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Rodrigo Labardini

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MEXICO'S FEDERAL ORGANIZED CRIME ACT

RODRIGO LABARDINI*

In discussing the Mexican Federal Organized Crime Act, or *Ley Federal Contra la Delincuencia Organizada* (LFDO),¹ I will focus on drug trafficking as the most pervasive form of organized crime in Mexico. However, I will be making references to other types of organized crime throughout this paper as well.

The fight against drugs in Mexico has been a long one. On November 12, 1908, Mexico's Constitution was amended to allow the federal congress to legislate on matters related to the general health and well being of society. On June 8, 1926, the Sanitary Code incorporated a list of prohibited controlled substances, including opium, morphine, cocaine, and heroin. During the administration of Lázaro Cárdenas (1934 – 1940), the fight against drugs received a special chapter in the administration's National Development Plan.² In fact, Mexico's eradication campaign is one of the most effective and oldest in the world, with a daily average of 20,000 soldiers eradicating illicit plants.³ Yet drug trafficking has been very difficult to combat and has taken its toll on Mexico during recent years.

Mexico fights drug trafficking for three reasons: to promote the health of Mexico's people, to elevate national security, and to increase international cooperation. In today's world, countries can no longer be classified solely as producers, distributors or consumers. Countries that were formerly labeled as producers or distributors are beginning to become consumers as well.⁴ Likewise, countries that were formerly consumers are now producing an important share of the world's illicit drugs.⁵

* LLB (Universidad Iberoamericana, Mexico City, 1986), MPA (Instituto Tecnológico y de Estudios Superiores de Monterrey, Mexico City, 1989), Graduate Course in American Legal Studies (Univ. of New Mexico, Albuquerque, 1991), LL.M. candidate (Universidad Iberoamericana), S.J.D. candidate (American University). Mr. Labardini is head of Chief of the Special Affairs Section at the Embassy of Mexico and is Professor on-leave of International Law at U. Iberoamericana. All opinions are of strict personal character and are not the opinions of any institution with which he is associated.

1. *Ley Federal Contra la Delincuencia Organizada* (LFDO), published in the *Diario Oficial de la Federación* (DOF) on November 7, 1996, as amended, available at <http://www.cddhcu.gob.mx/leyinfo/pdf/101.pdf> (last visited April 2, 2003). All Mexican legislation herein cited can be accessed at the same website hosted by the Chamber of Deputies of Mexico's Federal Congress. All translations of legal texts are provided by the author.

2. Efraín García Ramírez, *DROGAS, ANÁLISIS JURÍDICO DEL DELITO CONTRA LA SALUD*, Editorial Sista, Mexico City, 1997, p. 99.

3. "Mexico's eradication program is one of the oldest and largest in the world. Most drug crop cultivation occurs in small fields located in remote areas to evade detection and eradication. Since lands used for illicit cultivation are subject to seizure, many growers use public or communal lands to avoid tracing ownership." Dept. Of State, *INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT – 2001*, delivered March 1st, 2002, see chapter on Mexico, p. V - 28.

4. While consumption in Mexico is not yet an epidemic phenomenon, it has grown significantly in the past years. According to data of the Mexican National Council Against Addictions (*Consejo Nacional Contra las Adicciones [CONADIC]*), in 1988, 2.99% of the Mexican population smoked marijuana, and in 1998 it was 4.70%; cocaine was used by 0.33% and 1.45%, respectively; and heroin went from 0.11% to 0.9% between 1988 and 1998. UNAM, *Se incrementa el consumo de drogas ilícitas en México: Navarro Paredes*, BOLETÍN UNAM-DGCS-0772, Sep. 1, 2002.

5. The U.S. is presumably one of the world's largest producers of marijuana and synthetic drugs. E.g., the U.S. is estimated to be producing approximately 2/3 of its domestic illicit marijuana market. Ex. gr. "Marijuana production and consumption is a serious problem in many countries—including in the United States. More than 10,000 metric tons (MT) of domestic marijuana and more than 5,000 metric tons of marijuana is cultivated and harvested in Mexico and Canada and marketed to more than 20 million users in the United States." Dept. Of State, *INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT – 2002*, delivered March 1st, 2003, see subchapter *Marijuana* in the chapter on *Policy and Program Developments*, p. II – 7.

Mexico is firmly convinced that the only way to combat drug trafficking is through international cooperation. International cooperation occurs when a region, several countries, or simply two countries, like Mexico and the United States, collaborate together, define mutually acceptable rules, create strategies, and then commit themselves to complying and abiding by those rules and strategies.⁶ This necessitates respect to the sovereignty and legislation of other countries, especially allies. Thus, the only way that Mexico and the United States can really fight the war against organized crime is through an internationally waged effort that is coordinated among all parties. It is clear that no State can overcome this problem in an isolated manner.

International organized crime is basically defined as a structure of three or more persons organizing themselves in order to commit a crime.⁷ It is considered a highly evolved type of crime.⁸ In some sense, it is a "perfected" crime. Furthermore, it is an expression of globalization.⁹ Many times, a debate about organized crime begins when a consensus has been reached about that crime, whether organized or not. The crime itself then exceeds the government's capacity to apply the rule of law to a group of criminals.

Today, organized crime, drug cartels, and terrorism are run by intelligent and sophisticated groups of criminals. They have state-of-the-art communication systems. They are highly developed users of technology and computers and are increasingly turning to encryption to hide their unlawful activities.¹⁰ Law

6. As in the *Single Convention on Narcotic Drugs*, Mar. 30, 1961, U.S.T. 1407, 520 U.N.T.S. 204 (amended by 1972 Protocol) [hereinafter *Single Convention*], or the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Dec. 20, 1988, 28 I.L.M. 493 (1989) [hereinafter *Vienna Convention*].

7. The term "organized crime" was first used by John Ladesco in 1929 referring to criminal operations carried out by "mafias". Procuraduría General de la República (PGR) [Mexico's Attorney General's Office], *Organized Crime*, <http://www.english.pgr.gob.mx/home.htm> (last visited April 3, 2003). The term came into regular use among members of the Chicago Crime Commission (CCC), a civic organization created in 1919 by businessmen, bankers and lawyers to promote changes in the criminal justice system in order to better cope with the crime problem. The CCC referred not to the criminal organization itself, but in a broader sense to the orderly fashion in which the so-called "criminal class" of an estimated "10,000 professional criminals" in Chicago allegedly could pursue "crime as a business". Klaus von Lampe, *The Concept of Organized Crime in Historical Perspective*, <http://people.freenet.de/kvllampe/lauhtm01.htm> (visited April 3, 2003). The CCC focused on conditions that ostensibly allowed criminals to secure a steady income from delinquency, especially property crimes, under virtual impunity. The CCC blamed both the city's government (for being incompetent, inefficient and corrupt) and the general public (for indifference and even open sympathy towards criminals). "This characterization of organized crime as an integral part of society apparently reflected the perspective of the old established protestant middle class on Chicago as a city that, after years of rapid growth and cultural change, was drowning in crime, corruption and moral decay." *Ibid.*

8. This type of crime is referred to as "organized" because it refers to the "association", the "society", the "group", the "corporation", the "syndicate", the "union", the "coalition", the "league", the "gremio". In essence, it alludes to the group as an entity, as a unit able to link, enhance and coalesce the individual member's efforts into one enormous thrust in achieving one result: a criminal offence that will reap benefits to every member in accordance to the hierarchy established within the association.

9. Moisés Naím, *The Five Wars of Globalization*, 134 FOREIGN POLICY 28 (January/February 2003).

10. "For example, the Subcommittee learned that an international terrorist, who was plotting to blow up 11 U.S. airliners, recorded his terrorist plans on his laptop computer files—which were encrypted. A multi-state gambling enterprise used encryption to hide its records of the daily take on bets, payoffs, and accounts due. A major international drug lord recently used encryption to frustrate a court-approved wiretap. And the numbers of criminals using encryption are doubling each year". Subcommittee on Technology, Terrorism, and Government Information, United States Senate Committee on the Judiciary, CRIME, TERROR, & WAR: NATIONAL SECURITY & PUBLIC SAFETY IN THE INFORMATION AGE, SUBCOMMITTEE ACCOMPLISHMENTS IN THE 105TH CONGRESS, REPORT SUBMITTED BY MAJORITY STAFF, November 1998, p. 23.

enforcement agencies are in unanimous agreement that widespread use of encryption technology ultimately will devastate their ability to fight such criminal activities, unless public safety features are built in into encryption products or architectures. For example, the highly encrypted cellular phones and communications systems used by drug traffickers are so encoded that U.S. law enforcement agencies have great difficulties breaking them, and sometimes are unable to do so.¹¹ This fact does not bode well for the Mexican efforts, or the efforts of any other country with less technological resources, being able to crack the case.

Organized crime carries out its illegal activities with the use of violence, intimidation, force, and corruption. Intimidation is common and reaps great benefit because the criminals wield enormous power without exercising force and because they feed on the population's natural fears. Most organized crime groups have independent economic power within their own turf. They also wield the political power to keep their operations safe and foster their economical and social power. In some areas, just being a part of one of these groups provides certain social standing or social stature. In Mexico's northern state of Sonora, being invited to parties thrown by drug traffickers is symbolic of high social standing.¹² Authorities do not always know who is a drug trafficker and who is not. Therefore, people attend these parties to climb the social ladder without considering it a bad thing for society as a whole. After all, they say, it is the authority's responsibility, not theirs, to root out the criminals. However, this balancing of dual roles in society will eventually break up social cohesion.¹³

The strength of organized crime lies in the alliances it creates among social actors and the illicit links it develops in society. Strong and illegal relations are developed between political, legal, individual, and military sectors. Their strength lies precisely in the illegality of their associations.

When the operation extends internationally, it becomes a transnational organized crime. In general, there are not sufficient legal apparatuses to effectively deal with criminals acting across international borders. The result is impunity, a void in the application of the law, a disruption of societal relations, and economic regulations that have no reality, further allowing lack of enforcement.

Further, the criminal operation can be very broad. It encompasses financial, commercial, securities, protection rackets, fraud, money laundering, illegal acquisition of property, and prostitution, among other activities. Thus, you may find

11. At the House Armed Services Committee and House Select Intelligence Committee hearings on July 13 and July 14, 1999, respectively, Attorney General Janet Reno and FBI Director Louis Freeh testified. Both opposed H.R. 850 (Security and Freedom through Encryption (SAFE) Act), 106th Cong. 1st session (a similar bill, S-798, 106th Cong., 1st session, was also introduced in the Senate). These officials admitted that 128-bit encryption is available on foreign markets, but continued to oppose U.S. exports of that strength on the grounds that it would speed up the pace at which criminals and terrorists around the world begin to use encryption. Nevertheless, Thomas Constantine, former Administrator of the Drug Enforcement Administration, conceded in his testimony that drug lords have been increasingly relying on encryption to encode conversations since 1995, and in fact mentioned that while in 1995 there were almost no encrypted communications between drug traffickers, during 1997 there had been 262 encrypted calls (the majority between the bosses in Mexico and their partners in the U.S.) that could not be decrypted by DEA, allowing the flow of tons of cocaine. He added that during 1998, the number of encrypted calls without any possibility of action rose to 519.

12. Personal conversation with three Sonoran citizens relating their lives during the 1990 decade.

13. For Mexican efforts to involve society in the general fight against corruption. See Rodrigo Labardini, *The Fight Against Corruption in Mexico*, in this volume.

that organized crime carries out its illegal activities in all spheres: financial, commercial, banking, securities, stock exchange, corruption, extortion, money laundering, gambling, slavery, trafficking of minors, of women, of migrants, etc. There is no area that it does not touch. As long as the organization may reap benefits, it will apply its structure to further any illicit conduct.

Criminal organizations generally have a highly centralized command structure. A few constitute the small decision-making group. As with any corporation, they have several departments a chief financial officer, a chief enforcement officer, and a chief operations officer, as well as someone who deals with security or protection. They keep very good track of their accounts, legal or not, and all of the corresponding paperwork.¹⁴ They keep track of everything taking place in the money trail¹⁵—everything from where the money is to where it is being laundered and the amount of the corresponding fee. Additionally, they control and keep zealous care of the identity—brand name and trademark—of their product. When they ship cocaine, heroin, or bricks, they put symbols to identify that “Los Alacranes”, or whatever name their organization uses, made the product. These methods of identification are similar to a patent or copyright within the illicit underworld.

The life of the organized crime group generally extends beyond that of its individual members. They may die a natural death, or sometimes not, but the organization keeps on because all developments are viewed in an organizational way. For instance, just as financial officers are substituted in a legitimate corporation, a criminal overseeing the financial aspects of the illicit trade can be substituted as well. However, although corporations tend to coalesce once again, when organized crime groups are disrupted, they seem to learn a lesson and do not immediately try to reconstitute themselves.¹⁶ Rather, they reorganize themselves in smaller groups guided by second or third lieutenants of the old organization. For example, several of the big organized crime operations in Mexico have been broken,¹⁷ but smaller organizations have begun to proliferate.¹⁸ This seems to be the

14. Official banking accounts used to launder illicit proceeds and those used to keep tabs and control of their daily financial activities, i.e., what may John Doe owe them and when was it due.

15. In fact, such record keeping assists law enforcement authorities in the fight against crime. “The Cali cartel kingpins were entrepreneurs who had invested heavily into commercial enterprises ... In addition, the kingpins were compulsive record keepers, whose records were eventually seized by the Colombia National Police and made available to U.S. authorities.” Mary Lee Warren, Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice, *Statement before the Judicial Review Commission on Foreign Asset Control*, September 21, 2000, pg. 5. The testimony may also be found in *Judicial Review Commission on Foreign Asset Control, FINAL REPORT TO CONGRESS* (January 2001), Appendices, Volume 1, at E-1, E-5.

16. Save for territory keeping and preserving their individual lives in the normally ensuing internal fighting after a group has been dismantled at the top.

17. Additionally, the *Procuraduría General de la República* (PGR), or Mexico’s Attorney General’s Office, other law enforcement entities, and the military services successfully targeted all seven major drug-trafficking organizations in Mexico. Among the most prominent actions included the capture by military units of the Arellano Felix Organization (AFO) kingpin Benjamin Arellano Felix in Puebla, just one month after his brother, also a kingpin, was killed in a shoot-out.

18. The AFO was not completely destroyed with the capture of Benjamín Arellano Félix and the death of his brother Ramón. AFO had already begun the modern route followed by criminal organizations: it was in the process of establishing and coordinating smaller groups. AFO had very strong links in all of the Baja California Peninsula, and the states of Sonora and Sinaloa in Mexico’s Pacific Coast, the states of Michoacán, Guerrero, Oaxaca, and the Federal District, as well as the state of Veracruz and other regions in the Gulf of Mexico. See Jorge Fernández Menéndez, *El futuro de Narcotráfico S.A.*, DIARIO MILENIO, Mexico City, March 12, 2002.

trend for drug trafficking organizations. Large cartels have become non-operational in Mexico and have transferred their structures to smaller organizational cells, to the point in which they lend amongst themselves drug routes, corrupt officials and even the territories in which they operate.¹⁹ This way they can be more effective because, by not being so big, they do not attract so much attention. They also become more efficient regionally and locally. They may not operate as internationally as the larger groups, such as the defunct *El Señor de los Cielos* (The Lord of the Skies), but they are very efficient locally. This growing diversification of trafficking organizations – with smaller groups interacting with one another to transfer illicit drugs from source to market – and the diversification of routes and methods pose major challenges for Mexican and international anti-narcotics programs.²⁰

The division of labor is usually rigidly hierarchical. Everyone knows what their job is and what and when they must perform it. Lower level criminals trying to bump off higher-ups disrupt the hierarchy, the loyalty, and the social ties of the organization.

In the legal field, Mexico has been doing many things to address this problem. In 1990, Mexico executed the *1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*.²¹ In 1991, one year later, there was a draft for a Mexican Federal Drug Trafficking and Drug Abuse Act.²² Unfortunately, this did not develop further, because a consensus had not yet developed in the Mexican legal community about the definition of organized crime, nor about how much personnel and resources the government could commit against such criminal activities.

In 1993, the concept of organized crime was finally agreed upon and was incorporated into Mexico's legal system. That entailed a reform to Article 16 of Mexico's Constitution, basically detailing that the maximum detention period of 48 hours is doubled in cases of organized crime.²³ In 1994, the Federal Criminal

19. The large cartels have become non-operational because they are easily identified, their movements are slower, their organization is easier to detect. Hence, they modernized themselves and restructured into operational cells. These cells are coordinated, in constant communication and do not act independently. These atomization of their activities complicates law enforcement efforts in Mexico. José Luis Vasconcelos, head of PGR's Specialized Unit Against Organized Crime (*Unidad Especializada contra la Delincuencia Organizada*) [UEDO], estimates that this form of operation has taken place since 1999. It was discovered specifically in the AFO, when several members were arrested: Ismael Higuera Guerrero, *El Mayel*; Jesús El Chuy Labra Avilés; Gilberto Higuera Guerrero, *El Gijillo*, y Rigoberto Yáñez Guerrero, *El Primo*. Gustavo Castillo Garcia and Socorro Castañeda Martín Sanchez, *Crean cárteles grupos pequeños para evitar ser detectados*, LA JORNADA, Mexico City, April 11, 2001.

20. Additionally, see George Tenet, Director of Central Intelligence, *Statement prepared for delivery before the Senate Select Committee on Intelligence on the "Worldwide Threat 2001: National Security in a Changing World"*, 07 February 2001.

21. Vienna Convention, *supra*, note 6. See <http://www.incb.org/e/conv/1988> (visited Feb. 12, 2003).

22. PGR, *Historical Background of the Federal Law Against Organized Crime*, <http://www.english.pgr.gob.mx/home.htm> (last visited April 3, 2003).

23. Mex. Const., art. 16(7), available at www.cddhcu.gob.mx/leyinfo/pdf/1.pdf (last visited April 3, 2003). "Ningún indiciado podrá ser retenido por el Ministerio Público por más de cuarenta y ocho horas, plazo en que deberá ordenarse su libertad o ponerse a disposición de la autoridad judicial; este plazo podrá duplicarse en aquellos casos que la ley prevea como delincuencia organizada. Todo abuso a lo anteriormente dispuesto será sancionado por la ley penal." *Id.* The congressional committees alluded to several criteria for organized crime: the permanence of the criminal activities committed, their lucrative nature, the degree of complexity of the organizations, the purpose of the association as the commission of crimes that affect fundamental individual and collective rights and goods and that also seriously affect the public health and security.

Procedures Code was modified to incorporate this change.²⁴ Also in 1994, the *Procuraduría General de la República* (PGR), Mexico's Attorney General's Office, drafted the Strategy to Combat Organized Crime emphasizing that only inter-agency strategy and coordination could contain organized crime. That is, the PGR by itself cannot do it. It requires the assistance of the Defense Ministry, the Marina Ministry, the Hacienda, and the Foreign Affairs Ministries, among others as well. Today, following a new integral approach, fifteen federal cabinet ministries and all of the Mexican states' Attorney General's Offices are involved with national security in the fight against organized crime and drug trafficking.²⁵

In order to adequately fight organized crime, Mexico had to reorganize itself. One of the first things was the creation of CENDRO, *Centro Nacional para la Planeación y Control de Drogas*, the National Planning Center Against Drugs,²⁶ which has been very useful functioning as a coordinating center to receive and dispatch information. In the second semester of 2002, CENDRO was transformed into the National Center for Planning Against Organized Crime.²⁷ This unit currently oversees and analyzes information related with organized crime and eleven additional crimes,²⁸ instead of information only related to drug trafficking and weapons-related offenses.

Next, an agency exclusively designed to combat drug trafficking was established. Originally called the *Instituto Nacional Contra las Drogas*, National Institute to Against Drugs, the infamous INCD,²⁹ it was later replaced by FEADS, *Fiscalía Especializada para la Atención de los Delitos Contra la Salud*, Specialized Prosecutor Against Drug Trafficking. This agency coordinates the national, regional and local programs against organized crime. Further, the LFDO provides that the PGR must have a dedicated unit specialized in the investigation and prosecution of

24. Art. 194-bis refers to doubling of warrantless arrest in cases of organized crime. See <http://www.cddhcu.gob.mx/leyinfo/pdf/7.pdf> (last visited April 3, 2003).

25. Ministries of Gobernación (SEGOB), Foreign Affairs (SRE), National Defense (SEDENA), Navy (SEMAR), Public Security (SSP), Finance and Public Credit (SHCP), Social Development (SEDESOL), Environment and Natural Resources (SEMARNAT), Economy (SE), Agriculture, Livestock, Rural Development, Fisheries, and Food (SAGARPA), Communications and Transport (SCT), Public Education (SEP), Health (SSA), Agrarian Reform (SRA), the Attorney General's Office (PGR), plus the Attorney General's Offices of Mexico's thirty-one states, of the Federal District and the Military Attorney General. Poder Ejecutivo Federal, PROGRAMA NACIONAL DE COMBATE A LAS DROGAS 2001 – 2006, see <http://www.pgr.gob.mx> (last visited April 4, 2003), and Poder Ejecutivo Federal, INFORME DE EJECUCIÓN DEL PROGRAMA NACIONAL DE DESARROLLO 2001 – 2006, PRIMER INFORME DE EJECUCIÓN 2001, pg. 465.

26. CENDRO – drafts guidelines against drugtrafficking, recognizing first and foremost that drugtrafficking is due to organized crime.

27. Centro Nacional de Planeación e Información contra la Delincuencia Organizada (CENDRO) of PGR.

28. See *infra*, note 43, text following.

29. In February 1997, General Jesús Gutiérrez Rebollo, the military officer appointed in December 1996 as Commissioner of INCD was arrested on narco-corruption charges. After the arrest, U.S.-Mexico relations became extremely tense, especially in face of the so-called narcotics "certification" procedures (§489 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. §2291). For additional background see Rodrigo Labardini, *El Proceso Estadounidense sobre "Certificación" de otros Estados en la Lucha contra el Narcotráfico*, EL FORO, ÓRGANO DE LA BARRA MEXICANA, COLEGIO DE ABOGADOS, A.C., Décima Época, Tomo XI, Número 1, Primer Semestre 1998, México, D.F., pp. 129 – 182. Gutiérrez Rebollo is currently serving a sentence in excess of 70 years. Between 1997 and 2001, three other generals were charged in civilian courts with drug trafficking: Jorge Mariano Maldonado Vega, Alfredo Navarro Lara and Ricardo Martínez Perea. During the Fox administration two other generals were similarly charged (Arturo Acosta Chaparro and Francisco Quirós Hermosillo) and were the first to found guilty by military courts. *Precedentes militares*, REFORMA, Mexico City, November 2, 2002.

offenses committed by members of organized crime.³⁰ Accordingly, the PGR created the *Unidad Especializada contra la Delincuencia Organizada* (UEDO), Specialized Unit Against Organized Crime, on April 30, 1997. In order to become a member of UEDO or FEADS, one must pass several examinations including medical and physical fitness, toxicological, psychological, social background, financial situation, and polygraphs (or lie detectors).³¹

During this process, the need for constitutional reform arose. In August of 1996, the Attorney General summarily dismissed for corruption 737 agents of the *Policia Judicial Federal*, the federal judicial police.³² Unfortunately, throughout the span of two years, around 500 of those individuals had to be rehired, because even if they were corrupt, they still had labor rights.³³ Additionally, there was not enough evidence to charge them criminally. Thus, the Constitution impeded the Attorney General from firing them. However, they were not reassigned to the same units, especially not to sensitive units. Some are still working, but authorities are now compartmentalizing procedures and analysis in order to prevent compromising information. The agents that had to be rehired are only given discrete and clear-cut tasks, while others manage and analyze the information they gather. The accumulated information has generally been successful and most notably has led to the arrest of Benjamín Arellano Félix, which was jointly executed by PGR and the Mexican military. Additionally, the Constitution was amended to allow mechanisms for removal of public officials (which includes agents) who do not meet the requirements under the laws in force at the time of dismissal, which must be complied with in order to remain in their post. In the event of unjustified dismissal, financial compensation will be offered, but not reinstatement.³⁴

During 1995, a first draft of an organized crime bill was presented to society through several academic and legal fora, conferences, and debates, including the National Consultation to Combat Drugtrafficking. In March of 1996, a bill was submitted to congress. The bill was approved on October 18, 1996. The changes proposed to Mexico's legal system were so sweeping in scope that they required several constitutional amendments.³⁵ The amendments dealt with the possibilities of intervening of private communications (wire-tapping), punishment reduction (similar to plea bargaining), rewards for validated and effective information given to the authorities, anonymous collaboration (i.e., anonymous tips), witness protection, and withholding the identity of witnesses.

30. LFDO, *supra* note 1, art. 8.

31. Tests are applied bi-annually, once after giving notice, the second on a random basis, to members of PGR's sensitive units: FEADS, UEDO, and the Specialized Unit Against Money Laundering (*Unidad Especializada contra el Lavado de Dinero*) [UELD].

32. *See inter alia*, Juan Manuel Venegas y Ciro Pérez Silva, *Habr  "auditoria exhaustiva" de la Contralor a a la direcci n de la PJF*, LA JORNADA, Mexico City, August 22, 1996.

33. Also, Mexico's Supreme Court had previously ruled that the relationship between agents and the State was of an administrative nature. Jes s Aranda, *Seg n la SCJN, la relaci n con ellos es administrativa y no laboral*, LA JORNADA, Mexico City, July 1, 1996.

34. Mex. Const., *supra* note 23, art. 123(B)(XIII)(3). "Members of the police institutions of municipalities, federal states, the Federal District and the Federation, can be removed from their posts if they do not comply with the requirements that the laws in force at the time of their dismissal stipulate. Their reinstatement or restitution is not mandated, whatever the action or means of defense against dismissal, only compensation will be in order. The dismissal of other public servants referred to in this subparagraph will be governed by the provisions of the laws applicable," (author's translation).

35. Articles 16, 20 (I), 21, 22, and 73 (XXI) had to be amended.

These amendments and the enactment of the *Ley Federal Contra la Delincuencia Organizada* (LFDO), Federal Organized Crime Act, allowed Mexican law enforcement agencies to start developing new schemes and in fact generated whole new areas of cooperation with the United States. Possibly the most important was the authorization to use wire-tapping or intervention of private communication.³⁶ This was not limited to telephone communications and may be applied to intervene any private communication.³⁷ Additionally, the advent of something similar to plea-bargaining was introduced.³⁸ As in the United States, Mexican authorities can now rely on anonymous informants³⁹ and offer witness protection⁴⁰ or other benefits to criminals that collaborate with the authorities.⁴¹

Organized crime is defined in Mexico⁴² as three or more individuals organized to permanently or repeatedly try to commit one of the following eleven crimes:⁴³ terrorism,⁴⁴ drug trafficking,⁴⁵ counterfeiting,⁴⁶ money laundering,⁴⁷ arms trafficking,⁴⁸ trafficking of migrants,⁴⁹ trafficking of organs,⁵⁰ robbery,⁵¹ kidnapping,⁵² trafficking of minors,⁵³ and car theft.⁵⁴ The Organized Crime Act was a huge conceptual change in Mexico.

However, the new anticrime legislation is still under criticism.⁵⁵ According to some, a fundamental difference exists between the criminal systems of the United States and Mexico. In the United States, criminal action is managed and decided by the prosecutor. In Mexico, the prosecutor is society's representative and thus has no possibility to allow criminals or defendants to fall into witness protection

36. Mex. Const., *supra* note 23, art. 16(9), and LFDO, *supra* note 1, arts. 8 and 15 – 28.

37. *Id.*

38. LFDO, *supra* note 1, art. 35 (II).

39. *Id.*, at art. 38.

40. *Id.*, at art. 34.

41. *Id.*, at arts. 35 – 39.

42. *Id.*, at art. 2.

43. On the other hand, art. 164-bis of the Federal Criminal Code (FCC) distinguishes between organized crime and gangs. The latter are defined as “habitual, occasional or transitory association or three or more persons that without being organized for criminal purposes commit some crime,” (author’s translation). See <http://www.cddhcu.gob.mx/leyinfo/pdf/9.pdf> (last visited April 3, 2003).

44. *Id.*, at art. 139.

45. *Id.*, at arts. 194 – 195.

46. *Id.*, at arts. 234, 235 and 237.

47. *Id.*, at art. 400-bis.

48. *Federal Act on Firearms and Explosives*, published in the *DOF* on January 11, 1972, as amended, arts. 83-bis and 84, available at www.cddhcu.gob.mx/leyinfo/pdf/102.pdf (last visited April 3, 2003).

49. Trafficking of migrants is denominated as traffic of undocumented persons and typified in Mexico in article 138 of the *Ley General de Población* (General Act on Population) published in the *DOF* on January 14, 1974, as amended, as the attempt to or the transport of Mexicans or foreigners to enter into another country without the proper documentation. <http://www.cddhcu.gob.mx/leyinfo/pdf/140.pdf>.

50. *Ley General de Salud*, published in the *DOF* on February 7, 1984, as amended (General Health Act), arts. 461, 462, and 462-bis, available at <http://www.cddhcu.gob.mx/leyinfo/pdf/142.pdf> (last visited April 2, 2003).

51. FCC, *supra* note 43, arts. 286 and 287, and the corresponding provisions included in local criminal legislation.

52. *Id.*, at art. 366, and the corresponding provisions included in local criminal legislation.

53. *Id.*, at art. 366-ter, and the corresponding provisions included in local criminal legislation.

54. *Id.*, at art. 381-bis, and the corresponding provisions included in local criminal legislation.

55. *E.g.*, while Justice Juventino Castro y Castro voted in favor of LFDO’s constitutionality, he has criticized the legislation as an “illiterate copy” of the old U.S. model. In a presentation on the panorama of penal sciences in Mexico, he criticized legislators and specialists who participated in the design and approval of the law because “it is not inspired in a congruous form with our traditional penal norms,” (author’s translation). See EXCÉLSIOR, Mexico City, September 3, 2002.

programs or bargain sentences. For instance, if criminal action is executed on behalf of society, on what account are sentences reduced or impunities created? Further, some argue that these changes go against Mexico's legal culture, by falsely conveying that criminal liability is a merchandise to be bartered and allowing impunity.⁵⁶

INTERVENTION OF PRIVATE COMMUNICATIONS

Intervention of private communications is probably the most important element of LFDO, and enables law enforcement authorities to identify and locate members of a criminal organization. It is generally the first evidentiary element submitted to dismantle a criminal group. In order to issue an order allowing intervention of private communications, a Federal Judge must verify that there are sufficient indicia that a person is a possible member of a criminal organization and such intervention is the only proper means to obtain the necessary information.⁵⁷ However, there have been difficulties administering the law in the courts. We are in the midst of a learning process and not exempt of controversy.⁵⁸

Only a *ministerio público*, or federal prosecutor, who is commissioned with the UEDO unit, may request a wiretap,⁵⁹ and constitutional law establishes that no judge can issue a wiretap for anything related to electoral, fiscal, commercial, civil, labor, or administrative issues, as well as communications between counsel and client.⁶⁰ This is something to keep in mind in light of the very important changes introduced in the United States legal system with the USA PATRIOT Act⁶¹ that allows some intervention into the attorney-client privilege.

UNDERCOVER OPERATIONS

The Attorney General is in charge of the authorization and supervision of the LFDO's provisions that allow for official undercover operations,⁶² which is a very difficult and sensitive issue.⁶³ The program was developed in cooperation with the

56. Justice Castro considers that LFDO has very laudable objectives but poor legal integrity. Jesús Aranda, *Consenso en la SCJN para eliminar la "fórmula Otero": Castro y Castro*, LA JORNADA, Mexico City, June 28, 2000. Nevertheless Justice Castro voted in favor of the Supreme Court's LFDO's constitutionality ruling. See notes 55 and 84.

57. LFDO, *supra* note 1, art. 15.

58. Justice Juventino Castro y Castro has repeatedly criticized LFDO because he has considered it unconstitutional and distorting of Mexico's criminal system. Carlos Avilés Allende, *Impugnan narcos a la UEDO*, EL UNIVERSAL, Mexico City, April 19, 2002, p. 5. Nevertheless, when Mexico's Supreme Court ruled on the constitutionality of LFDO, Justice Castro voted approvingly. See notes 55 and 84. Also see Gabriel Regino, *La intervención de las comunicaciones privadas en Mexico*, KO'AGA ROÑETA se.vii (1997). See <http://www.derechos.org/vii/regino2.html>. <http://www.derechos.org/koaga/vii/regino2.html> (last visited September 17, 2002).

59. LFDO, *supra* note 1, arts. 8(4) and 15 – 28.

60. Mex. Const., *supra* note 23, art. 16.

61. HR 3162 RDS, Oct. 24, 2001, 107th Congress, available at http://www.eff.org/Privacy/Surveillance/Terrorism_militias/20011025_hr3162_usa_patriot_bill.html (last visited Feb.12, 2003).

62. LFDO, *supra* note 1, art. 11.

63. After the "Operation Casablanca" was announced, in which several U.S. law enforcement agents carried out undercover activities in Mexico without the U.S. government informing Mexican authorities of such activities, Mexico protested Operation Casablanca for the use of unilateral activities, hindrance of bilateral anticrime

United States.⁶⁴ Agents infiltrate the criminal organizations in order to gather information that will assist in dismantling them. Information is also gathered regarding all persons constituted to foster illicit purposes. It is a highly useful element because it allows law enforcement to know the structure and actual operation of the criminal organization, as well as its area of influence. Agents may spend long and difficult periods in undercover operations. The United States Federal Bureau of Investigation (FBI) reports that agents who spend long periods undercover can suffer tensions from maintaining dual personalities.⁶⁵ During the time the agent is infiltrated, he or she behaves like a criminal in order to gather information. It is then difficult to incorporate the individual into normal society once again. To do so requires retraining, rehab, and psychological help, and because Mexico has limited experience in this area, cooperation between Mexico and the United States is very important.

RESERVATION OF IDENTITY

The LFDO also allows the government to withhold the identity of witnesses testifying against organized crime.⁶⁶ It is important to note that the confidentiality of the identity of the witness is kept only during the investigation phase, or *durante la averigación previa*. Once it gets to the judicial process and criminal action has been instituted, the information must be disclosed.⁶⁷ The possibility to reserve the identity of a possible witness is an innovative tool in Mexico's criminal system established to protect individuals that can provide helpful information that may lead to the eventual location and arrest of criminals.

PROTECTION OF PERSONS

The measures protecting persons were created to safeguard the integrity and security of persons collaborating or participating in the investigation and prosecution of organized crime and its members. They ensure the physical, moral and psychological integrity before any danger, intimidation, or reprisal arises. These

cooperation, and as a serious violation of Mexico's sovereignty. See *Laundering 'milestone' reached as two Mexican banks convicted*, MONEY LAUNDERING ALERT, May 1999. Mexico denied, on February 7, 1999, the extradition requests of five Mexicans charged with money laundering. Embassy of Mexico in the U.S.A., *Government of Mexico Announces Decisions on "Operation Casablanca"*, Press Release, Bol-99-17, Feb. 7, 1999. Nonetheless, all five of them were tried in Mexican courts for the alleged offenses pursuant to FCC, arts. 4 and 9(2) of the U.S.-Mexico Extradition Treaty (Extradition Treaty, May 4, 1978, U.S.-Mex., 31 U.S.T 5059. For the official text of the Treaty in Spanish, see DOF, Feb. 26 and May 16, 1980). The U.S. government did not highly criticize the denial of the extraditions, presumably as a way to assuage Mexican concerns in the "Casablanca" aftermath.

64. On January 20, 2000, in a hearing with Mexico's Senate, Mexico's Attorney General stated that an undercover operation had been undertaken by a U.S. citizen, of which an official of the Ministry of Finance (SCHP) had been advised. The operation was contemplated in LFDO and the *Memorandum of Understanding for Procedures for Cooperation Between Law Enforcement Agencies of the United States and Mexico* executed in Merida, Yucatán, Mexico, on February 15, 1999. Andrea Becerril and José Galán, *El secreto del operativo narcofosas, "por falta de credibilidad en las autoridades"*, LA JORNADA, Mexico City, January 21, 2000. The Merida MOU was a follow-up to the "Brownsville Letter" of July 25, 1998, which Mexican Attorney General Madrazo and U.S. Attorney General Reno had hurriedly agreed upon in order to alleviate the strained U.S.-Mexico relationship after "Operation Casablanca", especially in the law enforcement cooperation field.

65. Michael J. Sniffen, *FBI Agent Sues Over Misconduct*, Associated Press, Nov. 4, 2000.

66. LFDO, *supra* note 1, art. 14.

67. *Id.*

measures may be instituted during the investigation phase (*averiguación previa*) or before, during, and after the criminal trial. Subject to protection are: 1) individuals acting against organized crime: *ministerio público* agents, experts, and judges, 2) people collaborating with the authorities: witnesses and members or organized crime,⁶⁸ and 3) victims of organized crime.

Protection is provided when the person renders his official statement (testimony) before a *ministerio público* agent of UEDO and the information provided may endanger such person. Law enforcement authorities have to verify the authenticity and veracity of the information and consider if it may also be useful in other investigations.

The type of support and protection given can be specific or global. Specific conditions refer to judges, witnesses, experts, and victims. Global measures refer to other individuals who are collaborating and who are in need of protection.⁶⁹ This group includes relatives, spouses, concubines and those living with said persons, collateral relatives up to the second degree, as well as individuals linked by love, respect, gratitude, or friendship to the witness or those collaborating with the authority. The government can offer many kinds of protection, including bodyguards, surveillance, witness protection, legal measures, or reserve of identity.⁷⁰ The protection is offered for as long as needed. Support given by the authorities includes economic, medical, educational, labor, and home assistance. The *ministerio público* for UEDO makes these determinations, defining the details, expenses, duration, and particular circumstances of the protection to be provided.

PLEA-BARGAINING

In Mexico, plea-bargaining is referred to as *beneficios de la ley*,⁷¹ or benefits of the law. In Mexico's traditional legal culture, plea-bargaining has created some controversy. In essence, it is the reduction of punishment that may be or has been imposed on an individual in exchange for information. While the defendant may be guilty, and should purge his or her sentence, he or she will not serve the full sentence and may in fact not be convicted of all the crimes he or she may have committed. In essence, plea-bargaining serves a utilitarian purpose by providing incentives to both sides. The prosecutor can obtain more information about other criminals in exchange for cooperation and it conserve judicial resources by avoiding a trial on every charge.

If a member of organized crime collaborates with authorities and such assistance provides important and relevant information leading to the arrest, capture, and imprisonment of other members of the criminal group, such collaborator will receive certain benefits, subject to his or her legal situation, whether as a suspect, a defendant, or a convicted and sentenced criminal. The four hypothesis available are: 1) no previous indictment or criminal proceeding exists against the collaborator, 2)

68. This aspect of the witness protection programs have been criticized by Justice Juventino Castro as generating impunity in Mexico. Nevertheless, when Mexico's Supreme Court ruled on the constitutionality of LFDO, Justice Castro voted approvingly. See *supra* notes 55 and 84.

69. LFDO, *supra* note 1, art. 34.

70. *Id.*

71. *Id.*, at art. 35.

the collaborator is under investigation, 3) a criminal procedure has been initiated, and 4) a sentence has been passed. If no investigation has begun, any evidence will be discarded;⁷² if an investigation has begun, up to two thirds of the sentence may be reduced;⁷³ if criminal process has begun, one half of the sentence may be reduced;⁷⁴ and if the individual has been sentenced, two thirds of the sentence may be reduced.⁷⁵

However, a contradiction seems to exist in the law. Only criminals involved in organized crime can receive these benefits.⁷⁶ Thus, the worst criminals receive the benefits of the law, which are not available to the common criminal. Furthermore, sentence reduction has been considered to create impunity in Mexico.⁷⁷ Yet law enforcement is achieving results, so perhaps the pragmatic aspects are triumphing over the theoretical ones.

REWARDS

Rewards may now be offered and given to whoever assists in order to locate and apprehend a criminal.⁷⁸ Rewards are considered a tool for prevention and dissuasion against criminals based on society's cooperation with law enforcement authorities. Only the Attorney General of Mexico (AGM) is empowered to authorize these rewards, and they will be subject to the terms and conditions set by the AGM.

Rewards are offered upon two conditions: 1) the sought after criminal must be a member of an organized crime group already under investigation (*averiguación previa*), and 2) information provided must be essential to the capture of the wanted criminal. In order to actually receive the reward, further conditions must be met as well. An arrest warrant must have been issued based on investigations of the member of the criminal organization. Information received by the authorities must be true and useful for the suspect's arrest. All proceedings arising from the arrests of members of criminal organizations shall be handled in federal courts.

ANONYMOUS INFORMATION

Anonymous information received by authorities must be verified by the *ministerio público* before it can be used.⁷⁹ If the information provided and the facts offered are verified to constitute a possible crime, authorities will begin the formal investigation process, gathering available evidence and interrogating witnesses. It is important to stress that anonymous information has no evidentiary value per se.

72. *Id.*, at art. 35(I). This is granted by the investigative authority.

73. *Id.*, at art. 35 (II). This benefit is requested by the prosecutor and granted by the judge.

74. *Id.*, at art. 35 (III). This benefit is requested by the prosecutor and granted by the judge.

75. *Id.*, at art. 35 (IV). This benefit is granted by the Ministry of *Gobernación* (Interior), which is in charge of the prison system.

76. *Id.*, at arts. 35-39.

77. Such is the opinion of Justice Juventino Castro Aranda, *supra* note 56. Nevertheless, when Mexico's Supreme Court ruled on the constitutionality of LFDO, Justice Castro voted approvingly. See *supra* notes 55 and 84.

78. LFDO, *supra* note 1, art. 37.

79. *Id.*, at art. 38.

ARREST WARRANTS

Under the Organized Crime Act, a search warrant must be issued within twelve hours of being requested.⁸⁰ The judge must decide on it. However, if for some reason a judge does not decide on the request, law enforcement authorities can take the request to the appellate court immediately, which must also decide within twelve hours.⁸¹ This is a radical change for criminal prosecutions in Mexico because Article 142 of the Federal Criminal Code for Criminal Procedure only requires that the request for an arrest warrant be processed within ten days.⁸² Appeals of a denial of search warrant related with organized crime must be decided within 48 hours.⁸³

CONSTITUTIONALITY OF LFDO

On June 25, 2002, after being strongly tested in the courts, the *Suprema Corte de Justicia de la Nación* (SCJN), the Supreme Court of Mexico, ruled that LFDO is constitutional.⁸⁴ The decision is viewed as representing the judiciary's commitment to fighting crime, especially after judges and justices had questioned LFDO's constitutionality in 1996.⁸⁵ This ruling was important due to its significant implications on international cooperation efforts, including extradition.

Several members of the Arellano Félix Organization (AFO) appealed the constitutionality of LFDO. Five *amparos* (constitutional appeals similar to *habeas corpus*) questioned the validity of 12 different articles of the LFDO, and, put into question the very existence of the PGR's *Unidad Especializada contra la Delincuencia Organizada* (UEDO), Specialized Unit Against Organized Crime.⁸⁶

The SCJN ruled that all provisions of LFDO under review were constitutional. The Court ruled that the offense of "organized crime"⁸⁷ is an independent and not a predicate crime, wherefore a person can be found guilty of organized crime itself, and organized crime is not necessarily an aggravating circumstance in the commission of the eleven crimes⁸⁸ predicating organized crime.⁸⁹ Thus, holding

80. *Id.*, at art. 15.

81. *Id.*

82. *Código Federal de Procedimientos Penales*, *supra* note 24.

83. LFDO, *supra* note 1, art. 15.

84. See Suprema Corte de Justicia de la Nación, *Versión Taquigráfica de la Sesión Pública Ordinaria del Pleno de la Suprema Corte de Justicia de la Nación, Celebrada el martes 25 de junio de dos mil dos*, Mexico City, June 25, 2002 [hereinafter *Public session*]. Also, see Jesús Aranda, *Se suma la SCJN a la mano dura contra el crimen*, LA JORNADA, Mexico City, June 26, 2002.

85. See *inter alia*, *supra* notes 56 and 84.

86. See Avilés, *supra* note 58.

87. LFDO, Articles 2 and 4.

88. See, *supra* notes 42 – 54.

89. "...el solo acuerdo de la organización o la organización misma, que tenga como fin cometer algunos de los delitos precisados en [LFDO, Article 2], es suficiente para imponer las penas previstas en el artículo 4° de la ley referida, con independencia de la sanción que le corresponda al ilícito o ilícitos cometidos. Acorde con lo anterior, debe decirse que el ilícito de mérito no es una agravante de los diversos previstos en las fracciones del citado artículo 2° de la ley en cuestión, toda vez que las circunstancias señaladas denotan la autonomía del ilícito de delincuencia organizada, porque le dan vida propia, esto es, para su consumación no requiere de la realización de otra conducta tipificada como delito". *DELINCUENCIA ORGANIZADA. El delito previsto en el artículo 2°, y sancionado en el artículo 4°, ambos de la ley federal contra la misma, es autónomo y no una agravante*. SCJN, Pleno, TESIS NÚM. XXV/2002, Amparo en revisión 173/2001.- 25 de junio de 2002.- Unanimidad de once votos.- Ponente: Sergio Salvador Aguirre Anguiano.- Secretario: Alberto Miguel Ruiz Matías; Amparo en revisión

people criminally liable if they associate with criminals to commit crimes does not violate freedom of speech because communication and association to commit a crime are not protected speech activities. What Article 2 of LFDO sanctions is the agreement to constitute a criminal organization.⁹⁰ By holding that the “vicinity” requirement is applicable only to members of a popular jury, but not to judges, the Court ruled that Article 6 of LFDO was constitutional.⁹¹ Now a judge from one part of the country can preside over a case involving a criminal from another part. In the past, the judge had to be from the same locale as the criminal.

Further, the SCJN ruled that Article 4 of the Act is not an unusual and cruel punishment.⁹² The Court used an unusual and unique interpretation to arrive at this ruling. It held that there was no unusual criminal punishment because the appealed act was an *auto de formal prisión*, or a judge’s order for formal imprisonment of an individual. Such an order only relates to probable cause without imposing any sanction. Thus, it was not ruling on the Act itself. The Court distinguished the LFDO from a judge’s final decision to convict and sentence. LFDO was constitutional because it is not until the judge completes his or her determination process, and decides how many years of imprisonment to impose, that the prisoner actually receives any criminal sanction. The decision is technically difficult and probably means that the issue will arise again once the defendants actually receive and begin serving their corresponding prison terms.

The Court further held that withholding informant and witness names and identities until the initiation of judicial proceedings is constitutional.⁹³ The SCJN stated that “the constitutionality issue ... of articles 14 and 34 [of LFDO] ... should

444/2001.- 25 de junio de 2002.- Unanimidad de once votos.- Ponente: José Vicente Aguinaco Alemán.- Secretaria: Martha Yolanda García Verduzco; Amparo en revisión 446/2001.- 25 de junio de 2002.- Unanimidad de once votos.- Ponente: Juan Díaz Romero.- Secretario: Gonzalo Arredondo Jiménez.

90. The only limitations on freedom of speech are that it does not attack morality nor rights of third parties, that it does not provoke the commission of an offense and that it does not perturb public order. *DELINCUENCIA ORGANIZADA. El artículo 2°, párrafo primero, de la ley de la materia, no viola la garantía de libertad de expresión consagrada en el artículo 6° de la constitución federal.* SCJN, Pleno, TESIS NÚM. XXVI/2002, Amparo en revisión 173/2001.- 25 de junio de 2002.- Unanimidad de once votos.- Ponente: Sergio Salvador Aguirre Anguiano.- Secretario: Alberto Miguel Ruiz Matías; Amparo en revisión 444/2001.- 25 de junio de 2002.- Unanimidad de once votos.- Ponente: José Vicente Aguinaco Alemán.- Secretaria: Martha Yolanda García Verduzco; Amparo en revisión 446/2001.- 25 de junio de 2002.- Unanimidad de once votos.- Ponente: Juan Díaz Romero.- Secretario: Gonzalo Arredondo Jiménez.

91. *COMPETENCIA PENAL. La garantía que otorga a los inculpados el artículo 20, apartado a, fracción vi, constitucional, no se transgrede por los numerales 6°, párrafo primero, y 10, párrafo tercero, del código federal de procedimientos penales, que permiten conocer de un delito a un juez de distrito distinto al del lugar en que aquél se cometió.* SCJN, Pleno, TESIS NÚM. XXIX/2002, Amparo en revisión 173/2001.- 25 de junio de 2002.- Unanimidad de once votos.- Ponente: Sergio Salvador Aguirre Anguiano.- Secretario: Alberto Miguel Ruiz Matías. Amparo en revisión 444/2001.- 25 de junio de 2002.- Unanimidad de once votos.- Ponente: José Vicente Aguinaco Alemán.- Secretaria: Martha Yolanda García Verduzco.

92. *DELINCUENCIA ORGANIZADA. Es inoperante el argumento consistente en que el artículo 4°, fracción i, inciso a), de la ley federal de la materia establece una pena inusitada y trascendental y, por ende, es violatorio del artículo 22 de la constitución federal, cuando se reclama con motivo del auto de formal prisión.* SCJN, Pleno, TESIS NÚM. XXX/2002, Amparo en revisión 446/2001.- 25 de junio de 2002.- Unanimidad de once votos.- Ponente: Juan Díaz Romero.- Secretario: Gonzalo Arredondo Jiménez.

93. *DELINCUENCIA ORGANIZADA. Para que sea procedente la impugnación en amparo, de los artículos 14 y 34 de la ley federal de la materia, es necesario que hayan sido aplicados en perjuicio de la parte inculpada, lo cual sólo ocurre si el ministerio público, antes del ejercicio de la acción penal, le oculta la identidad de los testigos que declararon en su contra.* SCJN, Pleno, TESIS NÚM. XXXI/2002, Amparo en revisión 446/2001.- 25 de junio de 2002.- Unanimidad de once votos.- Ponente: Juan Díaz Romero.- Secretario: Gonzalo Arredondo Jiménez.

be examined ... where the federal [prosecutor] *before exercising criminal action against the defendant had reserved or hidden the identity of the witnesses that testified against him*, but where from the investigation proceedings one can conclude that names of the witnesses were included and the [prosecutor] provided them to the indicted ...", then there is no violation.⁹⁴ In other words, as long as it appears that the government had recorded the names during the investigations (*averiguación previa*), and this was given to the suspect, then there is no violation. However, recall that LFDO provides that the authorities can withhold from the suspect any information regarding an individual who is providing help or information *until* the corresponding judicial procedure begins.⁹⁵ The informant's identity must be revealed once the judicial procedure begins or there could be a violation. So, according to the SCJN, authorities are allowed to keep the informant's identity reserved and in full confidentiality but if the information was included in the investigations and they gave it to the suspect, then it is okay. Yet, in a way, the authorities would be violating their duty to maintain confidentiality, and presumably limiting the potential effects of their investigation while also endangering the individual whose identity was supposed to be reserved. Thus, the Court resorted to an original legal argumentation to arrive at its decision in this quite contradictory situation.

On the other hand, the SCJN's ruling is encouraging for future cases in front of the Court. The decision may signal the Judiciary's commitment in the fight against crime.⁹⁶ Mexico now has a pseudo-RICO Act⁹⁷ and is making important progress against organized crime. The arrest of Benjamín Arellano Félix, the death of his brother, and the dismantling of the Arellano Félix Organization (AFO) are the most notable examples. Further, the Court also announced in its holdings that it understands that the world is dealing with a new type of crime,⁹⁸ which may explain why the public session lasted only 15 minutes and the media was not formally convened.⁹⁹

Accordingly, and remembering that on October 2, 2001, the SCJN ruled that Mexico cannot extradite any person unless the Requesting State provides assurances

94. "debe estimarse que el cuestionamiento de la constitucionalidad de los artículos 14 y 34 de la Ley Federal contra la Delincuencia Organizada, que facultan al Ministerio Público de la Federación a mantener bajo reserva la identidad de las personas que rindan testimonio en contra de algún miembro de la delincuencia organizada, hasta el ejercicio de la acción penal, con la correlativa obligación de la Procuraduría Federal de la República de prestar apoyo y protección suficientes a dichos testigos, sólo procede ser examinado en el juicio de amparo, cuando el Ministerio Público Federal, antes de ejercitar la acción penal contra el inculpado, hubiere mantenido en reserva o le haya ocultado la identidad de los testigos que declararon en su contra, pero cuando de las actuaciones de la averiguación previa se desprende que se asentó el nombre de cada uno de dichos testigos y el Ministerio Público los dio a conocer a la parte inculpada como las personas que deponen en su contra, y esta última se manifestó conocedora de sus identidades, es dable concluir que los artículos citados no se aplicaron en la parte que podría perjudicarlo y que, por tanto, opera la causal de improcedencia establecida en el artículo 73, fracción VI, de la Ley de Amparo." *Id.* (emphasis added) [author's translation].

95. See *supra* note 67, text accompanying.

96. See *inter alia*, *supra* notes 56 and 84.

97. *Racketeer Influenced and Corrupt Organizations* (RICO) chapter of the Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961 – 1968.

98. During the intense debate about LFDO, that lasted for several months, the Justices became convinced that crimes like drug trafficking, trafficking of persons and minors, trafficking of arms, and kidnapping, need to be tackled by the authorities in a very particular ways, and thus, the corresponding punishments must also be exemplary. Jesús Aranda, *Podría cambiar la SCJN su postura sobre la pena capital*, LA JORNADA, July 1, 2002.

99. *Id.*

that life imprisonment shall not be imposed,¹⁰⁰ there have been reports that the SCJN may reconsider its position on the life imprisonment in extradition issue.¹⁰¹ This is attributed to the fact that SCJN has now realized the powers and the dangers posed by organized crime and drug-trafficking. Mexico has new powers and new means to combat crime. Yet the problem is huge and there is still a considerable need for new units, more resources, and more vetting of agents. Nevertheless, the stage is set and Mexico is hopeful that the courts, the administration, the legislature, and society will go forward hand in hand.

100. For further information see Rodrigo Labardini, *Mexico's Supreme Court to analyze whether extradition is allowed where life imprisonment sentence may be imposed*, 17 INTERNATIONAL ENFORCEMENT LAW REPORTER 418 (October 2001), and Rodrigo Labardini, *Extradition from Mexico allowed with assurances that life imprisonment will not be imposed*, 18 INTERNATIONAL ENFORCEMENT LAW REPORTER 404 (October 2002).

101. Aranda, *supra* note 98.