THE *PRO PERSONAE* PRINCIPLE AND ITS APPLICATION BY MEXICAN COURTS

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ABSTRACT

This article investigates the development and application of the *pro personae* principle – also known as the *pro homine* principle – both internationally and in the context of Mexico. It argues that the principle is a potential tool for advancing the realisation of human rights but that in the context of Mexico its application is still fraught with problems. Since the incorporation of the *pro personae* principle into the Mexican constitution did not modify the supreme clause of the land, nor change the distribution of legal powers among the judiciary, Mexican judges are unable to utilise the principle as broadly and consistently as it has been used in the international arena. This article concludes that the *pro personae* principle has neither resolved the debate about the hierarchy of human rights treaties in Mexico nor commanded the direct execution of human rights treaties by the judiciary. Rather, the principle represents an urgent calling for Mexican judges to become acquainted with the norms and institutions of international human rights law and to utilise them as much as their legal powers permit.

Keywords

Pro personae principle – *Pro homine* principle – Mexico – domestic courts – International human rights treaties

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INTRODUCTION

Legal interpretation is more an art than an exact science.[1] It is not merely about attributing meaning to words, but is also a process of persuasion,[2] whereby theory becomes practice.[3] As with any other art, legal interpretation is subjective and relative, which requires tools and methodologies. The selection of those tools and their use by the interpreter is what ultimately ensures that legal interpretation can accomplish its primary aim, namely the delivery of justice.

Although the interpretation of international treaties has not necessarily been a central aspect of the work of domestic courts, this is progressively changing, particularly in the field of human rights.[4] Over the last decades, international human rights law has considerably influenced national legal systems to the point that many constitutions today afford special status to human rights treaties.[5] This has prompted an increasing number of domestic courts to interpret and apply such treaties domestically.

In the context of Latin America, the main influence upon such interpretation has come from the Inter-American Court of Human Rights (IACtHR) through its interpretative methodology known as the *pro homine* or *pro personae* principle.[6] Different countries in the region have adopted this principle and domestic courts are increasingly engaging with the methodology that the principle seemingly prescribes.[7] This is the case with Mexico and the constitutional amendment of 10 June 2011.

This article examines the international emergence and application of the *pro personae* principle, its incorporation into the Mexican legal system and its use by Mexican courts. It seeks to evaluate the methodology that the principle entails in practice, particularly in the context of Mexico. In doing so, it seeks to demonstrate that despite the promises of a new age of international human rights, in the Mexican context at least, the *pro personae* principle is far from achieving that aim. Institutional barriers in the country, in particular, prevent the application of

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[1] ILC, 'Yearbook of the International Law Commission Volume II: Documents of the sixteenth session including the report of the Commission to the General Assembly' (1964) UN Doc A/CN.4/SER.A/1964/Add.1, 54, [5]; Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury* (Liberty Fund 2008) 407. See also ILC, 'Report of the International Law Commission on the work of its eighteenth session' (4 May–19 July 1966) in ILC, 'Yearbook of the International Law Commission Volume II: Documents of the second part of the seventeenth session and of the eighteenth session including the reports of the Commission to the General Assembly' (1966) UN Doc A/CN.4/SER.A/1966/Add.1, 172; and ILC, 'Report of the International Law Commission on the work of its eighteenth session: Draft articles on the law of treaties with commentaries' (4 May-19 July 1966) UN Doc A/6309/Rev.1 in ILC, 'Yearbook of the International Law Commission Volume II' (n 1) 218.

[2] John Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (2010) 23 Harvard Human Rights Journal 1, 5.

[3] Michael Waibel, 'Demystifying the Art of Interpretation' (2011) 22(2) The European Journal of International Law 571, 572.

[4] Georg Nolte, 'Introduction' in Helmut Philipp Aust and Georg Nolte (eds), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP 2016) 1-5.

[5] Thomas Buergenthal, 'Modern Constitutions and Human Rights Treaties' (1997) 36 Columbia Journal of Transnational Law 211, 217.

[6] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, CUP 2013), 12.

[7] Alejandro Rodiles, 'The Law and Politics of the Pro Persona Principle in Latin America' in Aust and Nolte, *The Interpretation of International Law by Domestic Courts* (n 4) 157; Yota Negishi, 'The Pro Homine Principle's Role in Regulating the Relationship Between Conventionality Control and Constitutionality Control' (2017) 28(2) The European Journal of International Law 457, 473.

the *pro personae* principle from being as applied as broadly and consistently as it seems to be at an international level.

The study opens with a brief exploration of human rights treaty interpretation at an international level. This includes an analysis of the general rules of treaty interpretation set out in the Vienna Convention on the Law of the Treaties (VCLT), followed by a brief consideration of the alleged special character of human rights treaty interpretation. It then moves on to the *pro personae* principle in itself. It explains the legal nature of the principle, its two directive constructions – as an interpretative principle in itself and as a normative conflict-resolution technique – and its practical application by the IACtHR. Some of the anxieties that have arisen around this principle are also presented with a view to discussing possible solutions to those concerns.

The second part of the study explores the Mexican legal system and its relationship with international law. It considers the supremacy clause in the context of the reform of June 2011. It then investigates the incorporation of the *pro personae* principle in article 1 and the paradigmatic change that it brought into the Mexican legal system.

The last part presents the most relevant case-law in which the *pro personae* principle has been applied in Mexico. The cases are organised in consideration of the two directive constructions that the *pro personae* principle entails. The aim is to show the paradox that the *pro personae* principle has introduced into the Mexican legal system and the institutional barriers that deter its effective application, not only when it is used by municipal judges, but also, more generally, when it is utilised as a normative conflict-resolution technique.

I. THE INTERPRETATION OF HUMAN RIGHTS TREATIES AND THE *PRO PERSONAE* PRINCIPLE

Interpretation of Human Rights Treaties

The Vienna Convention on the Law of Treaties

International human rights law is part and parcel of international law. This means that the general rules on treaty interpretation are applicable to human rights treaties. Articles 31 to 33 VCLT contain rules on treaty interpretation that are legally binding not only for states parties, but also for all states as a matter of customary law.[8]

The customary nature of the VCLT's rules on treaty interpretation is now well established.[9] Debate is instead focused on different questions, such as whether rules of general customary law on interpretation have a different content to those of the VCLT.[10] It is not the purpose of this study to analyse in depth this issue, but some insights can be presented. To begin with, the International Court of Justice (ICJ) has recognised that since customary law and treaty law have

[8] *Kasikili/Sedudu Island Case* (*Botswana v Namibia)* (Merits) [1999] ICJ Rep 1045, [18]-[20]; *Sovereignty over Pulau Ligitan and Pulau Sipadan Case* (*Indonesia v Malaysia*) (Merits) [2002] ICJ Rep 625, [37]-[38].

[9] *Application of the Convention on the Prevention and Punishment of the Crime on Genocide* (*Bosnia-Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 43, [160]; Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 13-19, 163-164.

[10] Panos Merkouris, *Article 31(3)(c) of the VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill Nijhoff 2010) 10.

their own distinct applicability,[11] they also have distinct legal natures. Treaty law is an opt-in system while customary law is an opt-out system.[12] Customary law has a dynamic character because its formation and existence depend on states' practice.[13] Consequently, because customary law can change more organically, it is reasonable to posit that it does not necessarily have the same content as articles 31 and 32 VCLT. Customary law could have changed and evolved from the treaty norms which may have once codified it.

Nonetheless, potential discrepancies between customary law on interpretation and the VCLT can be reconciled using article 31(3)(b) VCLT, which enables the interpreter to consider 'any relevant rules of international law'. New content of customary law can be used or incorporated into the process of interpretation on the basis that relevant 'rules of international law' include customary law.[14] Moreover, because the provisions of the VCLT on interpretation are written in open terms, which permit a variety of new constructions around them,[15] there is enough room to fit in new elements of customary norms. Consequently, articles 31 and 32 VCLT can coincide with customary law as long as interpreters understand customary law as 'relevant rules on interpretation'. Indeed, utilising customary law under the umbrella of relevant rules could bring the content of articles 31 and 32 VCLT in line with contemporary standards.

Another question concerning international rules on interpretation is whether they are proper 'rules', given that they do not comply with the usual formula of rules. They cannot for instance be violated in a significant way.[16] Certainly, at an international level, the violation of rules on interpretation does not constitute a wrongful act in the same way as inflicting torture does. However, at a domestic level that the situation seems to be different. For example, within the Mexican legal system a violation of the rule of textual and strict interpretation of norms of criminal law could lead to the annulment of the entire legal process.[17] The strict interpretation of criminal law, which also includes international norms, constitutes a fundamental part of the human right to due process. In that sense, rules on interpretation at a national level might have more of a legal significance than in the international arena.[18]

Continuing with the analysis of the VCLT rules on interpretation, whereas articles 32 and 33 address respectively secondary or supplementary means of interpretation, and priority of languages if a treaty is adopted in more than one, article 31 contains the main source of interpretation. Article 31(1) establishes that international treaties '… shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. This provision recognises, without any hierarchy, four elements of interpretation: good faith, literal interpretation, contextual interpretation, and interpretation in light of the treaty's object and purpose. These four

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[11] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v *United States of America*) (Merits) [1986] ICJ Rep 14, [177].

[12] Niels Petersen, 'The Role of Consent and Uncertainty in the Formation of Customary International Law' in Brian D. Lepard (ed), *Reexamining Customary International Law* (CUP 2017) 113.

[13] Vaughan Lowe, *International Law: A Very Short Introduction* (OUP 2015) 24.

[14] Merkouris, *Article 31(3)(c) of the VCLT and the Principle of Systemic Integration* (n 10) 10.

[15] Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in Dinah Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2015) 745-750.

[16] Jan Klabbers, 'Virtuous Interpretation' in Malgosia Fitzmaurice, Olufemi Elias, and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff 2010) 30-31.

[17] Sergio García Ramírez and Julieta Morales Sánchez, 'Considerations on the Principle of Criminal Legality in Jurisprudence of the Inter-American Court of Human Rights' (2011) 24 Revista Mexicana de Derecho Constitucional 195, 211.

[18] Manuel Vidaurri Arechiga, 'La Interpretación de la Ley Penal' in María Bono López (ed), *Liber ad honorem Sergio García Ramírez Volume I* (Universidad Nacional Autónoma de México 1998) 731.

elements are part of one single general rule on interpretation,[19] in which the text, object and purpose of the treaty have the same importance and should be used in tandem, or holistically, as a 'process of progressive encirclement'.[20] In fact, the International Law Commission (ILC) has confirmed the equal value of these elements, articulating that article 31 '… cannot properly be regarded as laying down a legal hierarchy of norms for the interpretation of treaties'.[21] Consequently, article 31(1) not only omits to establish any hierarchy, but it also emphasises unity and connexion between its components.

As a holistic rule on interpretation, article 31 VCLT can be subjected to exceptions. As early as the 1960s, the ICJ stated that when the textual interpretation of a treaty '… results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it'.[22] Accordingly, textual interpretation can exceptionally be dismissed when an inconsistency between the meaning of the words and the spirit, purpose and context of the treaty occurs. Later again in the 1990s, the ICJ reaffirmed that the text of a treaty needs to be interpreted in accordance with the natural and ordinary meaning of the terms[23] and in the light and context of the object and purpose of the treaty.[24] Moreover, in cases of ambiguity of the provisions of a treaty, other supplementary methods of interpretation should be used to clarify its meaning.[25]

Understandably, due to its immediate tangibility, the text of the treaty can frequently be the point of departure for treaty interpretation.[26] Once again, this does not mean that textual interpretation has a superior claim over the object and purpose of a treaty, but merely implies that '[t]he elements of interpretation in the article have in the nature of things to be arranged in some order. But it was considerations of logic, not any obligatory legal hierarchy …' which rendered it so.[27]

All things considered, article 31(1) does not establish a relation of subordination between its different elements of interpretation. It seeks to achieve an interpretation that is simultaneously evident from the ordinary meaning of the terms, logically clear, and produces the expected result.[28] Article 31(1) is one single and holistic rule of interpretation which reasonably starts with consideration of the text of the treaty, followed by its context, object and purpose in a logical order.[29] No subordination between those elements is prescribed,[30] and interpreters thus need to utilise them holistically.

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[19] Mark E. Villiger, 'The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The "Crucible" Intended by the International Law Commission' in Enzo Cannizzaro (ed), *The Law of the Treaties Beyond the Vienna Convention* (OUP 2011) 108-10, 114-15.

[20] International Centre for Settlement of Investment Disputes, *Aguas del Tunari v Bolivia* (Decision on Respondent's Objections to Jurisdiction) (2005) ICSIDARB/02/03 [91].

[21] ILC, 'Yearbook of the International Law Commission Volume II' (n 1) 219-220, [8]-[9].

[22] *South West Africa Cases (Ethiopia* v *South Africa; Liberia* v *South Africa)* (Preliminary Objections) [1962] ICJ Rep 319, 336.

[23] *Arbitral Award of 31 July 1989* (*Guinea-Bissau v Senegal*) (Merits) [1991] ICJ Rep 53, [48].

[24] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway)* (Merits) [1993] ICJ Rep 38, [27].

[25] *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v Chad)* (Merits) [1994] ICJ Rep 6, [41].

[26] *Avena and Other Mexican Nationals* (*Mexico v United States of America*) (Merits) [2004] ICJ Rep 12, [83]-[85].

[27] ILC, 'Yearbook of the International Law Commission Volume II' (n 1) 220, [9].

[28] Jean-Marc Sorel and Valérie Boré Eveno, 'Volume I, Part III Observance, Application and Interpretation of Treaties, s.3 Interpretation of Treaties, Art. 31' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of the Treaties* (OUP 2011) 808.

[29] ILC, 'Yearbook of the International Law Commission Volume II' (n 1) 206 [36].

[30] Gardiner, *Treaty Interpretation* (n 9) 222.

Additionally, paragraphs 2, 3 and 4 of article 31 VCLT refer to other means of interpretation which also merit consideration. Here subsequent agreements between the parties seem to play a predominant role. They can be in connection to the procedural requirements of conclusion of the treaty or any agreements subsequently reached by the parties. They can also be related to the interpretation or application of the treaty, such as agreements regarding the meaning of the terms of the treaty or other instruments linked thereto. Also, article 31(3)(b) stipulates that any relevant rules of international law should also be considered. As mentioned before, here is where customary law could be an element linked to the interpretation of the treaty.

Despite the existence of a holistic, general and internationally binding rule of interpretation set out in article 31 VCLT, the next section exposes the lack of agreement about the applicability of this rule to international human rights treaties.

Special Character of Human Rights Treaties

Notwithstanding the fact that international human rights law is part of general international law, the former has developed a parallel aspiration to create a legal framework in which, beside states and international organisations, individuals are also subjects of prerogatives.[31] After the Second World War and pursuing certain universal standards of justice, international human rights law turned to individuals as the holders of rights and with some capacity at the international level.[32] The adoption of the UN Declaration of Human Rights (UNDHR) marked the beginning of the universal human rights movement, for which the protection of the human person is the ultimate object and purpose.[33] Since then, an extensive *corpus juris* and various international mechanisms of protection have been developed in favour of individuals.[34]

This human-centred approach of international human rights law has not only provoked the creation of a vast human rights *corpus juris* but has also generated the emergence of particular methods of interpretation. Several human rights treaties explicitly establish the manner in which their provisions shall be interpreted, making it clear that human rights norms set minimal standards with the overall aim to further develop the scope of protection.[35] For instance, article 29 of the American Convention on Human Rights (ACHR) prohibits that convention from being interpreted in a way that suppresses, restricts, precludes, excludes or limits the rights and freedoms therein recognised, to a greater extent not permitted by the convention. Other similar provisions include article 5.1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and article 17 of the European Convention on Human Rights (ECHR).

The special pro-individual characteristic of human rights treaties has also been highlighted by different international monitoring and adjudicatory bodies. The European Court of Human Rights (ECtHR) has emphasised the special nature of the ECHR,[36] calling it a 'living

[31] Antonio Augusto Cançado Trindade, *The Access of Individuals to International Justice* (OUP 2011) 6.
[32] Theodor Meron, *The Humanization of International Law*, vol III (Martinus Nijhoff Publishers 2006) 6-8.
[33] Louis Henkin, 'The Universal Declaration at 50 and the Challenge of Global Markets' (1999) 25 Brooklyn Journal of International Law 17, 19.
[34] Thomas Buergenthal, 'The Normative and Institutional Evolution of International Human Rights' (1997) 19(4) Human Rights Quarterly 703, 722.
[35] Karlos Castilla, 'El Principio Pro Persona en la Administración de Justicia' (2009) 20 Revista Mexicana de Derecho Constitucional 65, 68.
[36] *Ireland v United Kingdom* App no 5310/71 (ECtHR, 18 January 1978) [239].

instrument'[37] that needs to be interpreted by reference to its object and purpose.[38] In the context of the UN, the same idea has been embraced, confirming that human rights treaties are living instruments,[39] which should be interpreted taking into account '… the circumstances of contemporary society'.[40] This type of interpretation has been referred to as evolutive, or dynamic, interpretation of human rights treaties.[41]

For its part, the IACtHR has not only adopted the conception that all human rights treaties are living instruments[42] that need to be interpreted by taking into account the changes over time and the current conditions of society,[43] but the Court has also developed its own methodology of interpretation called the *pro homine* or *pro personae* principle. This *pro personae* methodology involves, in tandem with an *evolutive* approach, the maximisation of the object and purpose of human rights treaties.

Despite the popularity of the idea of the special character of human rights treaties in their interpretation, this position has some drawbacks. First, advocating a dynamic interpretation and emphasising a contextual approach could lead to '… attempts to justify presenting the relevant treaty provision in a way different from what it says on its face, and consequently from what the parties have really agreed on'.[44] Second, human rights treaties are still international treaties. This means that they are governed by the same rules on interpretation as general treaties. It would therefore not be correct to argue:

> … that because of the importance of the object and purpose of human rights treaties this particular element of interpretation should take on greater importance when one is interpreting human rights treaties than when one is interpreting other types of treaty. [45]

Finally, supporting the *sui generis* nature of human rights treaties and their interpretation leads to the fragmentation of international law[46] and, eventually, to conflicts between jurisprudential criteria, forum-shopping and legal uncertainty.[47]

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[37] *Tyrer v United Kingdom* App no 5856/72 (ECtHR, 25 April 1978) [31].

[38] *Soering v United Kingdom* App no 14038/88 (ECtHR, 7 July 1989) [87]; *Loizidou v Turkey* App no 15318/89 (ECtHR, 23 March 1995) [72], [75]; *Rantsev v Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010) [275].

[39] UNHRC 'Communication no 829/1998' in *Roger Judge v Canada* (5 August 2002) UN Doc CCPR/C/78/D/829/1998, [10.3]; UNHCR CERD 'Communication no 26/2002' in *Hagan v Australia* (20 March 2003) UN Doc CERD/C/62/D/26/2002, [7.3].

[40] UNHCR CAT 'Communication nos 130/1999; 131/1999' in *V.X.N. and H.N. v Sweden* (15 May 2000) UN Doc CAT/C/24/D/130; 131/1999, [7.3].

[41] See generally Rudolf Bernhardt, 'Evolutive Treaty Interpretation, Especially of the European Convention on Human Rights' (1999) 42 German Yearbook of International Law 11. See also Michael P. Van Alstine, 'Dynamic Treaty Interpretation' (1998) 146(3) University of Pennsylvania Law Reviw 687; Christian Djeffal, 'Dynamic and Evolutive Interpretation of the ECHR by Domestic Courts?' in Aust and Nolte (n 4) 175-197.

[42] *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights*, Advisory Opinion OC-2/82, Inter-American Court of Human Rights Series A No 2 (24 September 1982) [29].

[43] *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-American Court of Human Rights Series A No 16 (1 October 1999) [114]-[115].

[44] Alexander Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 311.

[45] Eirik Bjorge, *The Evolutionary Interpretation of Treaties* (OUP 2014) 36.

[46] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L682, [17].

[47] ILC, 'Report of the International Law Commission' (1 May–9 June and 3 July–11 August 2006) UN Doc A/61/10, 404-405, [244], [251].

Without underestimating the merits on both sides of the discussion, human rights treaties possess as a matter of fact an important characteristic that distinguishes them from other international treaties. They are not constructed on the basis of reciprocal obligations between states parties, but are made to control states' power over individuals by granting entitlements to the latter vis-à-vis states.[48] Those entitlements are set as minimal standards of governments' behaviour. In other words, contrary to other treaties, human rights treaties seek '… to protect the autonomy of individuals against the majoritarian will of their state, rather than give effect to that will'.[49] This, to some extent, overturns states' sovereignty.[50] In that respect, different from general international treaties, human rights ones are legal instruments of *ordre publique*[51] for the protection of the basic rights of human beings. They all share the same ultimate and universal object and purpose, to ensure that every human being lives in freedom and with dignity.[52]

Despite this, human rights treaties are neither entirely separated or different from general international law, nor can their interpretation escape the scrutiny of the VCLT. To begin with, the idea of non-reciprocal obligations is not exclusive to human rights treaties, and some conventions on environmental protection also share this characteristic. Also, human rights treaties do not solely comprise of unilateral obligations. For example, article 24 of the ECHR and article 45 of the ACHR are based on reciprocity.[53] The same can be said about the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention), which contains stipulations of a contractual character, such as article 14, which establishes the period of effectiveness of the convention and the way denunciations need to be notified.

Moreover, it might be true that an interpretation that emphasises the purpose and object of the treaty is particularly advantageous for human rights treaties, but that does not entail a *carte blanche* to omit considerations with regard to the text of the treaty.[54] As discussed previously, the general rule of treaty interpretation is a single overarching one with different constitutional elements which need to be considered holistically.[55] The object, purpose and text of human rights treaties are elements of equal importance under the general rule of interpretation.[56] Because article 31 VCLT does not permit the text of the treaty to override its purpose and object, interpretation of human rights treaties perfectly fits into the general rule prescribed by that article.

All things considered, despite the fact that human rights treaties have different objectives from general treaties, there is no sufficient theoretical basis that allows, first, to differentiate human rights treaties from the corpus of general international treaties and, consequently, justifies the existence of a special method of interpretation of human rights treaties.[57] Thus,

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[48] Olivier De Schutter, *International Human Rights Law* (2nd edn, CUP 2014) 118-120.

[49] George Letsas, 'Intentionalism and the Interpretation of the ECHR' in Fitzmaurice, Elias and Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties* (n 16) 272.

[50] Birgit Schlütter, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (CUP 2012) 264.

[51] Ineta Ziemele and Lāsma Liede, 'Reservations to Human Rights Treaties: From Draft Guideline 3.1.12 to Guideline 3.1.5.6' (2013) 24(4) The European Journal of International Law 1135, 1147-1148.

[52] Christian Tomuschat, *Human Rights: Between Idealism and Realism* (3rd edn, OUP 2014) 1-7, 112.

[53] ILC, 'Second report on reservations to treaties, by Mr Alain Pellet, Special Rapporteur' (13 June 1996) UN Doc A/CN.4/477/Add.1, [77]-[85].

[54] Schlütter, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies' (n 50) 280.

[55] ILC, 'Fragmentation of International Law' (n 46) 428.

[56] Gardiner, *Treaty Interpretation* (n 9) 222.

[57] Fitzmaurice, 'Interpretation of Human Rights Treaties' (n 15) 740-744.

human rights treaties should be interpreted according to article 31 VCLT and relevant rules of customary law.

The Pro Personae Principle and its Application by the IACtHR

The Pro Personae Principle

Over the past few decades and based on the idea that human rights treaties have a special character due to their purpose and object, the IACtHR has developed a particular methodology of interpretation called the *pro homine* or *pro personae* principle.[58] The emergence of this principle can be tracked back to early advisory opinions of the IACtHR where, in order to expand the scope of its adjudication competence,[59] the Court invoked article 29 of the ACHR. Later , the IACtHR also referred to article 31(1) VCLT when it decided on the non-suspension of legal remedies[60] and judicial guarantees.[61] Interestingly, in those early advisory opinions there was no explicit reference to the *pro personae* principle itself. However, the methodology that it entails has been developed since then to the point that the principle has not only been widely promoted by the IACtHR, but has also had great acceptance by the Inter-American Commission of Human Rights (IACHR).[62] Moreover, the *pro personae* principle has also been expressly quoted by the various bodies of the UN.[63]

The first time the term *pro personae* or *pro homine* was invoked in the context of the IACtHR was in two separate opinions of its judges, one on the issue of compulsory membership of journalists in an association,[64] the other in a case relating to the right to truth and judicial guarantees and protection.[65]

The *pro homine* or *pro personae* principle has been defined as 'the hermeneutic criterion that informs the whole human rights legal system'. According to this, human rights norms should be interpreted as extensively as possible when recognising individuals' rights and, by contrast, as restrictively as possible when the norm imposes limits on the enjoyment of human rights.[66] At the same time, the principle commands that in case of conflicts between human rights norms, the norm that better protects the individual's rights should prevail.[67]

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[58] Álvaro Francisco Amaya Villareal, 'El Principio *Pro Homine*: Interpretación Extensiva vs. El Consentimiento del Estado' (2005) 5 Revista Colombiana de Derecho Internacional 337.

[59] "*Other Treaties" Subject to the Consultative Jurisdiction of the Court*, Advisory Opinion OC-1/82, Inter-American Court of Human Rights Series A No 1 (24 September 1982) [41].

[60] *Habeas Corpus in Emergency Situations*, Advisory Opinion OC-8/87, Inter-American Court of Human Rights Series A No 8 (30 January 1987) [14]-[16].

[61] *Judicial Guarantees in States of Emergency*, Advisory Opinion OC-9/87, Inter-American Court of Human Rights Series A No 9 (6 October 1987) [37]-[38].

[62] IACHR, 'Strategic Plan 2011-2015' (2016) 7, para 82.

[63] UNHRC, 'Communication no 1536/2006' in *Elgueta v Chile* (Individual Opinion of Ms Helen Keller and Mr Fabián Salvioli) (7 September 2009) UN Doc CCPR/C/96/D/1593/2006, [11].

[64] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, Inter-American Court of Human Rights Series A No 5 (Separate Opinion of Judge Rodolfo E. Piza E.) (13 November 1985) [11]-[12].

[65] *Bámaca-Velasquez v Guatemala* (Separate Concurring Opinion of Judge Sergio García Ramírez) Inter-American Court of Human Rights Series C No 70 (25 November 2000) [3].

[66] Mónica Pinto, 'El principio *pro homine*: Criterios de hermenéutica y pautas para la regulación de los derechos humanos' in Martín Abregú and Christian Courtis (eds), *La aplicación de los tratados sobre derechos humanos por los tribunales locales* (Editores del Puerto 1997) 163.

[67] Castilla, 'El Principio Pro Persona en la Administración de Justicia' (n 35) 71-78.

Thus, the *pro personae* principle is two different things: an interpretative principle in itself and a normative conflict-resolution technique. The former seeks to set a particular pathway of interpretation, the latter a pathway of conflict-resolution of human rights norms. The two directives of the *pro personae* principle have been identified, the first as the interpretative priority (*preferencia interpretativa*), and the second as the priority of norms (*preferencia de normas*).[68]

Regarding the first directive – interpretative priority or the interpretative principle in itself – it implies the need to choose, among the different possible ways of interpretation, the one that better protects the human rights of the person concerned, either by extending (*preferencia interpretativa extensiva*) or by limiting (*preferencia interpretativa restringida*), the meaning, content and scope of the norm.

In relation to the second directive – priority of norms or the normative conflict-resolution technique – it requires the selction of, among the different existing human rights norms, the one that most benefits the person concerned.[69] Here, conflicts between human rights norms should not be determined by hierarchical frameworks or rules of *speciality* but should be governed by the subjective purpose of human rights norms, i.e. the protection of the individual person.[70]

As to the origin of the *pro personae* principle in international law, it is not easy to determine whether it is a self-standing interpretative principle or merely a terminological re-packaging of the existing VCLT interpretative elements. This is because, first, article 31 VCLT is unclear in the relationship between its elements[71] and is itself also subject to interpretation as a matter of customary law.[72] Second, human rights treaties are written in general and vague terms which can be interpreted in different ways.[73] All this provides an open framework that, ostensibly, permits the argument that the *pro personae* principle derives from the general rule set out in article 31 VCLT. However, at the same time, the *pro personae* principle promotes giving more weight to the object and purpose of human rights treaties in order to guarantee their effectiveness. This is inconsistent with the holistic approach to the general rule of interpretation of article 31 VCLT.

In legal practice, the *pro personae* principle is often derived from article 29 ACHR as well as article 31 VCLT. As mentioned earlier, the former prohibits any interpretation that suppresses or restricts the enjoyment and exercise of the rights and freedoms recognised in the convention, other treaties and domestic laws. Meanwhile, the latter provides a good framework for integrating innovative developments in human rights treaty interpretation.[74] Consequently, the *pro personae* principle is not merely a re-packaging of the existing VCLT interpretative elements. The emergence of the principle has occurred as a combination of article 31 VCLT and the prohibition on restrictive interpretation set out in article 29 ACHR.[75] Both articles together justify the existence of the principle and define its methodology.

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[68] Edgar Carpio Marcos, *La interpretación de los derechos fundamentales* (Palestra Editores 2004) 470-473.
[69] Castilla, 'El Principio Pro Persona en la Administración de Justicia' (n 35) 71-78.
[70] Humberto Henderson, 'Los tratados internacionales de derechos humanos en el orden interno: la importancia del principio *pro homine*' (2004) 39 Revista IIDH 71, 87.
[71] Fitzmaurice, 'Interpretation of Human Rights Treaties' (n 15) 740.
[72] Panos Merkouris, 'Interpreting the Customary Rules on Interpretation' (2017) 19 International Community Law Review 126, 142-154.
[73] Frédéric Vanneste, *General International Law Before Human Rights Courts: Assessing the Specialty Claims of International Human Rights Law* (Intersentia 2010) 253-257.
[74] Schlütter, 'Aspects of Human Rights Interpretation by the UN Treaty Bodies' (n 50) 317.
[75] Fitzmaurice, 'Interpretation of Human Rights Treaties' (n 15) 753–757; Zlata Drnas de Clément, 'La complejidad del principio *pro homine*' (2015) 12 JA 2015-I 98, 109 <http://www.corteidh.or.cr/tablas/r33496.pdf> accessed 4 September 2018.

The Application of the Pro Personae Principle by the IACtHR

The IACtHR has not made express reference to the *pro personae* principle in all cases. Nonetheless, the use of its methodology – understood as the combination of article 29 ACHR and article 31 VCLT – has increased in the judgments of the Court over the last decades.

As regards the interpretative priority of human rights norms – or the *pro personae* principle as an interpretative principle in itself – the IACtHR has notably expanded the scope of protection of the ACHR in cases concerning violations of the rights of indigenous people.[76] In an 'integral interpretation of the indigenous cosmovision',[77] the Court determined that article 21 ACHR, which speaks of the right to property in a sense of individual ownership based on a title to property, also includes the right to collective property of the land of indigenous peoples, which is more a matter of factual possession, and use and enjoyment of the land by the whole community than a single proprietorship.[78] Later on, the Court ruled that despite the fact that 'ethnic origin' is not expressly recognised in article 1(1) ACHR, it counts as a prohibited ground of discrimination based on the fact that article 1(1) permits the inclusion of 'any other social condition' as grounds for discrimination.[79] Another clear example of the interpretative expansion of the ACHR is with regards to the right to seek and receive public information. From considering this right to originally be part and parcel of the freedom of expression under article 13 ACHR, the IACtHR has since asserted that the right to have access to public information is a self-standing right.[80]

In relation to the restrictive interpretation criterion that the *pro personae* principle entails – also part of the *pro personae* principle as an interpretative principle in itself – the IACtHR has ruled that states parties to the ACHR can only renounce the competence of the Court in strict compliance with its denunciation procedure and by referring to the ACHR as a whole. In any case, the withdrawal shall not come into effect immediately but a year after.[81] Other examples of restrictive interpretations by the IACtHR include cases concerning the death penalty, military jurisdiction and the use of force by states' agents. In these cases the Court has ruled that capital punishment must be limited to the most serious criminal offences,[82] and that military criminal

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[76] IACHR, 'Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System' (30 December 2009) OEA/Ser.L/V/II. Doc 56/09; *Norín Catrimán et al (Leaders, Members and Activist of the Mapuche Indigenous People) v Chile* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 279 (29 May 2014) [155].

[77] Antônio Augusto Cançado Tríndade, 'The Right to Cultural Identity in the Evolving Jurisprudential Construction of the Inter-American Court of Human Rights' in Sienho Yee and Jacques-Yvan Morin (eds), *Multiculturalism and International Law: Essays in Honour of Edward McWhinney* (Martinus Nijhoff 2009) 485.

[78] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 79 (32 August 2001) [143]-[151].

[79] *Norín Catrimán et al v Chile* (n 76) [202]-[206], [270].

[80] *Claude-Reyes et al v Chile* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 151 (19 September 2006) [77]; IACHR, Office of the Special Rapporteur for Freedom of Expression, 'The Inter-American Legal Framework Regarding the Right to Access to Information' (7 March 2011) OEA/Ser.L/V/II. CIDH/RELE/INF. 9/12, [14].

[81] *Ivcher-Bronstein v Peru* (Competence) Inter-American Court of Human Rights Series C No 54 (24 September 1999) [33]-[43].

[82] IACHR, 'The Death Penalty in The Inter-American Human Rights System: From Restrictions to Abolition' OEA/Ser.L/V/II. Doc 68 (31 December 2011) 61-62, 115.

jurisdiction shall have a restrictive scope[83] and operate only in relation to active soldiers.[84] In addition, the use of force by states' agencies shall be interpreted restrictively. This last pronouncement means that governments' workforces are allowed to use no more than the strictly necessary force in cases of detention of civilians.[85]

Regarding the directive of priority of norms – or the *pro personae* principle as a normative conflict-resolution technique – the IACtHR has stated that when the ACHR and any other human rights treaties are simultaneously applicable to the same situation, the treaty that contains the most advantageous norm for the protection of the relevant human right should prevail.[86] This means that the Court can select from the whole human rights *corpus juris* the norm that brings more benefits to the individual.

This approach has permitted the IACtHR to constantly, even outside the sphere of human rights, invoke different international treaties outside the framework of the Organisation of American States (OAS), also including non-legally binding instruments or soft law.[87] For instance, and similar to its previous reasoning on the issue of the right to information on consular assistance,[88] the Court determined that it is appropriate to interpret and apply the ACHR in tandem with other different international treaties that, in principle, fall outside the field of human rights, for example treaties on humanitarian law.[89] The Court also ruled that states shall take special measures to protect children and to rehabilitate juveniles in compliance with the Convention on the Rights of the Child (CRC), general comments of the UN Committee on the Rights of the Child, and other different UN guidelines.[90] Equally, and taking into consideration a variety of international treaties on refugee law and international declarations and jurisprudence from the ECtHR and UN bodies, the IACtHR has ruled that the right to seek and be granted asylum provided for in article 22(7) ACHR must be processed with due judicial guarantees.[91]

Consequently, the IACtHR has not only created the *pro personae* principle based on articles 29 ACHR and 31 VCLT, but the Court has actively used it as a means to adapt the ACHR to the socio-legal realities of the different countries in Latin America. The Court has also utilised the principle to expand the application of the ACHR to different areas that originally fell outside the scope of the convention, and extended its own jurisdiction to review member states' compliance with international instruments other than the ACHR, and soft law.

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[83] *19 Tradesmen v Colombia* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 109 (5 July 2004) [173]; *Tiu Tojín v Guatemala* (Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 190 (26 November 2008) [118]-[120].

[84] *Radilla-Pacheco v Mexico* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 209 (23 November 2009) [274].

[85] *J. v Peru* Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 275 (27 November 2013) [330], [362].

[86] IACtHR Advisory Opinion OC-5/85 (n 64) [43]-[52].

[87] See generally Gerald L. Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 The European Journal of International Law 101; Lucas Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law' (2010) 21(3) The European Journal of International Law 585.

[88] IACtHR Advisory Opinion OC-16/99 (n 43) [58]-[62], [113]-[115].

[89] *Vásquez Durand et al v Ecuador* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 332 (15 February 2017) [30]-[32].

[90] *Street Children (Villagrán-Morales et al) v Guatemala* (Merits) Inter-American Court of Human Rights Series C No 63 (19 November 1999) [194]; *Juvenile Reeducation Institute v Paraguay* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 11 (2 September 2004) [163], [221].

[91] *Pacheco Tineo Family v Plurinational State of Bolivia* (Judgment) (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 272 (25 November 2013) [128]-[160].

From a human rights perspective, the use of the *pro personae* principle by the IACtHR has contributed to the progressive development of the international human rights system in the region by establishing a sense of unity. It has also crystallised the purpose of international human rights law by prioritising the human person.[92] This is because all state agents, particularly those exercising judicial power, are now obliged to utilise this principle in order to guarantee and secure the protection of individuals.[93] Furthermore, the use of the *pro personae* principle has promoted the unity of international law via judicial dialogue[94] and mitigated its fragmentation.[95]

Conversely, the use of the *pro personae* principle can have adverse consequences. First, by stretching the scope of the ACHR, the IACtHR might have gone too far and become too divorced from the consensual aspect of human rights treaties.[96] In other words, the Court might be putting at risk the Inter-American system by overstretching State consent[97] and interpreting the convention against the will of the states parties.[98] Secondly, the use of the *pro personae* principle does not guarantee the effectiveness of human rights treaties, since the latter depends more on the facilitation of means for the domestic implementation of human rights than on the expansion of their scope.[99]

As a matter of fact, the IACtHR has indeed introduced normative elements that were not originally agreed by the states parties to the ACHR, such as the right to collective property to land of indigenous peoples and the right to seek and receive public information. Understandably, this could have adverse consequences such as the denunciation of the convention,[100] which ultimately would leave individuals without regional protection.

Nevertheless, there are clear reasons that justify the use of the *pro personae* principle by the IACtHR. First, its use is legally based on articles 29 ACHR and 31 VCLT. Second, human rights treaties are instruments of self-commitment[101] in which nation states set, in general and sometimes ambiguous terms, minimal standards of protection in favour of individuals. Those terms, of course, need to be adapted to specific contexts and realities. However, no interpretation should go below the normative expectations of those treaties. Third, similar interpretative practices can be found in the context of the ECtHR, which has also interpreted the ECHR in an evolutive manner that departs from the original text of the convention. Finally, as it has been said, the rules on treaty interpretation in the VCLT are also ambiguous, allowing the possibility of some discretion on the part of the interpreter.[102] Moreover, despite the alleged drawbacks of the *pro personae* methodology, many Latin American countries have incorporated the principle into their domestic legal systems,[103] among them Mexico.

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92 Valerio de Oliveira Mazzuoli and Dilton Ribeiro, 'The Japanese Legal System and the *Pro Homine* Principle in Human Rights Treaties' (2015) 15 Anuario Mexicano de Derecho Internacional 263.

93 Castilla, 'El Principio Pro Persona en la Administración de Justicia' (n 35) 81-83.

94 Michael Freitas Mohallem, 'Horizontal Judicial Dialogue on Human Rights: The Practice of Constitutional Courts in South America' in Amrei Müller (ed), *Judicial Dialogue and Human Rights* (CUP 2017).

95 Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights' (n 87) 586.

96 Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (n 87) 123.

97 Rodiles, 'The Law and Politics of the Pro Persona Principle in Latin America' (n 7) 161-3.

98 See generally Villareal, 'El Principio *Pro Homine*: Interpretación Extensiva vs. El Consentimiento del Estado' (n 58).

99 Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (n 87) 115.

100 International Justice Resource Center, 'Venezuela Denounces American Convention on Human Rights as IACHR faces Reform' (19 September 2012) <http://www.ijrcenter.org/2012/09/19/venezuela-denounces-american-convention-on-human-rights-as-iachr-faces-reform/> accessed 4 September 2018.

101 Christian Tomuschat, *Obligations Arising for States without or Against their Will* (Martinus Nijhoff 1993) 274.

102 Fitzmaurice, 'Interpretation of Human Rights Treaties' (n 15) 745.

103 Negishi, 'The Pro Homine Principle's Role in Regulating the Relationship Between Conventionality Control and Constitutionality Control' (n 7) 473.

Consequently, provided that the *pro personae* principle is not presented and used as a free reign to ignore considerations with regards the agreements reached by the states parties,[104] its eclectic methodology – the combination of article 29 ACHR and article 31 VCLT – seems to be a powerful tool to achieve the progressive development of human rights norms. In any case, the interpreter needs to be careful enough so as to avoid overstepping the political border-line that permits the human rights system to achieve its ultimate purpose. Here, subjectivity is an unavoidable feature of human rights interpretation that must be managed by the interpreter by employing a transparent, practical, coherent, and sensitive methodology.[105]

II. THE INCORPORATION OF THE *PRO PERSONAE* PRINCIPLE IN THE MEXICAN LEGAL SYSTEM

Mexico has been described as a moderate monist state[106] where international treaties become part of the legal system provided that those instruments follow the formal process of ratification with the approval of the Congress.[107] Article 133 of the Mexican Constitution states:

> This Constitution, the laws of the Congress of the Union that come from it, and all the treaties that are in accordance with it, that have been concluded and that are to be concluded by the President of the Republic with the approval of the Senate will be the Supreme Law of all the Union. The judges of every Federal State will follow this Constitution and these laws and treaties regardless of the dispositions to the contrary that are contained in the constitutions or the laws of the Federal States.[108]

Article 133 articulates the principle of the 'supreme law of the land', according to which international treaties become part of the law of the federation, the caveat being that they observe the formal processes for their conclusion.[109] Article 133, which is also referred to as the 'supremacy clause',[110] is not entirely clear with regards to the hierarchy of international treaties within the Mexican legal system. This means that, in principle, human rights treaties do not have preferential status over any other treaty and are equally subordinated to the Mexican constitution.

Interestingly, in some jurisdictions human rights treaties are granted explicit constitutional status,[111] while in other countries it is not the constitution but secondary laws that permit

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[104] Luigi Crema, 'Disappearance and New Sightings of Restrictive Interpretation(s)' (2010) 21(3) The European Journal of International Law 681, 698-700.

[105] Tobin, 'Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation' (n 2) 14.

[106] César Sepúlveda, *Derecho Internacional* (Porrúa 2004) 81.

[107] Luis Miguel Díaz, 'National Treaty Law and Practice: Mexico' in Duncan B. Hollis, Merritt R. Blakeslee and L. Benjamin Ederington (eds), *National Treaty Law and Practice* (Martinus Nijhoff 2005) 451.

[108] Mexican Constitution of 5 February 1917, article 133, translation by the author <http://www.ordenjuridico.gob.mx/Constitucion/1917.pdf> accessed 4 September 2018.

[109] David N. Cinotti, 'The New Isolationism: Non-Self-Execution Declarations and Treaties as the Supreme Law of the Land' (2003) 91(6) The Georgetown Law Journal 1277, 1290.

[110] Jorge Carpizo, 'La Interpretación del artículo 133 constitucional' (1969) 2(4) Boletín Mexicano de Derecho Comparado 3, 3-7.

[111] Constitution of Argentina, article 75.22 <http://www.biblioteca.jus.gov.ar/argentina-constitution.pdf> accessed 4 September 2018; Constitution of Spain, article 10.2

different sources of accommodation for human rights treaties. For instance, human rights treaties can be recognised, in the constitution and/or secondary laws, as binding parameters for domestic courts when performing their jurisdictional functions.[112] This has been the case in Mexico since the constitutional reform of June 2011 which, without modifying article 133, introduced the *pro personae* principle in article 1(2).

In June 2011, the Mexican constitution was reformed in order to introduce different provisions in the field of human rights, *inter alia* the adoption of the *pro personae* principle of interpretation. As in the Inter-American human rights system, the constitutional adoption of this methodology had the aim of promoting a more flexible and effective approach to human rights interpretation under the umbrella of humankind[113] so as to avoid an overly formal and rigid approach. In Mexico, the reform was rather understood as a shift in the interpretation and application of human rights, '… from formal hierarchy to substantive protection',[114] than a conflict-resolution technique between domestic norms and international human rights treaties.

Article 1 of the Mexican constitution states:

> (1) In the United Mexican States everybody enjoys the human rights recognised in this Constitution and in the international human rights treaties that the Mexican States is party, and also the guarantees for their protection, which exercise could not be restricted or suspended but in those cases and under the circumstances prescribed in this Constitution.
>
> (2) Human rights norms shall be interpreted in accordance with the Constitution and international treaties in the field, always favouring the widest protection to individuals.
>
> (3) All the authorities, within the scope of their own competences, have the obligation to promote, respect, protect and fulfil human rights accordingly to the principles of universality, interdependency, indivisibility and progressivity... (emphasis added)[115]

The constitutional reform of article 1 seemed to have made official what many had been supporting for years:[116] a new and progressive understanding of the relationship between international human rights norms and domestic laws, characterised by an openness to external sources of interpretation. As a consequence of the reform, human rights treaties became part of the fundamental norms and principles of Mexico. This set of principles has been called *bloque*

<http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf> accessed 4 September 2018.

[112] Gerald L. Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance' (2003) 55(5) Stanford Law Review 1863, 1890.

[113] Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New* Jus Gentium (2nd edn, Martinus Nijhoff 2010) 225.

[114] Negishi, 'The Pro Homine Principle's Role in Regulating the Relationship Between Conventionality Control and Constitutionality Control' (n 7) 466.

[115] SEGOB, Decreto de Reforma Constitucional, DOF 10 de Junio de 2011, Secc.I, p.2. http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_194_10jun11.pdf accessed 4 September 2018.

[116] José Ramón Cossío Diaz, 'Los intrumentos internacionales en materia de derechos fundamentales y el principio *pro homine*' (2007) 247 Revista de la Facultad de Derecho de México 377, 377-383.

de constitucionalidad (constitutional block), which entails a web of fundamental rules and values that cannot be overridden by any authority unless under exceptional circumstances.[117]

The aim of the adoption of the *pro personae* clause was that human rights, regardless of their source, be interpreted and applied in such a way that favours the individual to the greatest extent. According to this, human rights treaties should no longer be organised in a hierarchical way – *pro personae* principle as a normative conflict-resolution technique – and their norms should be either extensively or restrictively interpreted given the particular circumstances of the case – *pro personae* principle as an interpretative principle in itself.[118] Moreover, the reform was also perceived as an obligation to enforce human rights treaties in the country by imposing on all the authorities the duty to promote, respect, protect and fulfil the relevant rights.[119] For instance, by calling on the legislature to enact the necessary laws to execute human rights which are not self-executing.[120] Interestingly, despite the expectations placed on the constitutional reform in Mexico and the emphasis put on the *pro personae* principle as a conflict-resolution technique, the substance of article 133 of the constitution remained the same. Thus, human rights treaties are still subordinate to the supreme law of the land.

A few months after the constitutional reform, the Supreme Court of Justice of the Nation (SCJN) had the opportunity to clarify the scope of article 1 on the occasion of the implementation of the IACtHR judgment in the case of *Radilla Pacheco*.[121] In its ruling, the Court considered articles 1 and 133 together and stated that all the authorities in Mexico, in particular the judiciary, are obliged to observe the *pro personae* principle, not only with regards to those human rights recognised in the constitution but also all the human rights contained in international treaties to which Mexico is party.[122] Later again, the SCJN produced another ruling which complemented this understanding of the constitutional reform. The Court confirmed that if in the same situation different human rights norms are applicable, for instance a constitutional one and an international one, the norm that should prevail is the one that better protects the individual.[123] This approach is similar to that of the IACtHR when referring to the applicability of foreign conventions within the context of the OAS.

In this sense, according to the SCJN's criteria, the incorporation of the *pro personae* principle into the Mexican constitution has two main purposes. First, it seeks to give liberty to a more flexible means of interpreting human rights norms, because the content and scope of the norms need to be evaluated by all state agencies, with the most favourable clause requiring compliance – *pro personae* principle as an interpretative principle in itself. Second, it aims to eliminate conflicts of norms between constitutional human rights and human rights treaties by making the latter part of the fundamental rules of the nation – the *pro personae* principle as a normative conflict-resolution technique.[124] However, the Court did not make clear how those purposes would be legally achieved, since article 133 of the Mexican constitution was not modified in the

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[117] Irvin Uriel López Bonilla, 'Significación del bloque de constitucionalidad en la temática de derechos humanos en el ordenamiento jurídico mexicano' (2015) 31 Letras Jurídicas 111, 118-121.

[118] Negishi, 'The Pro Homine Principle's Role in Regulating the Relationship Between Conventionality Control and Constitutionality Control' (n 7) 475.

[119] José de Jesús Orozco Henríquez, 'Los derechos humanos y el nuevo artículo 1° constitucional' (2011) 5(28) Revista del Instituto de Ciencias Jurídicas de Puebla 85, 93-94.

[120] See generally Thomas Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law* (Martinus Nijhoff 1992).

[121] *Radilla-Pacheco v Mexico* (n 84).

[122] SCJN Plenum, Judgment of 14 July 2011 (Exp.912/2010) [27] <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=121589>

[123] SCJN First Chamber, Tesis 1.aXXVI/2012(10a.), SJFyG, V, I, February 2012, 659.

[124] Henderson, 'Los tratados internacionales de derechos humanos en el orden interno' (n 70) 87.

reform and only extra-legal powers of municipal judges to apply directly the constitution and/or human right treaties was granted.

Regardless, the adoption of the *pro personae* principle in Mexico was gladly welcomed by many, as it promises to make human rights a reality in the country and influence the wider region.[125] The reform was perceived as the recognition of the universal nature of human rights,[126] and the elimination of the idea of human rights as an exclusive issue of sovereign states.[127] This position coincides with the view that giving human rights treaties constitutional rank is the best way to enable the judiciary and legislature to consider international human rights obligations seriously by eliminating legal barriers that traditionally impeded their compliance and effective implementation.[128]

At the same time, the incorporation of the *pro personae* principle seems to be problematic, not only for the lack of modification of the supremacy clause, but also due to its unidirectional and subjective methodology[129] and the enormous need of political will of different Mexican authorities for its effectiveness.[130] Evidently, the mere elevation of human rights treaties to a constitutional level is insufficient to achieve the effective protection of human rights in the country. Other socio-legal factors play an important role, such as the availability of judicial remedies, the self-execution or non-self-execution nature of those rights, and the technical capacity of the judiciary.[131] This is particularly true in a country where the constitution is consistently violated and the rule of law is non-existent, such as in Mexico.[132]

All things considered, the incorporation of the *pro personae* principle in the Mexican constitution looks like a promising change given the way human rights had been perceived in the country. The protection of the inherent rights of the Mexicans are now at the top of the government's agenda. However, the reform seems to be insufficient to achieve its full aim since article 133 of the constitution remained unreformed and municipal judges lack the power to enforce the constitution and human rights treaties directly.

III. THE *PRO PERSONAE* PRINCIPLE AND ITS APPLICATION BY MEXICAN COURTS

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[125] UNHCR, '2013 United Nations Human Rights Prize', <http://www.ohchr.org/EN/NewsEvents/Pages/hrprize.aspx> accessed accessed 4 September 2018.

[126] Christina M. Cerna, 'Status of Human Rights Treaties in Mexican Domestic Law' (2016) 20(4) American Society of International Law <https://www.asil.org/insights/volume/20/issue/4/status-human-rights-treaties-mexican-domestic-law> accessed 4 September 2018.

[127] Jorge Ulises Carmona Tinoco, 'The Judicial Application of International Human Rights Treaties' (2007) 7 Mexican Law Review <http://info8.juridicas.unam.mx/cont/mlawr/7/arc/arc2.htm> accessed 4 September 2018.

[128] Thomas Buergenthal, 'The Evolving International Human Rights System' (2006) 100(4) The American Journal of International Law 783.

[129] Rodiles, 'The Law and Politics of the Pro Persona Principle in Latin America' (n 7) 174.

[130] Ricardo Velázquez, 'El principio Pro Persona en la legislación mexicana' (*Milenio*, 25 May 2016) <http://www.milenio.com/firmas/ricardo_velazquez/principio_Pro_Persona-legislacion_mexicana_18_743505712.html> accessed 4 September 2018.

[131] Neuman, 'Human Rights and Constitutional Rights' (n 112) 1893.

[132] 'Mexico's growing crisis: Reforms and democracy, but no rule of law' (*The Economist*, 15 November 2014) https://www.economist.com/leaders/2014/11/15/reforms-and-democracy-but-no-rule-of-law> accessed 24 August 2018; Edgardo Buscaglia, 'Mexico: Neither Pax Mafiosa, nor rule of law' *ALJAZEERA* (15 December 2016) <http://www.aljazeera.com/indepth/opinion/2016/12/mexico-pax-mafiosa-rule-law-161214115937003.html> accessed 4 September 2018.

The Pro Personae Principle and the Judiciary in Mexico

The theoretical monist-dualist framework is useful to explain the different pathways that states can take to implement human rights treaties. However, from a practical perspective, domestic courts are increasingly taking many different approaches to enforce human rights treaties.[133] In some cases, the courts themselves are in fact those who lead the human rights movement in their countries.[134] This may be the reason why it is generally said that national judges are entrusted with the role of guardians of human rights in their jurisdictions, especially in states whose systems are open to international human rights law.[135]

In the case of Mexico, the adoption of the *pro personae* principle into the constitution marked a move towards political openness to human rights treaties.[136] It commands *all* the authorities and particularly the judiciary not only to observe the methodology of the most favourable clause, but also to comply with the international human rights obligations acquired by the Mexican state as a whole. Domestic judges are obliged to perform, additionally to traditional judicial review, what has been called a 'control of conventionality',[137] which is an assessment of the compatibility of domestic laws with international human rights standards. This paradigm aims to invest judges with the role of watchdogs of international human rights obligations. This indeed appears to be an excellent strategy in theory, one which is also highly desirable from a human rights perspective. Nonetheless, in reality, many municipal judges are facing obstacles due to the current characteristics of the Mexican legal system.[138] This is not only due to the issues around the primary use of international human rights treaties and the need to comply with the supremacy clause, but also because municipal judges do not have the power to directly apply or interpret the constitution.

In Mexico the adjudication system is a hybrid one.[139] First, there is no constitutional court. Second, only federal courts (Tribunals of Circuit and the SCJN) are invested with the necessary powers to perform both control of constitutionality and control of conventionality.[140] This

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133 David Sloss, 'Domestic Application of Treaties' in Duncan B. Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 367-377.

134 See generally Malcolm Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review' (2009) 6(2) Sur Revista Internacional de Direitos Humanos 98.

135 Mauricio Iván del Toro Huerta, 'La apertura constitucional al derecho internacional de los derechos humanos en la era de la mundialización y sus consecuencias en la práctica judicial' (2005) 38(112) Boletín Mexicano de Derecho Comparado 325, 344-345.

136 Negishi, 'The Pro Homine Principle's Role in Regulating the Relationship Between Conventionality Control and Constitutionality Control' (n 7) 463.

137 The control of conventionality or conventionality control is a term introduced by the IACtHR in the case of *Almonacid-Arellano et al v Chile* (Preliminary Objections, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 154 (26 September 2006) [124] and reiterated in *Radilla-Pacheco v Mexico* (n 84) and *Cabrera García and Montiel Flores v Mexico* (Preliminary Objection, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 220 (22 November 2010) [225]; see generally Eduardo Ferrer Mac-Gregor, 'Interpretación conforme y control difuso de convencionalidad: El nuevo paradigma para el juez mexicano' (2011) 9(2) Estudios Constitucionales 531.

138 Karlos Castilla, 'El control de convencionalidad: Un nuevo debate en Mexico a partir de la sentencia del caso Radilla Pacheco' (2011) 11 Anuario Mexicano de Derecho Internacional 624.

139 Patricio Navia and Julio Ríos-Figueroa, 'The Constitutional Adjudication Mosaic of Latin America' (2005) 38(2) Comparative Political Studies 189, 200-203.

140 Elena I. Highton, 'Sistemas concentrado y difuso de control de constitucionalidad' in Armin von Bogdandy et al (eds), *La Justicia Constitucional y su Internacionalización: ¿Hacia un ius constitutionale commune en América Latina?* (Universidad Nacional Autónoma de México Instituto de Investigaciones Jurídicas 2010) 131-133.

means that only federal courts have the possibility to review and override secondary laws that contradict the constitution and/or human rights treaties.

Contrary to federal courts, municipal judges are not invested with the necessary powers to perform either control of constitutionality or control of conventionality. Moreover, those judges not only lack the power to review and dismiss secondary rules, but they are legally bound to comply with such laws.[141] In many cases, the lack of compliance with secondary laws can bring adverse administrative and/or criminal consequences against municipal judges.[142] As a result, those judges are not really in a position to legally dismiss secondary laws in order to give preference to human rights norms in accordance with the *pro personae* principle. In other words, even when human rights treaties have reached the status of constitutional norms as a consequence of the June 2011 reform, the control of conventionality and/or constitutionality that the *pro personae* principle entails is a function that municipal judges cannot legally perform.

This legal barrier has in fact been acknowledged by the SCJN itself. The Court has stated that the reform of article 1 of the constitution represents a shift from the traditional control of constitutionality that had previously operated in Mexico based on the supremacy clause (article 133). In an attempt to open up the possibility for municipal judges to comply with the new paradigm, the Court then reversed its previous decision that had said that only federal courts could perform control of constitutionality.[143] It is still not clear however in what way the reform of June 2011 has modified the supremacy clause and granted powers to municipal judges, given that no reference is even made to it.

In addition to this, the SCJN has also tried to provide some sort of guidance to judicial personnel, outlining a small number of steps that judges should follow in order to comply with the new constitutional mandate. First, human rights norms should be interpreted, either extensively or restrictively, according to the competences of each judge. Second, if the previous step is insufficient to achieve the greatest protection for the human right concerned, then judges are allowed to dismiss the application of the norms that pose as obstacles in order to reach the greatest protection.[144] The dismissal of laws in this case, according to the Court, would not count as an infringement of the legal duties of the municipal judges.[145] This criterion is similar to the one of the IACtHR,[146] which stated that compliance with the control of conventionality by domestic judges shall be performed according to each judge's legal powers.[147]

The solution of the SCJN is similar to the one given by the IACtHR in the case of *Radilla Pacheco*. Whilst the two solutions are both very simplistic,[148] in the case of the SCJN, it also lacks legal basis. The SCJN ignores the points that the constitutional reform of 2011 did not change the legal framework according to which the powers of municipal judges are limited to obey and apply the law, and that human rights treaties are still subject to article 133 of the Mexican constitution. This was not changed by the fact that the SCJN overruled its previous criteria which prohibited municipal judges from performing control of constitutionality. Consequently, municipal judges are not legally permitted to dismiss laws in order to thoroughly comply with

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141 Héctor Fix-Zamudio, *Introducción al Estudio de la Defensa de la Constitución en el Ordenamiento Mexicano* (2nd edn, Universidad Nacional Autónoma de México Instituto de Investigaciones Jurídicas 1998) 152-153.

142 For the different sanctions that judges may face under the Mexican law, see: <http://mexico.leyderecho.org/responsabilidad-judicial/> accessed 4 September 2018.

143 SCJN, Plenum, Jurisprudences P./J.74/99 and P./J.73/99, SJFyG, X, August 1999, 518.

144 SCJN (n 122) [28]-[34].

145 SCJN, Second Chamber, Jurisprudence 2a./J.56/2014(10a.), GSJF, 6, II, May 2014, 772.

146 *Radilla-Pacheco v Mexico* (n 84) [339].

147 SCJN (n 122) [32(c)].

148 Ariel E. Dulitzky, 'An Inter-American Constitutional Court? The invention of the Conventionality Control by the Inter-American Court of Human Rights' (2015) 50 Texas International Law Journal 45, 60-61.

the *pro personae* principle, due to the fact that they are neither entitled to perform control of constitutionality nor control of conventionality, or indeed to disdain the text of the constitution in order to give preference to a human rights treaty.

The desirable solution would be that these domestic judges were legally granted the necessary power to perform control of conventionality and that article 133 was reformed. It is of course important to mention that, according to the principle of division of powers, such legal powers need to be granted by general laws passed by the Congress and in that respect, the SCJN cannot oblige the Congress to issue the necessary laws, nor can it directly decide the new general competences of municipal judges via jurisprudential means. Interestingly, despite the fact that the SCJN has asserted that its criteria do not conflict with the principle of division of powers, the Court did not go any further in explaining its argument. [149]

As a result, municipal judges are not in a position to comply with the *pro personae* principle. Only federal courts are vested with the necessary powers to observe the *pro personae* principle but remain restricted by the supremacy clause. The following section addresses how federal courts, particularly the SCJN, apply that principle in practice.

The Application of the Pro Personae Principle by Federal Courts

It was previously explained that the *pro personae* principle entails two directives: the *interpretative priority – pro personae* principle as an interpretative principle in itself – and the *priority of norms – pro personae* principle as a normative conflict-resolution technique. Under the first directive, human rights norms can be extensively or restrictively interpreted, while the second requires a selection of norms either from the Mexican legal system or from international law. Very often the directives of the *pro personae* principle are applied in tandem. For the purposes of this section however, with the intention of systemising their analysis, the cases here are presented following these two separate directives.

Interpretative Priority

An interesting case in which the *pro personae* principle was applied in an extensive manner was in relation to the right to have a name.[150] In September 2010, an individual wanted to rectify her birth certificate because her father's surname had been wrongly registered.[151] The petition of correction was rejected by the authorities of the state of Aguascalientes. The grounds for the denial were that article 133 of the civil code of the state only permits the amendment of birth certificates in extraordinary circumstances, such as when the person concerned proves that he or she has publicly used a different name from the one that appears on the certificate. In other words, the municipal laws do not allow individuals to alter their birth certificates as an autonomous decision.

Having exhausted the judicial remedies without any success, the case reached the SCJN.[152] The grounds contested were, among others, violation of articles 1 and 133 of the Mexican

[149] SCJN (n 122) [32(c)].

[150] This case is analysed in Helmut Philipp Aust et al, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' (2014) 27 Leiden Journal of International Law 75, 98-100; Rodiles, 'The Law and Politics of the Pro Persona Principle in Latin America' (n 7) 170.

[151] In Mexico, the family name is comprised of both the father's and the mother's surname.

[152] SCJN, First Chamber, Judgment of 18 January 2012 (Amp.Dir.Rev. 2424/2011).

constitution, article 18 ACHR, and the principle of non-discrimination.[153] The Mexican constitution does not recognise in itself the right to have or change one's name. Article 29 of the Mexican constitution vaguely refers to the right to preserve one's name in cases of suspension of guarantees due to national emergencies. For its part, article 18 ACHR says:

> Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all, by the use of assumed names if necessary.

In January 2012, the SCJN ruled in favour of the plaintiff, recognising in her favour the right to change her name. The Court considered that despite the fact that in the Mexican constitution the right to change one's name is not recognised, such prerogative constitutes an individual liberty which cannot be limited. Therefore, owing to the application of the *pro personae* principle the right to change one's name was recognised and guaranteed under article 18 ACHR.[154] Additionally, the Court considered that the denial of the right to rectify the plaintiff's name would have violated the principle of non-discrimination, since that prerogative had been previously guaranteed in favour of other people.[155]

The expansion of the right to have a name is clear in this case. Based on the *pro personae* principle, the SCJN not only decided to apply article 18 ACHR over article 133 of the civil code of Aguascalientes, but the Court also interpreted extensively that right in order to include the individual's prerogative to modify their names by autonomous decision.

The approach of the SCJN was questionable[156] from the perspective of international law and also from the perspective of domestic politics. To begin with, the SCJN did not expressly adduce article 31 VCLT. This can be seen as disregarding the rules on interpretation of international treaties. However, the Court followed a balanced interpretation of article 18 ACHR by which the text of the treaty and its object and purpose were ultimately considered in a harmonised way. Second, the SCJN exceeded its adjudication powers by interfering with the attributions of the legislative authorities of the state of Aguascalientes in a matter that does not concern the federation, that is, the civil right to have a name.

Nonetheless, from the human rights perspective, the Court really embraced an evolutive interpretation of the right to have a name. This interpretation is also coherent with the essential constitutional principle of freedom that says that 'Everything which is not forbidden is allowed'. Article 18 ACHR recognised the right to a name in positive terms, not as a prohibition but as a liberty. For its part, the Mexican constitution does not recognise in itself the right to have a name, but neither does it prohibit opting to change it. Therefore, the interpretation that the prerogative to have a name includes the right to change it as long as the exercise of that right does not interfere with the rights of others is legally justified.

Another intriguing case considers the right to housing.[157] On this occasion the SCJN took into account different international instruments to expand the scope of article 4 of the Mexican constitution. In 2008 an individual alleged the invalidity of a contract of sale by which she had

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[153] Héctor Musalem Oliver, *Reseña del Amparo Directo en Revision 2424/2011: Contenido y Alcance del Derecho al Nombre*, Reseñas Argumentativas, Primera Sala, SCJN. https://www.scjn.gob.mx/sites/default/files/resenias_argumentativas/documento/2017-01/res-JRCD-2424-11.pdf

[154] SCJN, First Chamber, Tesis 1a.XXV/2012(10a.), SJFyG, V, I, February 2012, 653.

[155] SCJN (n 152) [79].

[156] Aust et al, 'Unity or Uniformity? Domestic Courts and Treaty Interpretation' (n 150) 98-100.

[157] SCJN, First Chamber, Judgment of 22 January 2014, (Amp.Dir.Rev. 3516/2013) 31-57.

acquired a luxurious flat in the state of Nayarit. The person concerned argued that the property had been built in violation of the municipal building laws and that the flat lacked sufficient illumination and ventilation. The claim had been dismissed by all the competent authorities on the grounds that the right to housing recognised in article 4 of the constitution did not protect properties catalogued as luxurious.

In 2012, the case reached the SCJN, which issued a judgment in favour of the plaintiff. The judgment considered article 25(1) UNDHR, article 11(1) ICESCR, articles 1.1 and 24 ACHR, and General Comment 4 of the UN Committee of Economic, Social and Cultural Rights. Basing its decision on those international instruments, the SCJN ruled that the right to shelter is applicable to any kind of house regardless of its socio-economic characteristics. The Court also stated that article 4 of the constitution shall include a right to adequate illumination and ventilation in accordance with different non-binding instruments elaborated by UN organisations and the World Health Organisation in Geneva.[158]

Thus, as regarding the interpretative priority directive of the *pro personae* principle, the SCJN has performed a far-reaching evolutive interpretation of human rights norms in a similar way to that of the IACtHR. The principle has equally served to transform soft law into binding criteria in the country. Interestingly, the two cases referred to share some common features. First, in both cases the SCJN looked for some sort of constitutional foundation, which it found in article 29 and article 4 respectively. The SCJN adopted those articles as a point of departure in order to perform a *pro personae* interpretation. Second, the expansion of the rights concerned did not contradict the Mexican constitution. In other words, the constitution neither prohibits the right to change one's name nor limits the right to shelter for certain types of social class.

Priority of Norms

As mentioned before, the adoption of the *pro personae* principle in article 1 of the Mexican constitution was thought to have brought to an end an old debate about the hierarchy of human rights treaties in the Mexican legal system. The idea was that international human rights would no longer follow the hierarchical framework established by the supremacy clause (article 133). They would instead be the object of a subjective methodology of evaluation: human rights norms, regardless of their source, would be directly interpreted and applied by all the Mexican authorities in accordance with the most advantageous clause. All this, however, was only true a few years after the reform of June 2011.

In an early case that involved the right to freedom of expression of journalists, the free flow of information and the rights to honour, reputation and private life, the SCJN applied the method of priority of norms that the *pro personae* principle entails. The Court ruled that even where the right to honour is not explicitly recognised in the Mexican constitution, it can be extracted from articles 11 ACHR and 17 ICCPR. The Court argued that the right to honour is inherent to the human person and that it also may represent a limitation on the right to freedom of expression.[159] This criterion gave birth to a binding jurisprudence that stated that international human rights norms should be preferred over constitutional norms when the former grants more prerogatives or imposes fewer restrictions than the latter for the enjoyment of the human right in question.[160]

[158] SCJN, First Chamber, Jurisprudence 1a.CXLVIII/2014(10a.), SJFyG, V, I, April 2014, 801.
[159] SCJN, First Chamber, Judgment of 23 November 2011, (Amp.Dir. 28/2010), 55-58.
[160] SCJN, First Chamber, Jurisprudence 1a./J.107/2012(10a.), SJFyG, XIII, 2, Octubre 2012, 799.

The preference of international human rights law over domestic legislation was reiterated in a controversial case that involved municipal rehabilitation programmes for children with drugs, alcohol and tobacco addictions in the state of Yucatan.[161] According to these programmes, administrative authorities were legitimised to impose the sanction of forced community work against parents or legal guardians who constantly fail to take their children to rehabilitation. The main paradox of the case was whether or not administrative authorities were entitled to impose immediately the sanction of forced community work, considering that article 21 of the Mexican constitution states that that type of penalty does not take effect immediately. It can only be applied as an alternative sanction, once other means have been exhausted. Additionally, the same article states that the sanction of forced community work can only be imposed by judicial and administrative authorities.[162]

In this case, the SCJN decided to perform in tandem control of constitutionality – with regards to article 21 – and control of conventionality – to analyse articles 1 and 2 of the International Labour Convention number 29 (ILO29), article 8 ICCPR and article 6 ACHR. These international norms refer to the right to work and, to some extent, assert that forced community work should only be imposed by competent *judicial* authorities. As a consequence of this, the SCJN deemed that those norms should prevail over article 21 of the Mexican constitution, since their application brings the most protective outcome. In other words, the application of those norms leads to the penalty of forced community work being void. Consequently, in February 2012 the SCJN annulled the sanction of forced community work prescribed by the municipal rehabilitation programmes of the state of Yucatan.[163]

Regarding the judgment of the SCJN, it is true that the Court made a rather superficial consideration of the international norms invoked in the sentence.[164] More importantly, the Court disregarded the fact that other interests were compromised in the case, such as the rehabilitation of the children subject to the programme and the obligation of their parents and the authorities to act in the best interest of the children. Additionally, the Court omitted to interpret the invoked international norms according to articles 31-33 VCLT.[165] The SCJN's judgment can thus be criticised for being over-focused on the applicability of the *pro personae* principle only with regards to the sanction of forced community work, without any consideration of the best interests of the children, or any single reference to the VCLT.

Once domestic courts are more open to engaging with human rights treaties, it is of fundamental importance that they pay much more attention to the binding rules of interpretation of those instruments. It has been argued previously that the *pro personae* principle is an eclectic principle derived from article 29 ACHR and article 31 VCLT. Therefore, the use of the principle should follow a reasonable consideration of both articles. Furthermore, it has been argued that the use of the *pro personae* principle to override constitutional norms is highly questionable, since article 133 of the constitution commands obedience to the law of the land. Moreover, the *pro personae* principle shall not be used in a unidirectional manner,[166] but its use needs consideration of all the values, interests and competing needs of all the parties concerned in each case.

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161 SCJN, Plenum, Judgment of 7 February 2012, (Acc.Inconst. 155/2007); Rodiles (n 7) 169-70.

162 First must be the penalty of warning, then fines, and finally forced communal work.

163 SCJN (n 161).

164 Rodiles, 'The Law and Politics of the Pro Persona Principle in Latin America' (n 7) 169.

165 The VCLT has been in force in Mexico since 27 January 1980, see Elma del Carmen Trejo García, *Tratados Internacionales vigentes en México: relación de Legislaturas y/o Períodos Legislativos en que fueron aprobados* (Centro de Documentación Información y Análisis, 2007) 3-4.

166 Rodiles, 'The Law and Politics of the Pro Persona Principle in Latin America' (n 7) 174.

The case analysed above brought once again the attention of the judiciary and practitioners to the supremacy clause (article 133), and questioned the scope of the *pro personae* principle.[167] Prior to the SCJN's judgment of February 2012, different federal tribunals had been applying the *pro personae* principle in contradictory ways, some of them giving preferential status to the constitution over international human rights norms,[168] while others interpreted human rights treaties and the constitution to have equal status.[169] Also, federal courts disagreed about the binding character of the jurisprudence of the IACtHR. Some alleged that it did not have binding status while others were of the opinion that it did.[170] As a consequence, in September 2013, the SCJN had to intervene to clarify the situation, issuing a mandatory rule about the hierarchical position of human rights treaties and the status of the IACtHR's jurisprudence in the Mexican legal system.[171]

First, the SCJN admitted that over the last decade the interpretation of article 133 of the Mexican constitution has been inconsistent. The current binding criterion is that international treaties are hierarchically positioned in the constitution. However, the Court recognised that since the reform of June 2011, the hierarchy of human rights treaties has changed. Those treaties have been incorporated into what is called the *bloque de constitucionalidad* (block of constitutionality). The Court also stated that it would be inappropriate to exclude from that block treaties which, in principle, fall outside the field of human rights, such as the Vienna Convention on Consular Assistance. Therefore, instead of differentiating between international treaties, the SCJN decided that the block of constitutionality should not only be integrated among human rights treaties, but should rather cover *all* international treaties which contain human rights norms.

Second, the SCJN stated that despite the fact that article 133 of the Mexican constitution was not reformed in June 2011, the incorporation of the *pro personae* principle has had the effect of making international human rights norms hierarchically equivalent to the constitution. In a rather contradictory manner, the Court then ruled that international human rights shall been interpreted without prejudice to the restrictions imposed by the Mexican constitution.[172] This was due to the fact that the last part of the first paragraph of article 1 of the constitution states that human rights '… could not be restricted or suspended but in those cases and under the circumstances prescribed in this Constitution'. In other words, the interpretation of international human rights norms cannot override the restrictions imposed on those rights by virtue of the constitution. Notably, the Court did not go further to determine what kind of limitations it was referring to.

This judgment is contradictory in itself. On the one hand it affirms that the adoption of the *pro personae* principle abolished the organisation of human rights norms in hierarchical terms and, on the other hand, it also confirms the supremacy of the Mexican constitution when imposing restrictions on the enjoyment of those rights.[173] The SCJN seems to be reluctant to admit that despite the fact that international human rights norms seek to protect precious

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[167] 'La Corte al Día: El Principio Pro Personae, muchas nueces y poco ruido' (*Vivir México*, 10 February 2012) <http://vivirmexico.com/2012/02/la-corte-al-dia-el-principio-pro-personae-muchas-nueces-y-poco-ruido> accessed 4 September 2018.

[168] Séptimo Tribunal Colegiado en Materia Civil del Primer Circuito, Tesis I.7o.C.46K, SJFyG, XXVIII, August 2008, 1083.

[169] Primer Tribunal Colegiado en Materias Administrativa y de Trabajo del Décimo Primer Circuito, Tesis XI.1o.A.T.45K, SJFyG, XXXI, May 2010, 2079.

[170] ibid 1932.

[171] SCJN, Plenum, Judgment of 3 September 2013, (Contradicción de Tesis 293/2011).

[172] SCJN, Plenum, Jurisprudence P./J.20/2014(10a.), GSJF, 5, I, April de 2014, 202.

[173] SCJN (n 172) Individual opinion of Judge Alfredo Gutiérrez Ortiz Mena.

objectives integral to humankind, they are not absolute and need to be balanced with other principles of modern democratic societies.[174] In any case, the new challenge for the Court is to clarify the scope of the term 'constitutional restrictions'.

Understandably, this judgment has been highly criticised by academics[175] and human rights activists,[176] who consider it a regression of the development of human rights in the country. According to these views it erodes the methodology of the *pro personae* principle, particularly its conflict-resolution directive.

After the judgment of September 2013, the judiciary went back to the old-fashioned interpretative approach of human rights treaties, the one that the *pro personae* principle was intended to remedy.[177] The interpretation and application of human rights treaties is once again determined by the supremacy clause.

Some are of the opinion that the effectiveness of the principle *pro personae* can still be saved by interpreting the first paragraph of article 1 of the constitution in tandem with article 29.[178] Article 29 talks about suspension of guarantees in a state of emergency and confirms that under certain circumstances such guarantees can be subject to suspension. Unfortunately, this position does not necessarily solve the problem. By their very nature, states of emergency are exceptional situations. They relate to extraordinary circumstances that threaten the life of a nation.[179] Therefore, the application of article 29 is limited and could not be used to address the issue of scope of the *pro personae* principle in ordinary times, that is, times of peace. Furthermore, there are other restrictions in the constitution that do not correspond to national emergencies and might be necessary and justified in specific situations, such as the expropriation of private property in order to ensure the human right to shelter for vulnerable groups.

A more realistic position would be to accept that the incorporation of the *pro personae* principle into the constitution did not modify the supremacy clause, according to which the Mexican constitution is on top of the pyramid,[180] nor did it entrust municipal judges with the necessary powers to apply directly the constitution and/or international human rights treaties. Thus, despite the fact that human rights treaties serve special purposes and objectives, they are still governed by the Mexican constitution at a domestic level.

Consequently, the *pro personae* principle, whether as an interpretative or a conflict-resolution principle, must necessarily operate within the boundaries of the Mexican constitution. This means that, on one hand, human rights can be extensively or restrictively interpreted as long as the interpretation does not contradict the text of the constitution; and, on the other hand,

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174 Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (OUP 2005) 61-70.

175 Geraldina Gónzalez de la Vega, '¿Qué pasó, entonces, en la Suprema Corte?' (*Nexos: el Juego de la Suprema Corte*, 3 September 2013) <http://eljuegodelacorte.nexos.com.mx/?p=3081> accessed 4 September 2018.

176 Amnesty International, 'México: Decisión de SCJN es un retroceso en protección de derechos humanos' <https://www.amnistia.org.pe/noticia/mexico-decision-scjn-retroceso-proteccion-ddhh/> accessed 4 September 2018.

177 SCJN, First Chamber, Jurisprudence 1a./J.37/2017(10a.), GSJF, 42, I, May 2017, 239.

178 SCJN (n 172) Individual opinion of Judge José Ramón Cossío Díaz; and Individual opinion of Judge Olga Sánchez Cordero de García Villegas; Eduardo Diego-Fernández Forseck, 'La Corte y el fin del principio pro homine en México' (*Nexos: el Juego de la Suprema Corte*, 5 May 2014) < https://eljuegodelacorte.nexos.com.mx/?p=3776 > accessed 4 September 2018.

179 De Schutter, *International Human Rights Law* (n 48) 583-632; Philip Alston and Ryan Goodman, *International Human Rights* (OUP 2013) 383-485; Marks and Clapham, *International Human Rights Lexicon* (n 174) 71-89, 149-161, 345-358.

180 SCJN (n 172) Individual Opinion of Judge Luis María Aguilar Morales.

international human rights norms can be directly applied by domestic courts provided that their application does not go against the Mexican constitution.

Lastly, human rights are not absolute. By nature they need to be balanced. Thus, the applicability of the *pro personae* principle should be seen differently, more as a matter of proportionality, legitimacy and legality than as a question of constitutional superiority of human rights. This means that regardless of their source, any limitation imposed on the enjoyment of international human rights should satisfy those three conditions. The condition of legality implies that any restriction on a human right must be prescribed by law. The condition of legitimacy means that the limitation must be motivated by a legitimate purpose. For its part, proportionality entails the requirement that any restriction on human rights must be limited to what is strictly necessary for the pursuance of the aim and it shall never go beyond what is called the 'minimal core' of the right.[181]

In this context, the *pro personae* principle should not be considered as a direct answer to the paradox about the position of human rights treaties in the supremacy clause. That principle is not an end in itself but a medium to achieve the best possible balance in a context where different human rights are constantly competing and clashing.

CONCLUSION

Human rights treaties, like any other treaties, constitute agreements between nation states. Nonetheless, their purpose and object are not the same: they seek to protect the fundamental rights and freedoms of all human beings. This particular aim has justified the emergence of different interpretative approaches to human rights treaties, such as the evolutive or dynamic interpretation of the ECHR and the *pro personae* principle developed by the IACtHR.

These new approaches of human rights interpretation fit well into article 31 VCLT, which establishes one single and holistic rule of interpretation that balances the text, object and purpose of treaties. Article 31 VCLT not only codifies customary law on interpretation but is also flexible enough to accommodate a variety of new constructions around its terms, including new elements of customary law. Article 31 VCLT is adequate for human rights treaty interpretation to the extent that it is indeed one of the two cornerstones that has prompted the emergence of the *pro personae* principle, the other one being article 29 ACHR.

The *pro personae* principle is a self-standing principle developed from articles 29 ACHR and article 31 VCLT in tandem. The two articles together give foundation and legal character to the principle. They also balance its methodology by pushing forward the universal realisation of human rights treaties (article 29) and, at the same time, reassuring a holistic interpretation of the different elements of the treaties (article 31). As regards its methodology, the *pro personae* principle has two different directives: an interpretative principle and a normative conflict-resolution technique. The former seeks to set a particular pathway of interpretation, the latter a pathway of conflict-resolution of human rights norms.

The use of the principle by the IACtHR has made it possible to expand the protective umbrella of international human rights law by going beyond the Inter-American system and importing human rights standards from other sources. Equally, the use of the *pro personae* principle has updated the content of human rights to current realities that originally did not

[181] De Schutter, *International Human Rights Law* (n 48) 339-381.

exist at the time of their codification. Simultaneously, the anxieties created by the use of the principle can be reduced by avoiding overstepping the political border-line that makes it possible for the human rights system to achieve its objectives.

The application of the *pro personae* principle at an international level does not seem to be as problematic as in the context of Mexico. Understandably, at a domestic level the distribution of power and institutional structures is clearly vertical and much more complex, whereas at international level relationships are horizontal and a matter of diplomacy. In Mexico, the *pro personae* principle was originally seen as the key to achieve direct enforcement of international human rights treaties. However, this has not necessarily been realised since article 133 remained unchanged and the judiciary at a municipal level was not formally granted the necessary powers to apply the *pro personae* principle. Actually, the lack of reform of article 133 of the Mexican constitution does not permit the application of the *pro personae* principle to be as broad as it is at an international level. This is because, in both its directives, either by expanding/restricting the content of human rights based on international standards or by opting to apply an international human rights treaty directly, Mexican judges necessarily need to deal with article 133 of the Mexican constitution.

Therefore, the *pro personae* principle has neither brought to an end the old debate about the hierarchy of human rights treaties in the Mexican legal system nor has it opened the gate for human rights treaties to be directly enforceable in Mexico. Nor should the principle should be seen as the ultimate answer to solving conflicts of norms (international human rights norms versus constitutional norms). In any case, the *pro personae* principle represents the openness of the Mexican legal system to take a more flexible approach to the interpretation and application of human rights treaties. At the very least, Mexican judges are now encouraged and obliged to look outside the domestic system to find legal answers in order to sufficiently deal with human rights cases. Those answers shall be admitted and utilised as long as they do not conflict with the Mexican constitution.

Consequently, the *pro personae* principle is a potential tool to advance the protection of human rights in Mexico, especially considering that Mexican judges, particularly at a municipal level, scarcely utilise international human rights norms. Thus, the *pro personae* principle is a calling for those judges to become acquainted with the norms and institutions of international human rights law and to utilise them. The onus is on Mexican judges to embrace the *pro personae* principle and to use it as much as their legal powers and institutional boundaries permit.

To what extent the principle has been or is going to be embraced by all members of the judiciary is something that needs further analysis and, in any case, remains to be seen in the coming years.