding the extent to which high courts encourage state actor accountability).

sions.²²⁰ Just as constitutional rights are mere words on paper without independent judiciaries willing to enforce them and active civil societies to hold state actors accountable, so too are they rendered relatively punchless if procedural restrictions hamper their utility in strategic litigation. Such restrictions can limit access to justice (e.g., through standing requirements) and the reach of favorable decisions (e.g., through lack of precedent). Thus, future research on the effectiveness of constitutionalized human rights law will need to drill down a bit in order to determine the extent to which procedural rules limit that effectiveness. In Mexico, as this Article has demonstrated, those restrictions are significant.²²¹

In conclusion, Mexico provides an intriguing site for the study of the circumstances under which constitutionalized human rights law provides an effective component of the legal toolkit available to cause lawyers advocating on behalf of refugees. It has an increasingly independent judiciary, cause lawyers determined to pursue strategic constitutional litigation on behalf of refugees, at least a few lower-level judges willing to strike down government decisions or policies that violate the newly enshrined constitutional rights of refugees, a history of assistance to refugees of various nationalities, and a public that is generally (though certainly not overwhelmingly) supportive of Central American refugees and human rights principles. However, many judges either do not understand or are hostile to the interplay between the Mexican Constitution and international human rights law, and Mexico's legal system contains significant barriers to legal precedent that would assist refugees beyond the parties to a particular dispute. In time, as recently initiated strategic litigation wends its way through the legal system, we will learn which of these factors advances or impedes the effectiveness of Mexico's recently enacted array of constitutionalized human rights protections. The groundwork for significant change has certainly been laid.

220. Gargarella, *supra* note 34, at 213–216.

221. In Ecuador, for example, litigants may file challenges to state policies directly with the Constitutional Court, rather than waiting for a series of lower courts to first render decisions that may or may not meet the requirements for appeal to a higher court. *See Meili, supra* note 11. *See also* GLOPPEN ET AL., *supra* note 44, at 16. (“Provision for direct and easy access to the superior courts for litigants impact radically on the flow of constitutional cases, which in turn enables the court to build a strong accountability function.”).

