



WITH FRIENDS LIKE THESE, WHO NEEDS ENEMIES?
TURNING ATTENTION TO PUBLIC CORRUPTION IN
MEXICO

Max Ross*

The United States has a strong national security interest in reducing and eliminating corruption through the use of targeted sanctions. Target sanctions are valuable for their efficacy and ability to avoid harming civilian populations. This Article proposes using Global Magnitsky Act sanctions against corrupt officials in Mexico and Latin America to achieve the dual aim of bolstering the United States' national security interests and further development of bilateral partnerships in the region.

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* George Mason University School of Law, Juris Doctor Candidate, May 2018; Editor-in-Chief, National Security Law Journal, 2017-2018; Virginia Commonwealth University, B.A. Political Science, August 2012. I would like to thank my wife, Bianca for her love and constant support. I would also like to thank my mom, Lorraine, my dad, Bill, and my brothers Henry and Charlie always believing in me and pushing me to be the best version of myself. Finally, I would like to thank the staff of the National Security Law Journal for their insights and contributions that have helped me reach this final version of my Comment. I could not have done this without all of your help.

INTRODUCTION

This Comment analyzes how the United States' national security interests are harmed by the corruption of Mexican public officials, arguing that Congress and the President should use the Global Magnitsky Act's targeted sanctions regime against known corrupt officials to make Mexico a stronger partner in the fight against transnational criminal organizations.

A COMPROMISED PARTNER

Heroin overdoses kill approximately two hundred Americans every week, with the vast majority of heroin supplied by cartel organizations in Mexico.¹ Overdoses have risen dramatically in recent decades, more than doubling between 2000 and 2014.² Transnational criminal organizations ("TCO")³ who supply America's heroin have operated nearly unchecked by the Mexican government, threatening security while fostering corruption across the region.⁴ Since former Mexican president Felipe Calderon's escalation of the fight against TCO drug traffickers in 2006, over 100,000 Mexicans have died from homicide and more than 26,000 have gone missing.⁵

¹ Don Winslow, *El Chapo and the Secret History of the Heroin Crisis*, ESQUIRE (Aug. 9, 2016), available at <http://www.esquire.com/news-politics/a46918/heroin-mexico-el-chapo-cartels-don-winslow/>.

² *Id.*

³ Because TCOs are difficult to define, this comment uses the term as catchall for several different kinds of profit-oriented groups operating across international borders that use laundering operations to cover black market profits and use violence. See Luz Estella Nagle, *The Challenges of Fighting Global Organized Crime in Latin America*, 26 FORDHAM INT'L L.J. 1649, 1655-56 (2002).

⁴ VANDA FELBAB-BROWN, UNITED STATES NATIONAL SECURITY POLICY IN LATIN AMERICA: THREAT ASSESSMENT AND POLICY RECOMMENDATIONS FOR THE NEXT ADMINISTRATION 8 (2008).

⁵ John M. Ackerman, *Mexico Is Not a Functioning Democracy*, FOREIGN POLICY (Feb. 23, 2016), available at <http://foreignpolicy.com/2016/02/23/obama-pena-nieto-mexico-corruption/>; Jason M. Breslow, *The Staggering Death Toll of Mexico's Drug War*, PBS FRONTLINE (Jul. 27, 2015) (citing UN Iraq Body Count Report and the Instituto Nacional de Estadística, Geografía, e Informática (Mexico)), available at <http://www.pbs.org/wgbh/frontline/article/the-staggering-death-toll-of-mexicos-drug-war/>.

In 2015, the Obama administration noted in the United States Global Anti-Corruption Agenda that the United States “views corruption as a growing threat to the national security of our country and allies around the world.”⁶ This is particularly relevant in Mexico, where corruption has debilitated the government’s capacity to enforce the rule of law and to resist narcotics-smuggling cartels.⁷ At one point in 2016, there were six current and former Mexican governors under investigation by the Mexico’s attorney general, three of whom had outstanding indictments in the United States.⁸ One governor, Javier Duarte of the state of Veracruz, was accused of using state resources to protect shipments of cocaine and amassing a network of shell companies to embezzle as much as \$1.7 billion.⁹ After stepping down in October 2016 due to the allegations, Duarte managed to disappear and elude law enforcement for eight months before being discovered in Guatemala and extradited back to Mexico.¹⁰

The ripple effects of the Mexican government’s losing struggle against narcotics smugglers cannot be ignored.¹¹ American lawmakers should continue to seek solutions via the prioritization of good governance and anti-corruption efforts, as

⁶ WHITE HOUSE, EXEC. OFFICE OF THE PRESS SECRETARY, FACT SHEET: THE U.S. GLOBAL ANTICORRUPTION AGENDA, (Sept. 24, 2014) *available at* <https://obamawhitehouse.archives.gov/the-press-office/2014/09/24/fact-sheet-us-global-anticorruption-agenda>.

⁷ EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY POLICY 2015 27-28 (2015).

⁸ See Andrea Noel, *Mexican Governors on the Lam*, DAILY BEAST (Dec. 3, 2016), *available at* <http://www.thedailybeast.com/articles/2016/12/03/mexican-governors-on-the-lam.html>; *These Mexican states are way too corrupt, according to the scandal-plagued president*, REUTERS (Jul. 12, 2016), *available at* <https://news.vice.com/article/these-mexican-states-are-way-too-corrupt-according-to-the-scandal-plagued-president>.

⁹ Noel, *supra* note 8.

¹⁰ Christopher Woody, *A former Mexican governor has been accused of involvement in forced disappearances, and it points to a sinister problem with Mexico’s police* BUSINESS INSIDER (June 11, 2018), <https://www.businessinsider.com/javier-duarte-former-veracruz-mexico-governor-accused-disappearances-2018-6>.

¹¹ See Gabriel Marcella, *AMERICAN GRAND STRATEGY FOR LATIN AMERICA IN THE AGE OF RESENTMENT*, STRATEGIC STUDIES INSTITUTE, 46 (September 2007). Some estimates put the death toll in Mexico much higher. Compare these deaths to the number of civilian deaths in Iraq (81,636) and Afghanistan (21,415) between 2007 and July 2015. Breslow, *supra* note 5.

the Obama administration sought to do through its Global Anti-Corruption Agenda.¹² Legislation that strengthens and reinforces foreign anticorruption generally will help strengthen Mexico in the fight against TCOs and ease the collateral effects felt by law enforcement in the United States. Targeted sanctions against public officials are an important tool to help deter bad behavior.¹³ In addition to funding anticorruption efforts, Congress and the President should use the Global Magnitsky Act (“GMA”) sanctions from the Sergei Magnitsky Rule of Law Accountability Act (the “original Magnitsky Act”) to target corrupt government officials in Mexico with asset freezes and visa bans. This will dramatically reduce incentives to participate in corrupt activity.

Part I of this Comment will provide a general overview of corruption in Latin America and why it matters to the United States. Part II will explain why corruption of Mexican public officials remains particularly important to the security of the United States. Part III will review the strengths and weaknesses of the approaches the United States has taken to combat crime and corruption abroad. Part IV will explain the growing use of targeted sanctions and will propose using the GMA’s targeted sanctions against corrupt public officials in Mexico.

I. Why Corruption in Latin America Matters

Mexico and Latin America have deep historic and economic ties to the United States. The Western Hemisphere has few countries overtly hostile to the United States, and relations between the United States and its neighbors have been incrementally improving for years.¹⁴ While relations have

¹² WHITE HOUSE, *supra* note 6.

¹³ William Felix Browder, *Putting the Bad Guys on Ice*, BLOOMBERG (Feb. 19, 2015), available at <http://www.bloomberg.com/news/articles/2015-02-19/u-s-should-freeze-assets-ban-travel-of-human-rights-abusers-more-often> (Highlighting the fear of reprisal human rights abusers feel under the original Magnitsky Act).

¹⁴ *Opportunities for U.S. Engagement in Latin America Before the S. Comm. On Foreign Relations*, 114th Cong. (2016) (statement of Shannon K. O’Neil, Nelson and David Rockefeller Senior Fellow for Latin America Studies). (highlighting

become less antagonistic, the United States' assistance in Latin America has created security gaps regarding assistance used to influence those countries.¹⁵

Latin America is one of the most violent regions in the world, due in part to pervasive corruption that corrodes the state's ability to support the rule of law.¹⁶ In the case of Mexico, "Washington is providing equipment and training to compromised agencies—at the same time that it's tracking their close ties to organized crime."¹⁷ After a historical overview of the United States' involvement in Latin America, this Part will show that the inability of Latin American nations to support the rule of law can be largely attributed to the corruption of their government officials.

The United States benefits economically from being located in a region of mostly democratic countries with emerging economies,¹⁸ which is why it has experimented with regional policy alternatives throughout its history.¹⁹ During the Cold War, Latin America was considered fertile ground for both

improvements in relations with Latin American countries thanks to changes in the U.S. attitude towards Cuba).

¹⁵ See Marcella, *supra* note 11, at 43.

¹⁶ *Opportunities for U.S. Engagement in Latin America Before the S. Comm. On Foreign Relations*, 114th Cong. (2016) (statement of Shannon K. O'Neil, Nelson and David Rockefeller Senior Fellow for Latin America Studies).

¹⁷ Jesse Franzblau, *Why Is the US Still Spending Billions to Fund Mexico's Corrupt Drug War*, *THE NATION*, (Feb. 27, 2015), <https://www.thenation.com/article/us-connection-mexicos-drug-war-corruption/>.

¹⁸ *Posture Statement of Admiral Kurt W. Tidd Before the S. Armed Services Comm.*, 114th Cong. 1 (2016) (statement of Kurt W. Tidd, Commander, United States Southern Command).

¹⁹ See *Opportunities for U.S. Engagement in Latin America Before the S. Comm. On Foreign Relations*, 114th Cong. (2016) (statement of Shannon K. O'Neil, Nelson and David Rockefeller Senior Fellow for Latin America Studies); Marcella, *supra* note 11, at v. Aggressive United States involvement in the region began with the Monroe doctrine, when President James Monroe declared to the world's colonial powers that aggression and attempts to re-colonize the western hemisphere after independence would not be tolerated. Latin America largely aligned with the United States throughout the early twentieth century and expressed hostility toward the axis powers during World War II. BRUCE W. JETLESON, *AMERICAN FOREIGN POLICY* 36, 92 (5th ed. 2014).

United States and Soviet influence.²⁰ Throughout the period, the United States' Latin America policy focused on a mix of security and development in the name of fighting communism.²¹ Even before the fall of the Soviet Union, the United States' national security interests had expanded to countering the drug trade in narcotics source and transit countries.²² In 1971, President Richard Nixon declared the "War on Drugs," beginning a new era in the prioritization of narcotics by United States law enforcement.

Crucial to understanding United States' national security interests in Latin America is a general understanding of corruption and its many forms. Corruption is a timeless and pervasive phenomenon that can be difficult to measure objectively due to its inherent secrecy and because assessing the effects of corruption involves questions of degree and perception.²³ For this reason, effort is frequently placed on collecting data on the total number of allegations within a country²⁴ to calculate the Corruption Perception Index ("CPI").²⁵ The World Bank provides a useful definition on the ways corruption can influence public officials:

"[T]he abuse of public office for private gain. This private gain could be in the form of money or favors for the benefit

²⁰ Marcella, *supra* note 11, at 4.

²¹ *Id.*

²² JETLESON, *supra* note 19, at 657 (quoting JULIA E. SWEIG, FRIENDLY FIRE: LOSING FRIENDS AND MAKING ENEMIES IN THE ANTI-AMERICAN CENTURY 149–151, 160–164 (New York: Public Affairs, 2006)).

²³ See Scheherazade S. Rehman & Frederick V. Perry, *Corruption, Constitutions, and Crude in Latin America*, 20 L. & BUS. REV. AM. 163, 167 (2014); Patricio Maldonado & Gerardo D. Berthin, *Transparency and Developing Legal Frameworks to Combat Corruption in Latin America*, 10 SW. J.L. & TRADE AM. 243, 249–51 (2004).

²⁴ While it can be useful to depersonalize the discussion of corruption in this way, more research on the effectiveness of different anti-corruption interventions is needed. Maldonado & Berthin, *supra* note 23, at 250.

²⁵ The CPI has been reported since 1995 and is based on surveys of various business and citizen groups in 174 countries in the world. Maldonado & Berthin, *supra* note 23, at 250. Transparency International's surveys ask questions such as "Is corruption a big problem in your country?" and "Do you trust your government?" Rehman & Perry, *supra* note 23, at 189.

of family or friends-or for the benefit of special interest groups such as a political party seeking to obtain or retain power. Such behavior by persons concerned with the procurement process often leads to economic losses for the public. Thus, many lose for the benefit of a few.”²⁶

In Latin America, enduring decades of an economic system that benefits the few has helped normalize, if not legitimize, corruption, which in turn severely reduces a state’s capacity to fight crime and enforce the rule of law. This holds true at all levels of society: the perception of corruption for even the pettiest bribe diminishes civic confidence in the ability of governments to enforce the rule of law, fundamentally weakening state institutions.²⁷ For that reason, strong state institutions must always hold public officials accountable for misconduct.²⁸

In Latin America, corruption has negative consequences beyond diminishing the effectiveness of law enforcement. According to the Inter-American Development Bank:

“The prevalence of corruption is to some degree an expression of the weakness of the rule of law as a whole, but its attention relates . . . to the weakness of the state’s financial administration, poor policy designs, deficiently transparent expenditure systems, antiquated procurement and public accounting systems, poor regulatory capacity, an absence of clear rules regarding privatization processes, and weaknesses in the civil service.”²⁹

Put another way, corruption is largely accepted to stunt economic growth because it distorts the regulatory environment

²⁶ Rehman & Perry, *supra* note 23, at 167-68 (citing WORLD BANK, STRENGTHENING WORLD BANK GROUP ENGAGEMENT ON GOVERNANCE AND ANTICORRUPTION 67 (Mar. 21, 2007)).

²⁷ WHITE HOUSE, *supra* note 6.

²⁸ Rachel Hilderbrand, *U.S. and Mexico’s Law Enforcement Strategy: Strengthening Mexico’s Institutions or Continuing Militarization?*, COUNCIL ON HEMISPHERIC AFFAIRS, 36 WASH. REPORT ON THE HEMISPHERE 7 (2016).

²⁹ Marcella, *supra* note 11, at 21 (quoting Christina Biebesheimer, *Expectations and Reality in Rule of Law Reform in Latin America*, 2 INTER-AMERICAN DEVELOPMENT BANK, 2004).

of markets.³⁰ Corruption drains public revenue collected by governments, lessening their ability to deliver social benefits to the people.³¹ For example, the weakness and corruption of law enforcement in El Salvador, Guatemala, and Honduras has allowed gang violence to spread, prompting significant increases in emigration and culminating in the 2014 migration crisis of unaccompanied minor children from Central America.³²

Corruption in Latin America matters to the United States because most of the narcotics that enter the United States are of South American origin and are moved through established routes in Mexico and Central America controlled by powerful TCOs.³³ TCOs profit from drug consumption in the United States, Europe, Asia, and within Latin America itself.³⁴ The enormous American demand for drugs has created huge financial incentives for cartels to supply this market.³⁵

The problem with current attempts to tackle TCOs is that governments underappreciate the importance of corruption among law enforcement officials. The United States tends to pay little attention to the corruption of Latin American public officials, considering corruption merely a consequence or side

³⁰ *Id.* at 7; Rehman & Perry, *supra* note 23, at 193.

³¹ WHITE HOUSE, *supra* note 6.

³² See Tidd, *supra* note 18; Danielle Renwick, *Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS, Jan. 19, 2016, available at <http://www.cfr.org/transnational-crime/central-americas-violent-northern-triangle/p37286> (noting that nearly 100,000 such minors arrived in the U.S. between October 2013 and January 2015).

³³ Peter Chalk, *The Latin American Drug Trade: Scope, Dimensions, Impact, and Response* 6 (2011), available at http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG1076.pdf.

³⁴ Marcella, *supra* note 11, at 9.

³⁵ Christopher Paul et al., *Mexico Is Not Colombia: Alternative Historical Analogies for Responding to the Challenge of Violent Drug-Trafficking Organizations*, RAND CORP. 21, 24 (2014), available at http://www.rand.org/content/dam/rand/pubs/research_reports/RR500/RR548z1/RAND_RR548z1.pdf (noting that the United States bears responsibility for the destabilization of the Latin American governments by failing to reduce the demand for illegal drugs, a topic not covered by this comment).

effect of the drug trade and lack of development.³⁶ Instead the United States prefers to focus on assistance in the form of training and hardware programs for Latin American militaries, law enforcement agencies, and justice systems.³⁷ For example, the United States, through the military support program Plan Colombia, enhanced the Colombian military's capability to fight traffickers and rebel groups.³⁸ While Plan Colombia dramatically improved Colombia's domestic security situation (proving that some security reforms with a strong military focus can be beneficial),³⁹ Colombia still remains hampered by corruption. In 2015 Colombia tied with Sri Lanka and Liberia at 83 on the CPI.⁴⁰ Without further anticorruption improvements, Colombia may squander its recent progress.⁴¹

Separately, the United States only recently began to address the problem of corrupt public officials in other parts of Latin America. For example, in Central America the United States recently began to support anticorruption efforts.⁴² Between 2008 and 2015 the United States contributed over \$1 billion to Central American anticorruption efforts through the Central America Regional Security Initiative ("CARSI").⁴³

³⁶ See Ackerman, *supra* note 5, at 3-4; *but see* Heather Nauert, *Global Magnitsky Designations for Nicaragua*, U.S. DEP'T OF STATE (July 5, 2018), available at <https://www.state.gov/r/pa/prs/ps/2018/07/283833.htm>.

³⁷ See Franzblau, *supra* note 17; Roger F. Noriega & Felipe Trigos, *Why isn't Mexico's security strategy working?*, AMERICAN ENTERPRISE INSTITUTE (Jun. 12, 2014), available at <https://www.aei.org/publication/why-isnt-mexicos-security-strategy-working/>.

³⁸ Some well-financed narcotics traffickers invested in submarines for smuggling. Chalk, *supra* note 33, at 59.

³⁹ See Tidd, *supra* note 18. There is now a treaty in place with the so called "narco-terrorists," the FARC, or the Revolutionary Armed Forces of Colombia.

⁴⁰ TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX (2015), available at <http://www.transparency.org/cpi2015#downloads> (follow "Downloads" hyperlink; then click "Data and Methodology").

⁴¹ See Joel Gillin, *Understanding the causes of Colombia's conflict: Weak, corrupt state institutions*, COLOMBIA REPORTS, (Jan. 13, 2015), available at <http://colombiareports.com/understanding-colombias-conflict-weak-corrupt-state-institutions/>.

⁴² Renwick, *supra* note 32, at 8.

⁴³ *Id.*

Based on Plan Colombia's moderate success in fighting TCOs, the United States launched the Merida Initiative in partnership with the Mexican government.⁴⁴ The United States planned that the Merida Initiative would eventually have the same long term effects on TCOs as Plan Colombia did in Colombia.⁴⁵ To date, Plan Colombia and the Merida Initiative produced mixed results.⁴⁶ Like Plan Colombia, the Merida Initiative lacks an anticorruption focus specific to the Mexican context.⁴⁷ To understand the shortcomings of the Merida Initiative, the next Part will cover Mexican corruption in detail and explain why the corruption of Mexican officials is a national security concern for the United States.

II. Mexico's Corruption Problem

As the Mexican government struggles to contend with drug cartels, it is frequently hamstrung by corruption and ineptitude.⁴⁸ In the 2018 CPI, Mexico ranks 138th out of 180 countries, tied with Russia, Iran, and Papua New Guinea.⁴⁹ The failure of the weak Mexican federal government and even weaker Mexican state governments to establish a strong sense of the rule of law is due to corruption within law enforcement agencies and a weak judiciary system.⁵⁰ According to United Nations statistics, Mexico remains among the most violent countries in the world.⁵¹ By one estimate, only 1% of reported crimes in Mexico are solved.⁵² Official surveys estimate that only 19% all crimes committed are ever reported in the first place.⁵³

⁴⁴ Noriega & Trigos, *supra* note 37, at 12, 19.

⁴⁵ See Felbab-Brown, *supra* note 4, at 5, 8; Tidd, *supra* note 18.

⁴⁶ See Felbab-Brown, *supra* note 4, at 8.

⁴⁷ Franzblau, *supra* note 17.

⁴⁸ Ackerman, *supra* note 5, at 1, 4.

⁴⁹ TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX (2017).

⁵⁰ Noriega & Trigos, *supra* note 37, at 2, 8, 10.

⁵¹ Breslow, *supra* note 5 (citing UN Iraq Body Count Report and the Instituto Nacional de Estadística, Geografía, e Informática (Mexico)).

⁵² Katy Watson, *People vs Politicians: Who can tackle Mexico's Corruption?*, BBC (Mar. 22, 2016), available at <https://www.bbc.com/news/world-latin-america-35865948>.

⁵³ Viridiana Rios, *Five Security Priorities for Mexico*, WILSON CENTER – MEXICO INSTITUTE, available at <https://www.wilsoncenter.org/article/five-security-priorities-for-mexico>.

Crimes are infrequently reported because only half the victims of crimes feel they are treated well when they report to authorities.⁵⁴ This high level of crime has consequences, with some estimates of Mexico's lost economic output due to corruption at 9%.⁵⁵

The United States Department of Justice reports that cartels bring in between \$18 and \$39 billion dollars of profit annually.⁵⁶ These funds allow the cartels to purchase military grade munitions and weapons and to field their own paramilitary units competitive with standard national military forces.⁵⁷ The cartels can even afford to recruit directly from the ranks of the Mexican military.⁵⁸ With such unchecked power, Mexico's drug cartels represent a kind of shadow government.

Mexico's cartels have long operated with impunity. During the Vicente Fox administration (December 2000-November 2006), corruption reached such a high level that one of the leading TCOs in Mexico, the Gulf Cartel, sent a letter to President Fox demanding that the federal police forces stop lending their services to work as "protection" for the Sinaloa Cartel.⁵⁹ In 2008, the anti-drug chief for President Fox's successor, Calderon, was arrested for providing intelligence the Sinaloa Cartel.⁶⁰ Observers who track the rise in the power of

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ David Pion-Berlin & Harold Trinkunas, Latin America's Growing Security Gap, 22 J. OF DEMOCRACY 40, 41 (2011).

⁵⁷ *Id.* at 41-42.

⁵⁸ The Los Zetas cartel originally recruited directly from the ranks of the Mexican army to serve as protection and enforcement for the Sinaloa cartel. Eventually these guards broke with their bosses and went out on their own. *See* Paul, *supra* note 35, at 41, 89 (comparing Los Zetas to Burmese military units which participate in the production and trafficking of narcotics, making that government complicit in the drug trade.).

⁵⁹ Hilderbrand, *supra* note 28, at 8. In Mexico, there is a widespread belief that the Sinaloa cartel is preferred by the Mexican government because it is less violent than other cartels such as Los Zetas or the Jalisco New Generation cartels. Winslow, *supra* note 1.

⁶⁰ The Mexican government's liaison to Interpol was also arrested in 2008. Ken Ellingwood, *Former anti-drug chief is arrested*, L.A. TIMES, (Nov. 22, 2008), available at <http://articles.latimes.com/2008/nov/22/world/fg-bribe22>.

Mexican TCOs believe that the Sinaloa cartel's connections to municipal, state, and federal officials allow it to dominate over its rivals.⁶¹ Prosecution of high-level officials is rare in Mexico.⁶² Politicians are frequently targeted for their opposition to the cartels. On January 1, 2016, the 33-year-old newly elected mayor of Temixco (a small city in the south of Mexico) promised in her inauguration speech to combat the cartels and their influence within local government.⁶³ The next night, armed commandos woke Mayor Mota in her home and executed her.⁶⁴ She was one of "152 mayors, candidates, and former mayors killed from 2005 through 2017, with 14 victims in 2015, six in 2016, and 21 in 2017. In total, nine sitting mayors were killed in 2017."⁶⁵ This makes mayors who object to corruption twelve times more likely to be killed than the general population in Mexico.

Beyond the silencing of politicians and law enforcement officials, Mexican cartels have also successfully suppressed media through intimidation and violence.⁶⁶ Mexico is now also one of the most dangerous places in the world for journalists, who are three times more likely to be killed than the average person in Mexico.⁶⁷ During the governorship of the Javier Duarte, cartels killed more than fifteen journalists in the state of Veracruz alone.⁶⁸

Since President Calderón's militarization of Mexico's fight against cartels, the Mexican government has been under

⁶¹ Winslow, *supra* note 1.

⁶² Hilderbrand, *supra* note 28, at 8.

⁶³ Ackerman, *supra* note 5.

⁶⁴ *Id.*

⁶⁵ Laura Calderón, Octavio Rodriguez Ferreira & David A. Shirk, *Drug Violence in Mexico: Data and Analysis Through 2017* JUSTICE IN MEXICO 5 (Apr. 2018), available at https://justiceinmexico.org/wp-content/uploads/2018/04/180411_DrugViolenceinMexico-12mb.pdf [hereinafter Calderón].

⁶⁶ Ackerman, *supra* note 5 ("A long list of independent journalists are excluded from radio and television for their anti-government views and Mexico's leading radio news anchor, Carmen Aristegui, was arbitrarily fired, apparently on direct order from the office of the president.").

⁶⁷ See Calderón *supra* note 65.

⁶⁸ *Id.*

increasing scrutiny for its human rights record.⁶⁹ United States support for such heavy-handedness and militarization only changed the scope of the fight and has itself furthered violence,⁷⁰ rather than contributing to long-term solutions. Observers argue that in a highly corrupt environment like Mexico, a militarized approach to fighting the drug war reduces the willingness of law enforcement agencies to cooperate, because trust between branches and agencies of government is reduced.⁷¹ Militarization of the conflict against TCOs increases the overall level of violence.⁷²

The failure of the United States and Mexico to reduce public corruption has three major consequences. First, it has led to a sharp increase in the amount of violence experienced on both sides of the border.⁷³ Second, public corruption allows an avalanche of narcotics to enter the United States and has created a public health emergency.⁷⁴ Finally, the inability of law enforcement officials to control corruption allows people to move freely across the border without government knowledge.⁷⁵ With respect to the first problem, violence caused by the drug trade has reached unacceptable levels even within the United States.⁷⁶ The high perception of corruption in Mexico led to the formation of armed vigilante groups in places where the Mexican state appears to not adequately protect its citizenry.⁷⁷ The

⁶⁹ See Ackerman, *supra* note 5.

⁷⁰ See Franzblau, *supra* note 17.

⁷¹ Hilderbrand, *supra* note 28, at 8.

⁷² See *id.*

⁷³ See *The Rise of Mexican Drug Cartels and U.S. National Security Before H. Comm. On Oversight and Gov't Reform Judiciary*, 111th Cong. 3-4 (2009) (statement of Lanny A. Breuer, Assistant Attorney General; William Hoover, Assistant Dir. Field Operations ATF; Anthony P. Palacio, Assistant Administrator for Intelligence).

⁷⁴ See *id.*; Winslow, *supra* note 1.

⁷⁵ Breuer, *supra* note 73.

⁷⁶ GEREBEN SCHAEFER ET AL., SECURITY IN MEXICO: IMPLICATIONS FOR U.S. POLICY OPTIONS xvi, 46, (2009), available at http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG876.pdf.

⁷⁷ These groups are problematic and corruptible in their own way. CARTEL LAND (The Documentary Group; Our Time Productions 2015) (documenting the quick rise and success of "autodefensas," or self-defense groups in the state of

emergence of vigilante groups on both sides of the border should alarm United States policymakers.

As previously stated, the majority of the narcotics that enter the United States come from Mexico.⁷⁸ The cartels bear significant responsibility for two crises facing the United States: the heroin and methamphetamine epidemics,⁷⁹ and increasingly engage in human trafficking across the border.⁸⁰ The corruption of law enforcement officials makes the border more porous and prevents the United States government from knowing who has entered and exited the country.⁸¹

III. Efforts TO ADDRESS Corruption

No silver bullet can immediately end corruption. Anticorruption is a project that requires a “permanent, proactive and unwavering commitment from many actors, including governments, the donor community, the private sector, the media,” and other groups.⁸² Policymakers in the United States and in Mexico should be praised for past commitments to curb corruption via multilateral treaties. While enforcement of these treaties is inconsistent, both countries remain parties to the treaties that commit them to search for new methods to fight corruption.⁸³ This Part will first review the international treaties targeting corruption to which the United States and Mexico are parties, and then cover the bilateral and unilateral actions taken by the United States to fight corruption abroad.

Michoacán and their quick fall into corruption and participation in protection rackets for methamphetamine cooks and innocent citizens).

⁷⁸ Schaefer, *supra* note 76, at xvi.

⁷⁹ Winslow, *supra* note 1.; Schaefer, *supra* note 76, at xvi.

⁸⁰ Schaefer, *supra* note 76, at 25.

⁸¹ *Id.* at 26.

⁸² Maldonado & Berthin, *supra* note 23, at 247.

⁸³ Noriega & Trigos, *supra* note 37; Nancy Zucker Boswell, *COMBATING CORRUPTION: FOCUS ON LATIN AMERICA*, 3 Sw. J.L. & Trade Am. 179, 190 (1996).

A. The Multilateral Approach to Fighting Corruption

Freedom from corruption is arguably a human right under international law, and the United States and Mexico are parties to a number of multilateral treaties that require both to take certain steps to fight corrupt influences within the government.⁸⁴ The United States, Mexico, and numerous countries in Latin America signed the United Nations Convention Against Corruption (“UNCAC”),⁸⁵ the Inter-American Convention Against Corruption (“IACAC”) (1996),⁸⁶ and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).⁸⁷ With these agreements in place, the relevant issue for United States policymakers is how the United States can assist its partners in meeting their treaty commitments.

The UNCAC is the first legally-binding multilateral agreement to specifically address public corruption.⁸⁸ It attempts to address the damage done to democracy, development, and the rule of law by establishing criminal penalties (some mandatory and some optional) for certain corrupt practices.⁸⁹ The UNCAC requires countries to outlaw foreign bribery, money laundering, influence peddling and embezzlement, and encourages outlawing less common forms of corruption.⁹⁰ The IACAC, passed by the Organization of American States, defines corruption and calls on signatories to implement certain anti-corruption mechanisms such as public comment provisions and

⁸⁴ See Juliet Sorensen, *Ideals without Illusions: Corruption and the Future of a Democratic North Africa*, 10 NORTHWESTERN J. INT’L HUMAN RIGHTS 202, 202 (2012) (citing G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948)).

⁸⁵ United Nations Convention Against Corruption, Oct. 31, 2003, S. TREATY DOC. No. 109-6, 2349 U.N.T.S. 41.

⁸⁶ Inter-American Convention Against Corruption, Mar. 29, 1996, S. TREATY DOC. No. 105-39, 35 I.L.M. 724, available at <http://www.oas.org/juridico/english/treaties/b-58.html>.

⁸⁷ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. No. 105-43, 37 I.L.M. 1.

⁸⁸ S. TREATY DOC. No. 109-6, 2349 U.N.T.S. 41.

⁸⁹ *Id.*

⁹⁰ *Id.*

transparency laws.⁹¹ The OECD Convention on Combatting Bribery was “signed at the request of the United States Congress and the President,” and calls on signatories to enact domestic laws equivalent to the United States’ Foreign Corrupt Practices Act (“FCPA”)⁹², which prohibits bribery of foreign government officials by American companies.⁹³ The right to freedom from corruption is thus guaranteed by treaties and agreements in addition to customary international law.⁹⁴ Article 21 of the Universal Declaration of Human Rights further declares a right for people to have some choice and influence over the representatives whom govern them.⁹⁵ Inherent in this right to democratic governance is the right to a government free from corruption.⁹⁶

Although Mexico made progress guaranteeing freedom from corruption, it must work to ensure this freedom is protected through enforcement of domestic anticorruption laws. Countries should be encouraged to put pressure on each other to guarantee that none are failing to meet their treaty commitments and obligations under customary international law.

B. United States’ Bilateral and Unilateral Efforts to Fight Corruption

Acting at times with partner nations and at times alone, the United States is proactive in the fight against corruption and crime. The current approach to addressing corruption in Mexico involves targeting Americans through the FCPA, and by slowly building up Mexican institutional strength through the Merida Initiative. Currently, the Merida Initiative rule of law programs only provide rewards and support for Mexican institutions that

⁹¹ Rehman & Perry, *supra* note 23, at 173-74 (citing Inter-American Convention Against Corruption, Mar. 29, 1996, S. TREATY DOC. NO. 105-39, 35 I.L.M. 724).

⁹² *Id.* at 173 (citing Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43, 37 I.L.M. 1).

⁹³ Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(2012).

⁹⁴ Sorensen, *supra* note 84, at 202.

⁹⁵ *Id.* (citing G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948)).

⁹⁶ *Id.*

make progress but do little to seek out and deter corrupt behavior by government officials in Mexico.⁹⁷

Congress first began to act against corrupt practices within United States companies doing businesses overseas in the 1970s. Congress signed the FCPA in 1977, and although federal prosecutors in the United States did not immediately bring cases against American business; severe penalties now exist for any business entity attempting to bribe foreign officials.⁹⁸ During the Obama administration's turn at FCPA enforcement, the United States government increasingly used the law to try and change corrupt cultures in other countries rather than just deter Americans from corrupting foreign officials.⁹⁹ Notably, the Office of Foreign Asset Control ("OFAC") has a designation for sanctioning TCOs, but it has yet to employ this designation to target Mexican cartels or officials.¹⁰⁰

The Merida Initiative, created during the George W. Bush administration, is a historic cooperation program between the United States and Mexico to fight TCOs.¹⁰¹ Recognizing Mexico as a security priority, the Merida Initiative has a military/law enforcement element as well as a development/rule of law element.¹⁰² The current rule of law programs administered by the United States Agency for International Development ("USAID") under the Merida Initiative focus on helping state governments within Mexico fully implement a series of constitutional legal reforms which move Mexico toward an oral,

⁹⁷ See Franzblau, *supra* note 17.

⁹⁸ Daniel R. Alonso, *Corruption Enforcement Becomes Focus of U.S. Foreign Policy*, CFO, (May 20, 2015), available at <http://ww2.cfo.com/regulation/2015/05/global-corruption-enforcement-becomes-focus-u-s-foreign-policy/>.

⁹⁹ *Id.*

¹⁰⁰ See Transnational Criminal Organizations, U.S. DEP'T. TREASURY (last accessed Sept. 9, 2018), available at <https://www.treasury.gov/resource-center/sanctions/Programs/Pages/tco.aspx> (targeting MS-13, but not Mexican smuggling cartels).

¹⁰¹ Merida Initiative, U.S DEP'T OF STATE (last accessed 1/7/2016), available at <https://www.state.gov/j/inl/merida/>

¹⁰² See *id.*

adversarial criminal justice trial system.¹⁰³ Mexican states with the longest history of USAID support saw a drop in pre-trial detention rates, in part through use of alternative mechanisms for non-violent and unintentional misdemeanors.¹⁰⁴ Through another Merida Initiative program, USAID delivered dozens of grants to nongovernmental organizations “that have resulted in programs for at-risk youth and programs that reduce violence against women, improve mental health, strengthen community cohesion, and improve education.”¹⁰⁵ Merida Initiative programs provide “classroom lessons on the culture of lawfulness and ethics to more than 600,000 students and 14,000 teachers, in some 7,000 separate schools located in 24 Mexican States.”¹⁰⁶ USAID committed to funding these rule of law programs through 2018.¹⁰⁷

On the military side, the Merida Initiative has provided funding for equipment, such as helicopters for Mexico’s Navy, Army, Federal Police, and Secretariat for Public Security.¹⁰⁸ By one estimate, funding now reaches over 52,000 Mexican officers.¹⁰⁹

¹⁰³ Mexican states have even fewer resources and less legal expertise than the Mexican federal government. USAID, MEXICO RULE OF LAW INFORMATION SHEET (Jan. 2016), *available at* <https://www.usaid.gov/sites/default/files/documents/2496/DO2%20fact%20sheet%20Jan2016.pdf>.

¹⁰⁴ *Id.* (noting a drop of 25%).

¹⁰⁵ *Security Challenges in Latin America Before the Subcomm. On State, Foreign Operations, and Related Programs of the H. Appropriations Comm.*, 112th Cong. (Mar. 29, 2012) (statement of William R. Brownfield, Assistant Secretary, Bureau of International Narcotics and Law Enforcement Affairs), *available at* <https://2009-2017.state.gov/j/inl/rls/rm/187097.htm>.

¹⁰⁶ *Id.*

¹⁰⁷ *See generally* USAID, MEXICO COUNTRY DEVELOPMENT COOPERATION STRATEGY FY 2014 – FY 2018, (Addendum Nov. 2015), *available at* <https://www.usaid.gov/sites/default/files/documents/1862/USAID-Mexico-CDCS-with-Addendum-1-as-of-Nov-2015.pdf>.

¹⁰⁸ *Security Challenges in Latin America Before the Subcomm. On State, Foreign Operations, and Related Programs of the H. Appropriations Comm.*, 113th Cong. (Mar. 29, 2012) (statement of William R. Brownfield, Assistant Secretary, Bureau of International Narcotics and Law Enforcement Affairs), *available at* <https://2009-2017.state.gov/j/inl/rls/rm/187097.htm>.

¹⁰⁹ *Id.*

The greatest advantage of the current United States approach to fighting Mexican drug cartels is that it does not antagonize the Mexican government. The confidence and trust on which the Merida Initiative is based is important to its success, especially as there is “historic suspicions of [United States] law enforcement officials and Mexican sensitivities to deeper cooperation with the [United States] government.”¹¹⁰

Some Latin American countries managed to reduce corruption without foreign assistance or intervention. Chile is one of the highest ranked Latin American countries on the CPI at 27th,¹¹¹ thanks to reforms passed over a decade ago. In 1999, Chile reformed its justice system to place effective sanctions on “big fish,” or high level government officials engaged in corruption.¹¹² Chile also passed campaign finance reforms that seek to prevent undue influence in government.¹¹³ These reforms contribute to Chile’s relatively high position on the CPI.¹¹⁴ The fact that Latin American countries demonstrate an ability to control corruption should factor into U.S. diplomatic policy. Without it, “[n]ew restrictions on bilateral cooperation, which make both nations more vulnerable to criminal activities, may reinforce the perception that Mexican authorities are more committed to protecting their country’s sovereignty than to fighting crime.”¹¹⁵

There are several disadvantages to the current approach to fighting corruption in Mexico: it does not properly prioritize corruption of public officials; it allows for wasted resources; and it sends the wrong message to partners in the fight against TCOs.

¹¹⁰ Noriega & Trigos, *supra* note 37.

¹¹¹ Chile falls behind only Uruguay, which ranks 21st. TRANSPARENCY INTERNATIONAL, *supra* note 40.

¹¹² This is akin to the “kingpin” theory of fighting crime mentioned above. Like the Carter administration passing “sunshine” government transparency laws after the Watergate scandal, Chile’s own scandals caused it to pass the Law of Administrative Integrity in 1999. See Alejandro Ferreiro, Symposium, *Corruption, Transparency and Political Financing: Some Reflections on the Experience in Chile*, 10 SW. J.L. & TRADE AM. 345, 348 (2004).

¹¹³ See Ferreiro, *supra* note 112, at 353.

¹¹⁴ TRANSPARENCY INTERNATIONAL, *supra* note 40.

¹¹⁵ Noriega & Trigos, *supra* note 37.

The Merida Initiative support may eventually lower corruption and enhance respect of the rule of law in Mexico, but it is taking far too long to produce results. USAID's goal to help all of Mexico's states fully implement the 2008 reform by 2016 fell short, with only six of Mexico's thirty-one states fully implementing the reforms to date.¹¹⁶ USAID's rule of law programs do not have long-term effects on Mexico's cartels, who can quickly ramp up their capacity for violence and ability to elude law enforcement.¹¹⁷

The current approach to anticorruption in Mexico and Central America requires the Department of Justice and the State Department to annually appropriate hundreds of millions of dollars, much of which is not spent effectively.¹¹⁸ Between 2008 and 2014, United States assistance to Mexico totaled over \$3 billion.¹¹⁹ In Mexico, despite the enormous allocation of resources for new training for attorneys, new court facilities, and the creation of a new national code, the United States' rule of law support effort has incomplete results and has not significantly reduced Mexico's perception of corruption.¹²⁰ This is largely because the United States' funding for rule of law programs comes with few strings attached and little to nothing is done about endemic high-level public corruption.¹²¹

¹¹⁶ USAID, MEXICO RULE OF LAW INFORMATION SHEET, (Jan. 2016), *available at* <https://www.usaid.gov/sites/default/files/documents/2496/DO2%20fact%20sheet%20Jan2016.pdf>.

¹¹⁷ Berlin & Trinkunas, *supra* note 56, at 45; Noriega & Trigos, *supra* note 37.

¹¹⁸ See *The Rise of Mexican Drug Cartels and U.S. National Security Before H. Comm. On Oversight and Gov't Reform Judiciary*, 111th Cong. 15, 20 (2009) (statement of Lanny A. Breuer, Assistant Attorney General; William Hoover, Assistant Dir. Field Operations ATF; Anthony P. Palacio, Assistant Administrator for Intelligence) *available at* https://www.justice.gov/sites/default/files/criminal-ocgs/legacy/2011/06/24/AAG%20Breuer%20Remarks_Mexican%20Drug%20Cartels_7.9.09.pdf.

¹¹⁹ John M. Ackerman, *Why America Is to Blame for Mexico's Carnage and Corruption*, FOREIGN POLICY (Nov. 26, 2014), *available at* <http://foreignpolicy.com/2014/11/26/why-america-is-to-blame-for-mexicos-carnage-and-corruption/>.

¹²⁰ Rios, *supra* note 53.

¹²¹ See USAID, *supra* note 107, at 18.

The United States' current position of overlooking corruption by Mexican public officials, conditioned on continued cooperation by law enforcement in the fight against the cartels, sends the wrong message to all parties involved. While there is growing evidence that the Mexican people want change and reform with respect to corruption,¹²² the United States appears unwavering in its support for the Mexican government and unwilling to criticize its approach toward corruption.¹²³

The United States needs an update to its current corruption-fighting approach. As long as Mexico fails to enforce the rule of law, the United States faces the risks that come with living beside a severely weakened state.¹²⁴ Although United States is limited in the actions it can take to handle a problem in a friendly, neighboring country,¹²⁵ tools that the United States uses elsewhere can and should be equally applied in Mexico.

IV. Using The Global Magnitsky Act

In eastern Europe and Russia, the United States has taken bold unilateral action to fight corruption through use of targeted sanctions. Rather than blindly continuing to provide resources and support to a state that has not shown that its law enforcement officials can act honestly,¹²⁶ the United States should target known corrupt Mexican government officials with individualized sanctions while maintaining current levels of support for Mexican law enforcement and rule of law programs. In December 2012, President Obama signed the Russia and Moldova Jackson-Vanik Repeal and original Magnitsky Act, which put targeted sanctions on specific Russian government officials linked to serious human rights violations and corruption

¹²² Duncan Wood, *Fighting Corruption in Mexico*, FOREIGN AFFAIRS, (Jun. 22, 2016), available at <https://www.foreignaffairs.com/articles/mexico/2016-06-22/fighting-corruption-mexico> (citing the coalition of civic groups that began to mobilize for anticorruption reforms in 2015 under the banner 3de3 (3for3)).

¹²³ Ackerman, *supra* note 5.

¹²⁴ See Felbab-Brown, *supra* note 4, at 3, 8.

¹²⁵ See Hilderbrand, *supra* note 28, at 9.

¹²⁶ Franzblau, *supra* note 17.

in Russia and Europe.¹²⁷ On December 23, 2016, the National Defense Authorization Act for the fiscal year 2017 included the GMA, enacting a worldwide version of the original Magnitsky Act.¹²⁸ Under the GMA, the President of the United States now has the power to impose targeted sanctions on non-United States citizens guilty of corruption or gross human rights violations anywhere in the world.¹²⁹ Before exploring the use of targeted sanctions, this section will briefly provide a history of the events that led to the passage of the original Magnitsky Act.

Russian lawyer Sergei Magnitsky investigated members of the Russian Interior Ministry for the largest tax-fraud case in Russian history, finding that at least \$230 million had been embezzled.¹³⁰ The scheme indicated the presence of high level links to organized crime and government officials.¹³¹ To shift blame, the same Russian officials Magnitsky had been investigating retaliated by imprisoning him for the same crimes they were accused of committing.¹³² Almost a year into his imprisonment, Magnitsky was found dead in his cell after being beaten to death with rubber truncheons by guards, according to independent investigators.¹³³ In response to his death, United States lawmakers sought targeted sanctions against certain Russian officials responsible for Magnitsky's death and eventually passed the original Magnitsky Act.¹³⁴ Through the original Magnitsky Act, the United States targeted the Russian

¹²⁷ Sergei Magnitsky Rule of Law Accountability Act of 2012, 22 U.S.C.A. § 5811 (West 2012).

¹²⁸ Global Magnitsky Human Rights Accountability Act, S. 2943, 114th Cong. § 1261 (2016) (enacted).

¹²⁹ Enough Team, "*A Groundbreaking Achievement*": Congress Passes "*Global Magnitsky Human Rights Accountability Act*", ENOUGH PROJECT (Dec. 8, 2016), available at <http://www.enoughproject.org/blogs/%E2%80%9C-groundbreaking-achievement%E2%80%9D-congress-passes-%E2%80%9Cglobal-magnitsky-human-rights-accountability-ac>.

¹³⁰ Marius Fossom, *Tajikistan's Magnitsky: The Case for a Global Magnitsky Act*, THE DIPLOMAT (Dec. 2, 2016), available at <http://thediplomat.com/2016/12/tajikistans-magnitsky-the-case-for-a-global-magnitsky-act/>.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

officials with visa bans and asset freezes within the banking system.¹³⁵ Like the Obama administration's new use of the FCPA penalties, the growing recognition that public corruption around the world affects United States national security established the original Magnitsky Act.¹³⁶

Fortunately, targeted sanctions to fight corruption are emerging as an element of United States' strategy in the Western Hemisphere.¹³⁷ In July 2018 the Trump Administration sanctioned three government individuals in Nicaragua connected with human rights abuses, one of whom is the current commissioner of the national police.¹³⁸ This is precisely the approach the United States could take with respect to Mexico. The visa restrictions and the asset freezes of the Global Magnitsky Act are the appropriate tools for dealing with public corruption in Mexico, because their use would be both lawful and effective.¹³⁹

Targeted sanctions are an increasingly attractive tool because they are non-violent and not overbroad, unlike general economic sanctions or trade embargoes which can wreak havoc on civilian populations.¹⁴⁰ In the past, the United States used targeted sanctions as a "warm-up" to other sanctions or as a "knock-out" punch to put the finishing touches on a larger sanctions regime, and the sanctions generally succeeded when designed to moderate improvements.¹⁴¹ An analysis of targeted

¹³⁵ 22 U.S.C.A. § 5811.

¹³⁶ Joseph K. Grieboski, *Global Magnitsky Act is a human rights paradigm shift*, THE HILL, (Sept. 10, 2015), available at <http://thehill.com/blogs/pundits-blog/international/252636-global-magnitsky-act-is-a-human-rights-paradigm-shift>.

¹³⁷ Nauert, *supra* note 36.

¹³⁸ *Id.*

¹³⁹ S. 2943, 114th Cong. § 1261.

¹⁴⁰ Elizabeth Clark Hersey, Note, *No Universal Target: Distinguishing Between Terrorism and Human Rights Violations in Targeted Sanctions Regimes*, 38 BROOK. J. INT'L L. 1231, 1233-34 (2013).

¹⁴¹ Gary C. Hufbauer & Barbara Oegg, Article, *Targeted Sanctions: A Policy Alternative?*, 32 LAW & POL'Y INT'L BUS. 11, 17 (2000). This comment does not call for targeted sanctions against corrupt Mexican officials to form part of a greater sanctions regime, but only to compliment support the United States already provides.

economic sanctions such as asset freezes shows that targeted sanctions are effective in bringing new policies nearly half of the time, compared to full trade embargoes, which succeeded in only a quarter of cases.¹⁴²

The GMA is unique because of its worldwide scope, allowing sanctions against public officials who are:

“responsible for, or complicit in, ordering, controlling, or otherwise directing, acts of significant corruption, including the expropriation of private or public assets for personal gain, corruption related to government contracts or the extraction of natural resources, bribery, or the facilitation or transfer of the proceeds of corruption to foreign jurisdictions.”¹⁴³

Under the GMA, Congress may submit the names of individuals recommended for sanctions, subject to the President’s approval.¹⁴⁴ The President may also unilaterally add individuals to the sanctions list based on “credible evidence.”¹⁴⁵ The GMA states that the President shall consider information from at least two members of the relevant congressional committees charged with oversight, or information provided by other countries governments or by nongovernmental organizations.¹⁴⁶ The President can also remove an individual from potential targeting if there exists credible information that the individual: is innocent; has been appropriately punished; has shown a credible change in behavior; or if necessary for national security purposes.¹⁴⁷

Tools like the GMA are increasingly attractive for policymakers, but they are not without complications for the individuals and states targeted with sanctions. Targeted sanctions raise issues of due process under customary

¹⁴² *Id.* at 16.

¹⁴³ S. 2943, 114th Cong. § 1263(a)(3).

¹⁴⁴ S. 2943, 114th Cong. § 1261.

¹⁴⁵ *Id.*

¹⁴⁶ S. 2943, 114th Cong. § 1263(c)(1)-(2).

¹⁴⁷ S. 2943, 114th Cong. § 1263(g)(1)-(4).

international law.¹⁴⁸ To ensure due process, the Universal Declaration on Human Rights seeks to protect the right to property and free association,¹⁴⁹ arguing that neither right should be taken from an individual arbitrarily.¹⁵⁰ The International Covenant on Civil and Political Rights contains a similar provision that guarantees the right to due process if faced with a charge.¹⁵¹ This typically means guaranteeing the right to a hearing before the loss of property.¹⁵² Because most individuals do not have the resources to handle their adjudication personally at the international level, and because treaties and multilateral conventions rarely confer jurisdiction on national courts to handle corruption, targeted sanctions regimes may deprive individuals of their property without due process.¹⁵³ The United Nations has attempted to grapple with this issue. In response to due process challenges to its targeted sanctions regime against Taliban officials, the United Nations created an independent ombudsman's office to review the cases of individuals targeted with sanctions.¹⁵⁴ This provided some amelioration of the due process issue.¹⁵⁵

Another concern raised by targeted sanctions regimes is that of state sovereignty, a key principle of international law.¹⁵⁶ Sovereignty is a government's "exclusive authority over [its] territory and population."¹⁵⁷ Within a state's territory, sovereignty gives rise to exclusive internal jurisdiction, or the right to create, enforce, and adjudicate laws.¹⁵⁸ Scholars of

¹⁴⁸ See Hersey, *supra* note 140, at 1234.

¹⁴⁹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

¹⁵⁰ See G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); Hersey, *supra* note 142, at 1252.

¹⁵¹ See Hersey, *supra* note 140, at 1253 (citing International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171.).

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See AM. SOC'Y INT'L L., *Jurisdictional, Preliminary, and Procedural Concerns*, in BENCHMARK ON INTERNATIONAL LAW § II.A 2 (Diane Marie Amann ed., 2014), available at www.asil.org/benchmark/jurisdiction.pdf.

¹⁵⁷ See Hersey, *supra* note 140, at 1248.

¹⁵⁸ See *id.*

international law consider extraterritoriality an affront to democratic state sovereignty.¹⁵⁹ “Targeted sanctions against individuals affiliated with a recognized state government (as opposed to non-state groups like terrorist organizations), may infringe on the target state’s exclusive internal jurisdiction, in violation of international law” because they are examples of extraterritorial action.¹⁶⁰ The GMA limits on the actions of United States citizens, as well as the restrictions on property within the United States, clearly fall within traditional notions of state sovereignty.

There are two arguments under which states can defend the use of targeted sanctions against foreign government officials. First, the universality principle of jurisdiction, which claims that the law equally grants jurisdiction to all nations.¹⁶¹ Viewed under this light, one state can contend that it is not acting extraterritorially when it acts to enforce international law under the universality principle, because the law is the same within its own territory and in the territory where the law is being enforced.¹⁶² Second, the effects doctrine, which claims that “Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.”¹⁶³ While neither rationale has yet gained widespread consensus as a justification for sanctions targeting corruption and human rights violations, targeted sanctions regimes are not going away anytime soon.¹⁶⁴ This is especially true for sanctions that seek to address internationally recognized crimes, so it is incumbent upon forward-thinking policymakers to determine

¹⁵⁹ *Id.* at 1248-49.

¹⁶⁰ *Id.* at 1260.

¹⁶¹ AM. SOC’Y INT’L L., *supra* note 156, at § II.A 4 (“Universal jurisdiction derives from the view that certain conduct (such as genocide, torture, piracy, aircraft hijacking, hostage taking, war crimes, and the slave trade) so concerns the entire international community of states that the prosecution of offenders by any state is warranted.”).

¹⁶² *See id.*

¹⁶³ *Id.* at 7 (quoting Justice Holmes majority opinion in *Strassheim v. Daily*, 221 U.S. 280, 285 (1911)).

¹⁶⁴ *See Hersey, supra* note 140, at 1262.

how to make targeted sanctions work in a way that conforms to principles of international law.¹⁶⁵

Anti-corruption and human rights activists called for the United States government to move forward with the GMA since the passage of the original Magnitsky Act.¹⁶⁶ The original Magnitsky Act set a new tone for action against corruption and human rights violations around the world.¹⁶⁷ Passage of the law shows that United States is both willing to take a stand on principle and to resist corruption in countries that affect United States interests.¹⁶⁸ In spring 2014, the European Parliament passed its own law similar to the original Magnitsky Act.¹⁶⁹ The original Magnitsky Act proved effective in light of the immediate response it provoked, as Russia took steps to prevent American adoptions of Russian children as well as to announce its withdrawal from a bilateral agreement on international criminal cooperation signed with the United States in 2002.¹⁷⁰ This response is indicative of that that the original Magnitsky Act created a panic among members of the Russian president's inner circle that their money in Western bank accounts is no longer safe.¹⁷¹

¹⁶⁵ See *id.* at 1266.

¹⁶⁶ *The Global Magnitsky Act Will Help Protect Human Rights Activists Worldwide*, WASH. POST (May 2, 2016) (arguing for its use in Azerbaijan) available at https://www.washingtonpost.com/opinions/a-means-to-better-protect-human-rights-activists-around-the-globe/2016/05/02/1f069f38-0b10-11e6-a6b6-2e6de3695b0e_story.html?utm_term=.df925111c9c0; *The Global Magnitsky Human Rights Accountability Act Moves Forward in Congress*, Enough Project, (May 18, 2016) (quoting John Pendergast about its potential use in South Sudan) available at <https://enoughproject.org/blog/global-magnitsky-human-rights-accountability-act-moves-forward-congress>.

¹⁶⁷ But see Steven Pifer, *Burying the Magnitsky Bill's Message*, BROOKINGS (June 29, 2012), available at <https://www.brookings.edu/opinions/burying-the-magnitsky-bills-message/>.

¹⁶⁸ Grieboski, *supra* note 136.

¹⁶⁹ Browder, *supra* note 13.

¹⁷⁰ John R. Cook, ed., *Jackson-Vanik Amendment Repealed; Magnitsky Provisions Draw Russian Ire and Termination of Adoption and Anticrime Agreements*, 107 AM. J. INT'L L. 449, 450-51 (2013).

¹⁷¹ Browder, *supra* note 13. Browder goes on to state "Magnitsky sanctions are the first major disruptive technology to transform human rights advocacy." *Id.*

The GMA includes a process for delisting, resolving any question issue over due process.¹⁷² The GMA explains that the President shall consider information from at least two members of the relevant congressional committees charged with oversight or on information provided by other countries' governments or by nongovernmental organizations whose role is to monitor human rights.¹⁷³ Upon receiving a submitted name from Congress, the President has 120 days to determine whether the named person has engaged in serious corruption or human rights violations.¹⁷⁴ If the President becomes aware of credible information that the sanctioned person did not participate in the activity for which the United States imposed sanctions, or if the person credibly demonstrates a significant change in behavior, a payment of compensation for the activity, and a credible commitment not to engage in the activity in the future, then the President may remove the sanctions on the person.¹⁷⁵ Like the ombudsman procedure employed by the United Nations, these provisions alleviate the due process issues raised by the GMA.¹⁷⁶

Under the universality principle, the GMA's use against corrupt Mexican officials would be legal because targeted sanctions would only seek to hold the Mexican government to its international legal commitments.¹⁷⁷ Because corruption is proscribed by international conventions to which Mexico is a party, the sanctioning party (the United States) would not be acting extra territorially, but rather seeking to adjudicate those laws (conventions) to which both countries are parties. The people of Mexico have a right to freedom from corruption under

¹⁷² S. 2943, 114th Cong. § 1263. Unfortunately, the original Magnitsky Act does not mention how notice is delivered to the affected parties and it does not provide the means by which an affected person can challenge the sanctions against them. Furthermore, the original Magnitsky Act does not provide guidance around what information qualifies as "credible." See Hersey, *supra* note 140, at 1272.

¹⁷³ Those members being the chairman and ranking member of the committee. S.2943, 114th Cong. § 1263(c)(1)-(2).

¹⁷⁴ S. 2943, 114th Cong. § 1263(d)(1).

¹⁷⁵ S. 2943, 114th Cong. § 1263(g)(1), (3).

¹⁷⁶ Hersey, *supra* note 140, at 1258.

¹⁷⁷ United Nations Convention Against Corruption, Oct. 31, 2003, S. TREATY DOC. No. 109-6, 2349 U.N.T.S. 41.

customary international law.¹⁷⁸ Under the effects doctrine, the United States has strong grounds for jurisdiction to impose targeted sanctions on corrupt Mexican officials that have “or is intended to have substantial effect within its territory.”¹⁷⁹

The GMA sanctions can be effective because their use would avoid damaging the Mexican people while preserving the working relationship between the United States and Mexico. Targeted sanctions can have a meaningful effect on public corruption in Mexico if they shift the behavior of public officials in any number of ways. The Global Magnitsky Act’s targeted sanctions will at the very least deter individuals from keeping their assets within United States’ jurisdiction,¹⁸⁰ preventing United States citizens and banks from being complicit in corruption. Further, targeting certain officials with asset freezes and visa bans will hamper their ability to continue participating in corruption, setting an example for others.¹⁸¹ Visa restrictions draw attention to the corruption of public officials by denying them and their supporters’ legitimacy.¹⁸² The lack of legitimacy brought on by public bans from travel into the United States will ideally be reflected at the ballot box when Mexican voters seek stronger leadership.

Nothing is preventing the United States from working with Mexico on strategic issues while imposing sanctions on judges and law enforcement officials that support TCOs.¹⁸³ The United States’ relationship to Mexico is very different from its relationship to Russia, so targeted sanctions may be even more successful against Mexico than against Russia. Mexico’s interconnected relationship with the United States, as well as the

¹⁷⁸ See Sorensen, *supra* note 86, at 202.

¹⁷⁹ AM. SOC’Y INT’L L., *supra* note 157, at § II.A 7 (quoting § 402(1)(c) of the Restatement of International Law.).

¹⁸⁰ Grieboski, *supra* note 136.

¹⁸¹ See Hufbauer & Oegg, *supra* note 141, at 15-16.

¹⁸² See *id.* at 15.

¹⁸³ William Felix Browder, *Putting the Bad Guys on Ice*, BLOOMBERG (Feb. 19, 2015) available at <http://www.bloomberg.com/news/articles/2015-02-19/u-s-should-freeze-assets-ban-travel-of-human-rights-abusers-more-often> (referring in the text to potentially using the Global Magnitsky Act against judges in Azerbaijan who convict journalists critical of the ruling regime.).

Mexican public's deep desire for a reduction in corruption,¹⁸⁴ mean that Mexico's response to imposed GMA sanctions will be very different from Russia's angry retaliation to the original Magnitsky Act.

Finally, use of the GMA in Mexico would closer align the United States' foreign policy with its values of human rights and fundamental freedoms, thereby building credibility in that country and in the region of Latin America.¹⁸⁵

CONCLUSION

Mexican corruption is an important national security concern for the United States. While Mexico's law enforcement and military remain committed to the fight against TCOs, there is little reason to believe the cartels can be defeated in the absence of tactics that target their enablers within government. Using the GMA's sanctions against corrupt Mexican officials will allow the United States to help the Mexican government gain more effective control over its territory and people. Publicly shaming the corrupt and seizing their assets while continuing to work with the Mexican government is the logical next step in fighting cartel organizations.



¹⁸⁴ See Wood, *supra* note 122.

¹⁸⁵ Grieboski, *supra* note 136.