

THE LIMITS OF THE INTERNATIONAL JUDICIAL FUNCTION OF THE MEXICAN FEDERAL JUDICIARY

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ABSTRACT: Mexican judges are increasingly acting as international law judges. Their international judicial function includes a basic understanding of a judicial function per se: dispute resolution through the application and interpretation of legal rules by an independent and impartial judicial body. The international character of this work depends on the recourse to international law as a legal basis for the dispute settlement of the particular cases brought to their jurisdiction. Mexican judges are performing an international judicial function when they interpret international law norms and principles, when they guarantee private persons' rights and duties under international law, and when they assess the conformity of domestic legislation with the international law commitments of the Mexican state. However, at present, Mexican judges are not behaving as ordinary judges of all international law. The place of international law in the Mexican Constitution, the slow democratization of the Mexican presidential regime and the deference of Mexican judges to the executive in foreign affairs help explain the constraints upon the international judicial function as experienced by Mexican judges. The general context of the Mexican political regime impacts the role of the federal judiciary with regards to the promotion of respect for the rule of law, domestically and internationally.

KEYWORDS: Mexican Courts and Tribunals, international judicial function, interpretation, conventionality control, Mexican Constitution.

RESUMEN: Los tribunales mexicanos actúan con cada vez más frecuencia como jueces de derecho internacional. Su función judicial internacional incluye el entendimiento genérico de toda función judicial: la resolución de controversias por parte de un órgano judicial independiente e imparcial, a través de la interpretación y aplicación de reglas jurídicas abstractas a casos fácticos concretos. La naturaleza internacional de dicha función depende del recurso al derecho internacional como base legal para el arreglo judicial de los litigios, presentados ante su foro. En este sentido, los tribunales mexicanos ejercen una función

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judicial internacional cuando interpretan las normas y principios del derecho internacional, cuando protegen derechos que el derecho internacional reconoce en el patrimonio jurídico de los particulares y cuando controlan la conformidad de las normas de derecho interno con los compromisos adquiridos por el Estado Mexicano en virtud del derecho internacional. No obstante, en la actualidad, los jueces mexicanos no actúan como jueces ordinarios de todo el derecho internacional. El lugar que ocupa este ordenamiento normativo en la Constitución de 1917, la lenta democratización del régimen presidencial mexicano y la deferencia de los miembros de la Judicatura Federal hacia el titular del Poder Ejecutivo Federal en asuntos de Política Exterior son importantes limitantes para la función judicial internacional de los tribunales mexicanos. El entorno general del sistema político mexicano ejerce un impacto considerable en la capacidad del Poder Judicial Federal de garantizar el respeto del estado de derecho, interno e internacional.

PALABRAS CLAVE: *Tribunales mexicanos, función judicial internacional, interpretación, control de convencionalidad, Constitución Mexicana.*

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I. INTRODUCTION

The ideas of the great French jurist Georges Scelle are gaining new attention in international law. In 1930, Scelle developed his theory of role splitting (*théorie du dédoublement fonctionnel*) in order to explain the new characteristics of the global society (*société globale*) in the period after the First World War.

The theory of *dédoublement fonctionnel* endorses the presumption that in every legal system there are three basic functions: legislative, executive and ju-

dicial. In domestic legal systems, state bodies, the so-called executive, legislative and judicial branches fulfill these functions. But a problem arises in the international legal system, as it lacks central executive, legislative and judicial branches, that could act in the name of the international community as a whole. Scelle's response to this inherent failure of international law was to argue that national bodies and agents of the executive, legislative and judicial powers of each state ought to perform a double function: act as bodies and agents of their own state within its internal legal order and, at the same time, as agents and bodies of international law.¹

To this day, there are no central legislative or executive powers in the international legal order.² Although international law has suffered from the unavailability of independent and impartial judicial bodies for more than three centuries,³ today we are living in an era of the "judicialization" of international law.⁴ At the end of the 20th Century and at the outset of the 21st Century, the proliferation of international courts and tribunals fundamentally changed the landscape of dispute settlement in international law. In Scelle's lifetime there were no more than three active international judicial bodies, at present, at least fifty such bodies perform an international judicial or quasi-judicial function.⁵ The existence of so many international courts and tribunals could suggest that Scelle's diagnostic of *dédoublément fonctionnel* is not accurate for 21st Century domestic judges, as they no longer have to struggle with the double personality of international and domestic law agents. Nevertheless, it appears that the multiplication of international courts and tribunals hasn't led to the suppression of the international judicial function of domestic judges.

The international judicial function of national judges includes a basic understanding of the judicial function *per se*: dispute resolution through the application and interpretation of legal rules⁶ by an independent and impartial judicial body. Thus, the internal or international character of the judicial function depends only on the nature of the legal rules that domestic tribunals

¹ Antonio Cassese, *Remarks on Scelle's Theory of "Role Splitting" (dédoublément fonctionnel) in International Law*, 1 *EJIL* 212 (1990).

² Some authors argue that the UN Security Council sometimes acts as an "international legislator" (Stefan Talmon, *The Security Council as a World Legislator*, 99 *AJIL*, 2005, 175-193).

³ Georges Michel Abi Saab, *The Normalization of International Adjudication: Convergence and Divergence*, 43 *NYUJ Int'L Pol* 1-4 (2010).

⁴ ANTONIO AUGUSTO CASCADO TRINDADE, LA EXPANSIÓN DE LA JURISDICCIÓN INTERNACIONAL Y SU IMPORTANCIA PARA LA REALIZACIÓN DE LA JUSTICIA, UN Lecture Series, http://legal.un.org/avl/l/Cascado-Trindade_HR_video_2.html; Virginia Petrova Georgieva, *La "judicialización": una nueva característica del orden jurídico internacional*, XV ANUARIO MEXICANO DE DERECHO INTERNACIONAL (2015).

⁵ Roger Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 *AJIL*, 2000, 160; PHILIPPA WEBB, *INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION 1* (Oxford University Press 2013).

⁶ Antonios Tzanakopoulos, *Domestic Courts in International Law: The International Judicial Function of National Courts*, 34 *LOYLA INT'L & COMPL REV* 13 (2011).

will have to interpret and apply. National judges perform an international judicial function each and every time that they have recourse to international law as a legal basis for the dispute settlement of cases brought to their jurisdiction.⁷

But what kind of international legal norms and principles can be invoked in domestic proceedings before national courts and tribunals? It is possible to classify said norms and principles into three categories: horizontal, vertical and transnational legal norms. Horizontal norms apply to relations between primary subjects of international law: states and international inter-governmental organizations. Vertical international legal norms are relevant to the relations between states and/or intergovernmental organizations and non-state actors (individuals, private companies, non-governmental organizations (NGOs), etc.). Finally, transnational norms deal exclusively with interactions between private persons.⁸

In principle, parties will not invoke the horizontal norms of international law in internal judicial proceedings, as their subjects (states and international intergovernmental organizations) have a special legal status as regards the jurisdiction of domestic courts and tribunals. Both legal entities enjoy immunity from jurisdiction for acts performed in the course of public functions.⁹ Unless they expressly admit a waiver of immunity, by virtue of the principle *pars in partem non habet jurisdictionem*, states are not allowed to appear before another state's national tribunals. In addition, litigants cannot initiate legal proceedings against international organizations before the domestic judges of their member states. However, there is an ongoing discussion about the possibility of limiting the jurisdictional immunity of states and international organizations. Some domestic courts have accepted judging foreign states for acts committed in violation of *jus cogens* rules.¹⁰ Additionally, national judges have resolved cases concerning the interpretation and application of horizontal rules of international law, such as those prohibiting the use of force in international relations or those governing the recognition of states and governments.¹¹

Today, the main field for the performance of an international judicial function by domestic judges remains the application and interpretation of vertical

⁷ TZANAKOPOULOS, *Supra*, 137.

⁸ DAVID SLOSS and MICHAEL VAN ALSTINE, *International Law in Domestic Courts* 7 (2015), available at <http://digitalcommons.law.scu.edu/facpubs/889>.

⁹ States and international organizations are immune from the jurisdiction of domestic tribunals only for their acts *de iure imperii* (acts performed in the use of their sovereign prerogatives). The immunity does not cover acts *de iure gestionis* (commercial acts realized on behalf of the State or the international organization).

¹⁰ Servine Knuchel, *State Immunity and the Promise of Jus Cogens*, 9 *NORTHWESTERN JOURNAL OF INTERNATIONAL HUMAN RIGHTS* 149 (2011).

¹¹ ANDRÉ NOLLKAEMPER and AUGUST REINISCH (eds.), *INTERNATIONAL LAW IN DOMESTIC COURTS. A CASEBOOK* 88 (Oxford University Press 2018).

and transnational types of norms. One of the revolutions in contemporary international law is the recognition of the international legal personality of private persons. Conventional and customary rules of international law create direct rights and duties upon private persons, and establish their access to international mechanisms of dispute settlement.¹² Although individuals and companies have *locus standi* before some international tribunals, there are other international courts, such as the International Court of Justice, the International Tribunal for the Law of the Sea or the Dispute Settlement Body of the World Trade Organization, that are closed to private persons. Thus, in the specialized grounds for the application of international norms, private subjects of international law depend on their national courts and tribunals to advance the protection of their rights and to enforce their respective duties under international law.¹³ Even the customary rule regarding the exhaustion of local remedies shows the “natural judge” of individuals and private companies is a domestic judge, even as regards international law.¹⁴ In the same sense, the competence of national judges in the protection of the rights and duties of private persons under international law is summed up in the expression “ordinary judges of international law”, which was used for the first time in the legal context of the European Union.¹⁵

Transnational norms are another strong point of connection between domestic judges and international law. Nowadays, states that are members of the global community have adopted international multilateral conventions. The principal objective of these conventions is to develop uniform conflict

¹² Individuals are the primary subjects of norms established by international human rights law, international economic law and international criminal law. Private companies have rights under international human rights law and international economic law, particularly in the investment protection field, but they still have no binding obligations under international law. The UN and other international organizations have made many efforts in order to establish the social responsibility of companies in international law.

¹³ SLOSS, *Supra*, 2

¹⁴ By virtue of this rule, individuals and private persons cannot bring a claim before international courts and tribunals, and states can't exercise diplomatic protection in their favor, until they exhaust all existing remedies in their domestic legal order. The aim of this rule is to permit States to redress any possible violation of international law commitments through the jurisdiction of their own tribunals.

¹⁵ This expression was first used in the legal order in the European Union in order to consider domestic judges “ordinary judges of communitarian law” (“*juges de droit commun du droit communautaire*”). Since the *Van Gend en Loos*, *Costa* and *Simmenthal* decisions of the Court of Justice of the European Union, the EU law established several duties upon national judges as the *prima facie* protectors of the rights granted to individuals by the laws of the European Union. In particular, they have to directly apply EU provisions that recognize the rights and duties of private persons, and set aside or leave unapplied any national provision that is contrary to EU law and hold the State responsible for any violation of EU law that is directly applicable to private persons. See: Saida El Boudouhi, *The National Judge as Ordinary Judge of International Law? Invocability of Treaty Law in National Courts*, 28 *LJIL* 286 (2015).

rules within private international law, as well as to harmonize substantive rules in many fields of transnational private relations (including civil and family law, trade law, administrative and procedural law). By applying these important treaties of private international law and resolving disputes between private parties that are subjects of more than one national legal system, domestic judges frequently behave as *prima facie* private international law judges.

The horizontal, vertical and transnational norms of international law enter the internal legal orders of states through different forms of domestication or internalization; unless they are vested by direct effect or enjoy direct applicability in national law. The domestication or filter proceedings differ from one country to another, depending on the constitutional system for the reception and incorporation of international law into the national legal order. Once domesticated, the norms of international law become part of domestic law. From a formalist point of view, when applying and interpreting those norms, national judges have recourse to domestic norms, but from a substantive point of view, they would use international law in the resolution of particular disputes.¹⁶ In other words, the domesticated norms of international law have formal validity based in domestic law, while the content of these norms has substantial foundations in international law. The use of domesticated international law in national dispute resolution also entitles domestic judges to perform an international judicial function.

Consequently, national judges have sufficient lawful basis for fulfilling an international judicial function. But the question remains: are they willing to do so? There is no legal obligation upon domestic judges to act as ordinary judges of international law. Neither domestic nor international law create such a duty on behalf of domestic judiciaries. The call for national judges to behave as judges of international law is of a persuasive nature, and depends on the voluntarism and internationalism present in the attitudes of judges. Some domestic tribunals, especially in dualistic legal systems, even have the possibility of using “avoidance techniques” to keep them away from the interpretation and application of international law in domestic cases. What factors can inhibit or exhibit the ability and the potential of domestic judges to act as ordinary judges of international law?

This article will analyze the performance of international judicial functions by Mexican judges. Are Mexican judges ordinary judges of international law, and if so, to what extent? What is the scope of their international judicial function? What are the constraints on their capacity and willingness to act as judges of international law?

The first part of this article will analyze the scope of the international judicial function of Mexican judges. It will focus on the methods of interpretation and application of international law used in specific resolutions. In particular, it will demonstrate that Mexican judges are performing an inter-

¹⁶ TZANAKOPOULOS, *Supra*, 143.

national judicial function when they interpret international law norms and principles, when they guarantee the rights and duties of private persons under international law, and when they control the conformity of domestic law and international law committed to by the Mexican state. The first part of this article will examine how the international judicial function of Mexican judges is limited, as Mexican judges are not behaving as ordinary judges of *all* international law.

The second part of this article will consider the general legal and socio-political context in which Mexican judges are active, and the influence that context has on their willingness and ability to fulfill an international judicial function. The place of international law in the Mexican Constitution, the slow democratization of the Mexican presidential regime and the deference to the executive power in foreign affairs on the part of Mexican judges are essential to understanding the constraints upon their international judicial function.

II. THE INTERNATIONAL JUDICIAL FUNCTION OF MEXICAN COURTS AND TRIBUNALS

1. *Mexican Judges as Protectors of the Rights and Duties of Private Persons under International Law*

As mentioned earlier, the vertical norms of international law have granted rights and duties to private persons, which can be invoked in domestic proceedings before national judges. There are several areas in which international law grants direct rights and duties to individuals. Many international norms and principles, applicable at the regional and universal level, protect the rights of some categories of individuals (refugees, stateless persons or workers) and the human rights of all private persons. Additionally, some regional human rights courts (like the European Court of Human Rights) have considered companies to enjoy a limited number of human rights. Private persons can invoke their human rights before international bodies (some UN bodies are competent in human rights protection) and before specialized regional courts and tribunals (like the European Court of Human Rights, the Inter-American Court of Human Rights or the African Court of Human Rights). All international human rights instruments establish the exhaustion of local remedies as a prerequisite for international judicial protection. Thus the ordinary, and primary, responsibility to protect international human rights belongs to national judges.

As noted, Mexican judges are increasingly acting as “ordinary judges of international human rights law”. They have actively assumed a new role as “inter-American judges”.¹⁷ In a growing number of cases, Mexican judges

¹⁷ Suprema Corte de Justicia de la Nación, Líneas generales de trabajo 2019-2022, Minis-

have afforded individuals judicial protection of their human rights, granted directly by international treaties.

Since 2008, circuit courts have considered that individuals can invoke human rights provisions contained in international treaties in constitutional protection lawsuit (*amparo*) proceedings.¹⁸ In other words, the circuit courts recognized that Mexican judges have jurisdiction over disputes related to the violations of human rights. This is recognized not only in the Mexican Constitution, but also in international human rights treaties.

In a 2007 case, the Supreme Court guaranteed the freedom of expression and the prohibition of censorship, in accordance with Article 7 of the Mexican Constitution and Article 13 of the American Convention on Human Rights.¹⁹ The Court mentioned that freedom of expression can't be restricted without the approval of competent authorities and that this freedom is co-substantial to the rule of law and democracy. In a case decided in 2008, the Supreme Court extended the scope of the judicial protection of the right to health, pursuant to Article 25 of the Universal Declaration of Human Rights, Article 12 of the International Pact on Economic, Social and Cultural Rights and Article 10 of the Additional Protocol of the American Convention on Human Rights on Social, Economic and Cultural Rights (which is also called the San Salvador Protocol). In 2008, Mexico's Supreme Court clarified the meaning of the right to respect of private life, enounced in Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Pact on Social and Political Rights, Article 11 of the American Convention on Human Rights and Article 16 of the Convention on the Rights of the Child.²⁰ The Supreme Court emphasized that the right to health, in conformity with these international law instruments, includes the access to a wide range of facilities, goods and services, as well as access to all other conditions necessary to enjoy a state of optimum health.²¹ In 2000, the Supreme Court protected the right to life, by virtue of the provisions of the Convention on the Rights of the Child and the International Pact on Civil and Political Rights.²² In an interesting case, resolved in 2011, a circuit court assumed possible violations to the right to honor, even if it is not granted by the Mexican Constitution. The court considered itself competent to afford protection regarding the right to honor, based solely on the provisions of the American Convention on Human Rights and the International Pact on Civil and Political Rights.²³

tro Arturo Zaldívar, p. 37, https://www.scjn.gob.mx/sites/default/files/carrusel_usos_múltiples/documento/2019-01/lineas-grales-trabajo-mj-arturo_zaldívar_lelo_de_larrea.pdf.

¹⁸ Amparo directo 344/2008, June 10, 2008.

¹⁹ Amparo en revisión 1595/2006, November 29, 2006.

²⁰ Amparo directo en revisión 2044/2008, June 17, 2009.

²¹ Amparo en revisión 173/200, April 30, 2008.

²² Acción de inconstitucionalidad 10/2000, Diputados integrantes de la Asamblea Legislativa del Distrito Federal, January 30, 2002.

²³ Amparo directo, 4/2012, Mayo 31, 2012.

In other cases, Mexican judges have been activists regarding the recognition of individual rights as human rights in international law. In the *Florence Cassez* case,²⁴ the Mexican Supreme Court took a position on the ongoing controversy surrounding the acceptance of the right to information on consular assistance as a human right. This is established in Article 36 of the Vienna Convention on Consular Relations. In accordance with the Advisory Opinion of the Inter-American Court of Human Rights *OC-16/99*²⁵ and in dissonance with the *Avena* case²⁶ of the International Court of Justice, the Mexican Supreme Court considered that Article 36 grants this human right to individuals. In a clear performance of an international judicial function, Mexico's Supreme Court considered "the right to notification, contact and consular assistance as an encounter point of two basic international law requirements. In the first place, the strengthening of the position of consular offices as representative of the sovereignty of the sending State and, on the other hand, the respect for human rights and the importance of their effective judicial protection, as an element of the due process of law."²⁷ The Supreme Court then ordered the liberation of Florence Cassez, a French citizen, arrested in violation of her right to information on consular assistance, without dismissing the criminal claims against her.

These recent cases show the willingness of Mexican judges to afford judicial protection of individual human rights under international law. In almost all ongoing cases in which Mexican judges deal with human rights violations, they have recourse not only to a constitutional basis in domestic law, but also, complementary or exclusively, to a basis in international human rights treaties. This evolution has significantly strengthened individual human rights protection in the Mexican legal order, and has paved the way towards a growing acceptance of the performance of an international (human rights) judicial function by Mexican judges.

Mexican judges can act not only as protectors of individual human rights, as granted by international law, but also as guarantors of the international duties of an individual. At present, individuals are active subjects of international human rights law and passive subjects of international criminal law. According to the norms and principles of this specialized branch of international law, individuals have the obligation not to commit so-called international crimes, such as genocide, war crimes, crimes against humanity and crime of aggression. Even if the 20th Century has witnessed the development of international criminal Courts and Tribunals (such as the International Criminal Court, the International Criminal Tribunal for ex-Yugoslavia

²⁴ Amparo Directo 517/2011, January 23, 2013.

²⁵ Opinión Consultiva OC-16/99, "El derecho a la información sobre la asistencia consular y su relación con las garantías mínimas del debido proceso legal", October 1st, 1999.

²⁶ ICJ, *Avena* and Other Mexican Nationals, (Mexico vs. United States of America), Judgment, I. C. J. Reports 2004, 12.

²⁷ *Cassez Case*, *Supra*, 82.

or the International Criminal Tribunal for Rwanda), the jurisdiction of domestic courts is essential for the prosecution of these crimes. In fact, national courts are ordinary judges of international criminal law on two counts. All domestic judges are vested with the authority to perform so-called “universal jurisdiction”. Since the *Eichmann* case,²⁸ which was decided by Israeli tribunals after the Second World War, it has been admitted that domestic judges can hold individuals accountable for the commission of international crimes, even if the offender is not a citizen of their state and the crimes were committed abroad. All domestic judges in states that have ratified the Rome Statute are, by virtue of its provisions, “complementary judges to the International Criminal Court”.²⁹

Mexican judges have so far not admitted their role as international criminal law judges. There are no cases in which they have exercised universal jurisdiction, as such. However, in the *Cavallo* case, decided in 2003,³⁰ the Mexican Supreme Court accepted the extradition to Spain of an Argentine national for the commission of international crimes in Argentina.³¹ The Supreme Court emphasized that “the tribunals of a State can exercise, in the name of the international community, as a whole, jurisdiction over some crimes”, particularly over genocide, torture and terrorism. No cases have been decided, until now, on the ground of Mexican judges’ complementarity to the International Criminal Court, nor have they ruled on the recognition of individual criminal responsibility under international law.

2. Mexican Judges as Interpreters of International Law

As mentioned above, domestic judges will act as ordinary judges of international law whenever they apply and interpret international law norms and principles in cases brought before their jurisdiction. Articles 31 to 33 of the Vienna Convention on the Law of Treaties establish the principal methods of interpretation of international law, and most domestic judges have recourse to these methods.³²

²⁸ District Court of Jerusalem, Israel, Criminal Case No. 40/61, Judgment, December 11, 1961.

²⁹ According to Article 1 of this treaty, the International Criminal Court “(...) shall be complementary to national criminal jurisdictions.” Additionally, pursuant to Article 17, a case before the Court “is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”.

³⁰ Amparo en Revisión 140/2002, June 10, 2003.

³¹ Manuel Becerra Ramírez, *El caso Cavallo*, 4 *ANUARIO MEXICANO DE DERECHO INTERNACIONAL* 610 (2004).

³² For an example of international treaties interpretation, according to the Vienna Convention methods, see: Canadian Supreme Court, *Pushpanathan and Canadian Council for Refugees*

Mexican judges have interpreted international law norms according to the same methods. The first case, rendered in 2002, dealt with the conformity of Mexican tax laws with the provisions of the Global Agreement on Trade and Tariffs (GATT).³³ By a unanimity of votes, the Mexican Supreme Court decided that the rules of interpretation of Articles 31 and 32 of the Vienna Convention are binding on the Court, but only if they don't fall apart from the provisions of Article 14 of the Mexican Constitution. The Court found that Article 31 establishes three principal methods of interpretation: literal, systematic and teleological. International law scholars use the terms textual, systemic and teleological to refer to the methods of Article 31. These differences in language show an intent by the Mexican Supreme Court to "accommodate" the Vienna Convention's methods to its own methods of interpretation, according to the provisions of domestic law.³⁴

In another case in 2002, the Mexican Supreme Court interpreted the Convention on the Prevention and Punishment of the Crime of Genocide, through the systematic (systemic) method, derived from Article 31 of the Vienna Convention.³⁵ In particular, the Supreme Court took into account the Convention's *travaux préparatoires* and concluded that the political motives of the author of genocide are not one of its constitutive elements. In a more recent case, decided in 2004,³⁶ the Supreme Court considered the interpretation of North American Free Trade Agreement (NAFTA) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) should be carried out in accordance with Articles 31 to 33 of the Vienna Convention on the Law of Treaties. However, in that case, the court did not proceed with a detailed interpretation process of the above-mentioned treaties.

Mexican judges have not only been interpreters of international law, by the use of international law's own methods of interpretation, as there are some recent cases where Mexican judges developed the so-called "consistent interpretation" technique. By way of this technique, domestic judges interpret national laws in conformity with the international law commitments of their respective States. Initiated in the US with the *Charming Betsey Case* in the US Supreme Court,³⁷ "consistent interpretation" is an obligation for some domestic judges, particularly in the European Union.³⁸ In other cases, the obligation of "consistent interpretation" is included in the Constitution

(Intervening) vs. Minister of Citizenship and Immigration, 4th June 1998; UK House of Lords, *M, Re, King vs. Bristow Helicopters*, 28th of February 2002.

³³ Amparo en revisión 402/2001, August 16, 2002.

³⁴ RODILES, *Supra*, 94.

³⁵ Amparo en revisión 140/2002, June 10, 2003.

³⁶ Amparo en revisión 237/2002, April 2 2004.

³⁷ U.S. Supreme Court, *Murray v. The Charming Betsey*, 6 U.S. 2 Cranch 64 64 (1804).

³⁸ Since the *Van Kolsen* and *Kamann* cases of the Court of Justice of the European Communities (Case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen*, [1984] ECR 1891. See also Case C-106/89, *Marleasing v. La Comercial Internacional de Alimentación*, [1991] ECR 4135,

of states.³⁹ Even with a lack of express obligation to do so, many domestic judges, in either monist or dualist countries, have interpreted domestic law in conformity with international rules and principles.⁴⁰ Consistent interpretation can render dualist systems, like Mexico's, monist in some sense⁴¹ through the oeuvre of domestic judges. In fact, through consistent interpretation, domestic judges can use international law instruments not incorporated or otherwise received in their respective domestic legal order, so as to shape the meaning of national legal norms and principles.⁴²

Domestic judges use the "consistent interpretation" technique with more frequency when they have to apply domestic legal provisions to human rights protection. In fact, national judges, particularly those working in Supreme and Constitutional Courts, always try to show that their interpretations of human rights, granted by internal norms and principles, are in conformity with international human rights instruments.⁴³

Mexican judges are not separate from this global judicial movement toward consistent interpretation of domestic law with international human rights law. In some case law decisions, Mexican judges have interpreted national legal provisions in accordance with international human rights instruments. In 2008, a circuit tribunal considered that the illegal deprivation of liberty is contrary to Articles 1, 14, 16, 103 and 107 of the Mexican Constitution, and must be interpreted in accordance with international human rights

esp. paras. 8–9), all the domestic judges of EU member States have the obligation to interpret domestic law in conformity with EU Law.

³⁹ Thus, for example, Article 10-2 of the Spanish Constitution expressly states that constitutional human rights provisions shall be interpreted in conformity with international human rights treaties ratified by Spain.

⁴⁰ See, for example: Supreme Court of Canada, *Baker*, [1999] 2 SCR 817, House of Lords of the UK, *A (FC) v. Secretary of State for the Home Department (Conjoined Appeals)* (2005) UKHL 71; Israeli Supreme Court, *Kav La'oved Association v. Israel*, HCJ 4542/02; ILDC 382 (IL2006) [37].

⁴¹ EL BOUDOUHI, *Supra*, 294.

⁴² JEAN D'ASPREMONT, THE SYSTEMIC INTEGRATION OF INTERNATIONAL LAW BY DOMESTIC COURTS: DOMESTIC JUDGES AS ARCHITECTS OF THE CONSISTENCY OF THE INTERNATIONAL LEGAL ORDER, in OLE KRISTIAN FAUCHALD AND ANDRÉ NOLLKAEMPER, *The Practice of International and National Courts and the De-fragmentation of International Law* 142, (ed. Hart Publishing) (2012); WAYNE SANDHOLTZ, HOW DOMESTIC COURTS USE INTERNATIONAL LAW, 38 *Fordham IntellIJ*, 2015, 598.

⁴³ Thus, for example, the Supreme Court of Canada, in *Slaight Communications Inc. v. Davidson case* ([1989] 1 S.C.R. 1038) considered that all constitutional provisions regarding human rights protection shall be interpreted in conformity with international human rights law. Similarly, the Supreme Court of India emphasized that international human rights norms and principles shall be taken into account in the interpretation of the rights to equality and no discrimination, protected by the their Constitution (*Vishaka v. The State of Rajasthan*, A.I.R. 1997 S.C. 3011 para. ¶13 (India)). The Supreme Court of Germany also established in its case law that fundamental rights recognized in the German Constitution shall be interpreted in conformity with the European Convention on Human Rights. (SADHOLTZ, *Supra*, 599).

instruments regarding the protection of the right to honor and reputation.⁴⁴ In an important 2011 case, the Supreme Court emphasized the importance of the interpretation of all domestic law in conformity with the objectives of human rights protections and related provisions of the Mexican Constitution and international treaties ratified by the Mexican state. The Supreme Court distinguished between two types of consistent interpretation: consistent interpretation in a broad and a limited sense. In a broad sense, it found that all domestic judges shall interpret the domestic legal order consistently with human rights, recognized in the Constitution and in international treaties... In a more limited sense, in the view of the Supreme Court of Mexico, “whenever there is more than one plausible interpretation, domestic judges shall prefer the one that is closer to the Constitution as well as to the international treaties to which the Mexican State is part”.⁴⁵ In the same case, the Supreme Court emphasized that a consistent interpretation shall always take into account the *pro homine* principle, which has become the guiding interpretative principle of the Court in the field of international human rights law.

The *pro homine* principle has been developed through the jurisprudence of international human rights courts, especially in the case law of the Inter-American Court on Human Rights. The *pro homine* principle is essentially an international human rights principle. By basing their own rules of interpretation in a hermeneutical principle of international (US) human rights law, Mexican judges have demonstrated that they feel bound by an international (human rights) judicial function.

A 2011 constitutional reform included the *pro homine* rule of interpretation of international and domestic human rights instruments in the first article of the Mexican Constitution.⁴⁶ Nevertheless, even before Constitutional reform, Mexican judges started to have systematic recourse to the *pro homine* principle. In a case, decided in 2004, a circuit tribunal affirmed

the *pro homine* principle is a hermeneutical principle, established in many international treaties and coincident with the fundamental nature of human rights. By virtue of this principle, human rights provisions shall always be interpreted in a broader sense when it comes to protecting human rights and in a more limited sense when it comes to restricting them.⁴⁷

One year later, another circuit court considered that recourse to the *pro homine* principle is not optative but obligatory, this because of its recognition in international treaties, which are part of domestic law and, thus are binding

⁴⁴ Amparo directo 344/2008, July 10, 2008.

⁴⁵ Varios 912/2010, July 14, 2011.

⁴⁶ According to this article: “The provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favor of the broader protection of people at all times”.

⁴⁷ Amparo en revisión 799/2003, April 21, 2004.

for Mexican judges.⁴⁸ In 2011, the Supreme Court confirmed the binding nature of the *pro homine* principle not only for judges, but for all State authorities. According to the Supreme Court: “all State authorities, in their respective spheres of competence, have the duty to apply norms, favoring at all times an interpretation that can afford a broader protection in favor of individuals”.⁴⁹

3. *The Role of Mexican Judges in Assessing the Conformity of Domestic Legislation with International Law*

In many domestic legal orders, the “conventionality control” (*contrôle de conventionnalité, control de convencionalidad*) refers to the obligation of domestic judges to control the compliance of domestic legislation with international law. The most advanced system of conventionality control was developed in the EU legal context. In the *Simmenthal* case,⁵⁰ the Court of Justice of the European Communities considered that domestic judges should leave all domestic provisions which are contrary to EU law “unapplied”.⁵¹ The judicial “non-application” of the rule doesn’t mean its formal abrogation, as it is an exclusive competence of the national legislators. However, it permits domestic judges to assure the efficacy of EU law commitments of their States and to protect the rights and duties EU legal norms grant to private persons. The *Simmenthal* doctrine has been one of the pillars of the conversion of domestic judges in EU member states to “ordinary judges of EU law”.⁵² Beginning in the early 1990s, national courts of EU member States accepted this role and started to control the compatibility of domestic legislation with EU law.

Another international court has recently developed the duty of domestic judges to assess the compatibility of national legislation with international human rights treaties. In the *Almonacid Arellano vs. Chile* case,⁵³ the Inter-American Court of Human Rights (IACHR) incorporated the *Simmenthal* doctrine in the Inter-American system in the following terms: “when States have rati-

⁴⁸ Tesis: I.4o.A.464, Materia administrativa, February, 2005.

⁴⁹ SCJN, Varios 912/2010, July 14, 2010.

⁵⁰ TJUE, June 19, 1990, aff. C-213/89, Rec. I.2433.

⁵¹ According to the Court: “Furthermore, in accordance with the principle of precedence of community law, the relationship between provisions of the treaty and directly applicable measures of the institutions on the one hand and the national law of the member states on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provisions of national law but- in so far as they are an integral part of, and take precedence in the legal order applicable in the territory of each of the member states- also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with community provisions”.

⁵² Antoine Vauchez, *Integration-Through-Law?: Contribution to a Socio-History of EU Political Common Sense*, *EUI WORKING PAPER NO. RSCAS 2008/10*, 11.

⁵³ September 26, 2006, para. 124.

fied an international treaty, such as the American Convention on Human Rights, their domestic judges, as State officials, are also submitted to the treaty... Consequently, according to the IACHR, domestic judges have the duty to avoid an annulment of the Convention's provisions *effet utile* in domestic legal orders by the application of domestic legislations that are contrary to its objectives and purposes. In other words, in the Court's opinion, domestic judges shall perform *some type* of conventionality control between the domestic legal norms invoked in concrete cases before them and the American Convention on Human Rights.

The Inter-American Court affirmed that the assessment of the compatibility of national legislation with the American Convention amounts to some type of conventionality control (*una especie de control de convencionalidad*), when this, in fact, is the only type of conventionality control. This shows the misunderstandings human rights judges can have regarding core concepts of general international law. Even the Inter-American Court's President Eduardo Ferrer considered in 2010 that the duty of national judges within the American Convention on Human Rights' member States to control the conformity of domestic legislation with this treaty is a new type of "diffuse conventionality control" that gives them a "new mission" and converts them into "Inter-American judges".⁵⁴ This is how a well-developed principle of international law at the European and global scale over the past decades has been recently *discovered* in the Latin American and the Inter-American contexts. Even if a legal basis for conventionality control has been present in Mexico's Constitutional Article 133 since 1917,⁵⁵ Mexican judges have only recently started to perform conventionality control.

In 2005, a circuit court controlled the conformity of Article 128 of the Federal Code on Criminal Proceedings with Article 8.2 of the American Convention on Human Rights, declaring the non-compatibility of the domestic law provision with the international treaty.⁵⁶ In 2007, the Federal Electoral Tribunal reviewed the conformity of the Constitution of Baja California Sur with Article 25 of the International Pact on Civil and Political Rights and Article 23-2 of the American Convention on Human Rights, in relation with the possible restriction of the right to take part in public affairs and elections.⁵⁷ In a decision rendered in 2009, a circuit court found that the performance of conventionality control is a duty upon Mexican judges in the area of human

⁵⁴ Eduardo Ferrer Mac-Gregor, *Interpretación conforme y control difuso de convencionalidad. El nuevo paradigma para el juez mexicano*, in LA REFORMA CONSTITUCIONAL DE DERECHOS HUMANOS. UN NUEVO PARADIGMA (Miguel Carbonell y Pedro Salazar coords., IJJ- UNAM 2012).

⁵⁵ According to Article 133 of the Mexican Constitution: "...The judges of each state shall observe the Constitution, the laws derived from it and the treaties, despite any contradictory provisions that may appear in the constitutions or laws of the states".

⁵⁶ Amparo directo 402/2004, October 14, 2004.

⁵⁷ SUP-JDC-695/2007.

rights protection.⁵⁸ The court considered that domestic judges must control conformity between national and “supranational norms,” in order to apply not only internal but also international legal instruments that afford protection of individual human rights. Also in 2009, another circuit tribunal asserted the compatibility of Article 190 of the Criminal Code of the state of Aguascalientes with Article 7 of the Universal Declaration of Human Rights and Article 26 of the International Pact on Civil and Political Rights.⁵⁹ In 2010, another circuit tribunal affirmed that “conventionality control shall be assumed by Mexican judges, in the resolution of cases brought before their jurisdiction, in order to verify that domestic legislation is not contrary to the objectives and aims of the American Convention on Human Rights”.⁶⁰ None of these cases dealt with the effects produced by conventionality control as regards the survival and/or future application of domestic legislation which is declared contrary to international human rights law.

The Mexican Supreme Court ruled on this question in an important case which was resolved in 2011.⁶¹ The Court incorporated almost to the letter the *Simmmenthal* doctrine of the European Court of Justice, and ruled that, by virtue of Article 133 and Article 1 of the Mexican Constitution, Mexican judges have the duty to “prefer human rights, granted by the Constitution and international human rights treaties, even in the case of the existence of contrary provisions in any inferior rule”. The Court added that even if judges are not allowed to do a general declaration upon the validity of the contrary rules or remove them from the domestic legal order, they do have the duty to leave unapplied these rules and give preference to those contained in the Constitution and in the international treaties. The Supreme Court also considered that conventionality control concerns only human rights provisions of international law and represents a duty for all judges in the Mexican State than can be performed *ex officio*.

To date, there are few cases in which Mexican judges have accepted to control the conformity of domestic legislation with non human rights provisions of international law. My research found only one recent case where a Mexican tribunal reviewed the compatibility of domestic legislation with international law provisions related to the protection of intellectual property rights. In a decision, rendered in 2004, the Supreme Court controlled the conformity of domestic legislation on industrial property with the Mexican State’s commitments in NAFTA and TRIP agreements. The Court developed a double step proceeding in conventionality control. First, it asserted that the above-mentioned treaties have been legally incorporated in domestic law and, consequently, are part of the domestic sources of legality. After that, the Supreme Court showed that there is no incompatibility between domes-

⁵⁸ Amparo directo 1060/2008, July 2, 2009.

⁵⁹ Tesis: XXIII.3o. J/2, Materia(s): Constitucional, Penal, October, 2002.

⁶⁰ Amparo directo 505/2009, January 21, 2010.

⁶¹ *Radilla*, “Varios”, July 12, 2011.

tic law provisions and these agreements. Instead, the Court emphasized that both provisions are not only harmonious but also complementary.⁶²

III. CONSTRAINTS ON THE FULFILMENT OF AN INTERNATIONAL JUDICIAL FUNCTION BY MEXICAN JUDGES

1. *International Law in the Mexican Constitution*

The place of international law in the Mexican Constitution is a very important limit for the scope of the international judicial function of Mexican judges. In fact, the Mexican Constitution includes few articles that deal with international law, and they are spread throughout the corpus of the fundamental norms. In particular, Articles 89, 104, 105, 117, 76, 15 and 133 deal with questions related to the sources of international law, their reception and incorporation in the Mexican legal order and their respective place in the internal hierarchy of norms. As will be demonstrated in what follows, the position of the federal judiciary towards these subjects is important.

With respect to the distribution of functions between the federation and federal entities (the states), the Political Constitution of the United Mexican States provides that the control of foreign policy belongs to the federation.⁶³ Regarding the distribution of functions between the three branches of the federation (the federal executive, the federal legislature and the federal judiciary), the Constitution designates an almost total power to the federal executive with regards to international relations. In Mexico's presidentialist regime, the President of the Republic is the principal authority in matters of international law.⁶⁴ The Constitution expressly prohibits the federal executive from celebrating specific types of international treaties.⁶⁵ By virtue of these checks

⁶² Amparo en revisión 237/2002.

⁶³ In this sense, by virtue of Article 117: "In no case shall the states: I. Conclude alliances or coalitions, or make treaties with any other state or foreign government".

⁶⁴ Pursuant to Article 89 of the Mexican Constitution: "The powers and rights of the President of the Republic are the following: (...) III. To appoint, with approval from the Senate, the ambassadors, general consuls, executive employees of the Treasury, and the members of the collegiate bodies in charge of regulation in the matters of telecommunications, power and economic competence; (...) X. To lead the foreign policy; to make and execute international treaties; as well as to end, condemn, suspend, modify, amend, withdraw reservations and make interpretative declarations relating such treaties and conventions, requiring the authorization of the Senate. For these purposes, the President of the Republic shall observe the following principles: the right to self-determination; non-intervention; peaceful solution of controversies; outlawing the use of force or threat in international relations; equal rights of States; international cooperation for development; the respect, protection and promotion of human rights; and the struggle for international peace and security".

⁶⁵ According to Article 15 of the Constitution: "The United Mexican States disallow in-

and balances, it is a combination of constitutional doctrine and legislative power that restrain the president's foreign policy and approve the international treaties celebrated by the president.⁶⁶ Regarding the division between Federal and Local Judiciaries in the Mexican federation, "Federal Courts have jurisdiction over: II. Any civil or mercantile controversy arisen about the observance and enforcement of federal laws or international treaties signed by Mexico... VIII. All controversies regarding diplomats and consuls".⁶⁷

The highest federal court (the Supreme Court of Justice of the Nation) is vested with the power to control the constitutionality of international treaties.⁶⁸ The Supreme Court has controlled the constitutionality of treaties in some concrete cases under its jurisprudence. In the 2003 *Cavallo* case, the defense tried to demonstrate the unconstitutionality of Articles V, VI and VII of the Convention on the Prevention and Punishment of Torture due to their incompatibility with the principle of self-determination of people and non-interference in domestic affairs, established in Article 89 of the Mexican Constitution. The Supreme Court rejected these arguments and considered that the treaty was not contrary to the Constitution.⁶⁹ In 2004, the Supreme Court clarified the consequences of a declaration of the unconstitutionality of a treaty;⁷⁰ in 2007 it considered all treaties to have a presumption of constitutionality.⁷¹

ternational treaties for extradition when the person to be extradited is politically persecuted, or accused of ordinary crime while having the condition of a slave in the country where he/she committed the crime, as well as the agreements or treaties that alter the human rights established by this Constitution and the international treaties signed by the Mexican State".

⁶⁶ By virtue of Article 76, "the Constitution grants the Senate several exclusive powers: (...) I. Power to analyze the foreign policy developed by the President of the Republic, based on the annual reports submitted to the Senate by the President and the Secretary of Foreign Affairs. The Senate shall have the power to approve the international treaties and conventions subscribed by the President of the Republic, as well as his decision to end, condemn, suspend, modify, amend, withdraw reservations and make interpretative declarations related to such treaties and conventions; II. Ratify appointments made by the President of... the Ambassadors and General Consuls; the directive employees of the Foreign Affairs Ministry...".

⁶⁷ Article 104 of the Mexican Constitution.

⁶⁸ Article 105 of the Constitution allows the Supreme Court to receive cases related to: "II. Unconstitutionality lawsuits directed to raise a contradiction between a general regulation and this constitution." Unconstitutionality lawsuits can be initiated by: "b) Thirty-three percent of the members of the Senate against federal laws or laws enacted by the Congress and applicable to Federal District, or against international treaties signed by the Mexican State".

⁶⁹ Amparo en revision 140/2002, June 10, 2003.

⁷⁰ The Supreme Court admitted that a treaty declared unconstitutional shall no longer be applied in the Mexican legal order and that the executive power shall inform the other contracting parties of the unconstitutionality declaration. In the same sense, the executive shall take measures towards "annulment" of the treaty or the insertion of reservation on its unconstitutional elements (Amparo en Revisión 237/2002).

⁷¹ The Supreme Court decided that whenever treaties fulfil the constitutional requirements regarding their celebration and incorporation in the Mexican legal order, their con-

The submission of treaties to constitutionality control is questionable from the perspective of international law. In fact, the *a posteriori* constitutionality control of a treaty is contrary to the principle of *pacta sunt servanda* and amounts to a unilateral amendment of the legal instrument. As emphasized by the Supreme Court of Turkey in a recent case, “it is a universally accepted principle that treaties should not be submitted to a constitutionality control,” as this control is contrary to the reciprocity and equality that govern interstate relations in international law.⁷² Through the acceptance of unconstitutionality lawsuits against treaties, the Mexican Constitution and the Supreme Court are actually confirming the full supremacy of the Constitution over Mexico’s international law commitments.

Finally, Article 133 of the Constitution determines the hierarchy of international law within the Mexican legal order.⁷³ The text provides that the Constitution, treaties and federal laws “shall be the supreme law of the country”, without giving any more precision on the relationship between the three.⁷⁴ The Supreme Court resolved this question in more recent case law. Initially the Court proclaimed the supremacy of the Constitution over treaties and considered treaties to have the same hierarchy as federal laws.⁷⁵ Fortunately, the Court modified its position and in 1999 recognized that treaties have supra legislative rank, as they are superior in the hierarchy of norms to all internal laws.⁷⁶ The Supreme Court reaffirmed this reasoning in 2007. In a decision on February 13, 2007, the Court concluded that “international treaties are hierarchically inferior to the Constitution, but superior to federal, general and local laws”.⁷⁷

stitutionality shall not be contested, unless otherwise proven in the legal proceedings of an unconstitutionality lawsuit (Amparo en revisión 120/2002, May 30, 2007).

⁷² Turkey’s Supreme Court found that if a state leaves the door open for unconstitutionality lawsuits against a treaty as an *a posteriori* reservation technique, the other contracting parties will not have incentives to enter in any future treaties with that State, because of his unwillingness to preserve the efficacy of a treaty and its full observance in good faith (*President of the Turkish Republic of Northern Cyprus vs. Assembly of the Turkish Republic of Northern Cyprus*, 25th November 2005).

⁷³ In a near copy of Article V-II of the US Constitution, this article states: “This Constitution, the laws derived from and enacted by the Congress of the Union, and all the treaties made and executed by the President of the Republic with the approval of the Senate, shall be the supreme law of the country. The judges of each state shall observe the Constitution, the laws derived from it and the treaties, despite any contradictory provisions that may appear in the constitutions or laws of the states”.

⁷⁴ What happens if there is a conflict between a treaty and a federal law or between a treaty and the Constitution? In other words, do treaties have infra-constitutional and infra-legislative hierarchy or are they hierarchically supra-constitutional and supra-legislative in nature?

⁷⁵ Amparo en revisión 1475/98, May 11, 1999.

⁷⁶ Amparo en Revisión 1475/2008, October 15, 2008.

⁷⁷ Amparo en Revisión 120/2002, October 1, 2004.

Additionally, in 2011, the Mexican legislature achieved an important constitutional reform in the area of human rights that modified the content of Article 1 of the Constitution, as well as the place of international human rights treaties in the Mexican legal order.⁷⁸ This provision placed international treaties that grant human rights to individuals on the same hierarchical level as the Constitution itself. In the area of human rights, it created a so-called “constitutionality bloc,” which includes constitutional and conventional provisions. In the words of the President of the Mexican Supreme Court, it marked the “Conventionalization of the Mexican Constitution”.⁷⁹ However, the reform was silent with regards to the resolution of a possible conflict between a human rights treaty and the Constitution. The Supreme Court had to interpret the new Article 1 and adjust the hierarchy between both legal instruments. In a case resolved in 2014,⁸⁰ the Supreme Court decided that if there is a “constitutional restriction” on the exercise of human rights granted by a treaty, the constitutional restriction shall prevail. The Court has since reaffirmed this solution.⁸¹

This Constitutional design of the place of international law in the Mexican legal order has important implications for the scope of the international judicial function performed by the Mexican federal judiciary. As stated above, the Constitution only includes references to treaties as a source of international law and completely ignores all other sources. Article 38 of the Statute of the International Court of Justice, which is binding for Mexico, lists at least two more formal sources of international law: custom and general principles of law. Additionally, there are modern sources such as unilateral acts of the State, resolutions of international organizations, international jurisprudence, soft law, gentlemen’s agreements, and so on.⁸² However, regarding its treatment of sources of international law, the Mexican Constitution is monothematic and seems to correspond to the level of development of international law sources doctrine common in the 19th Century.⁸³ If Mexican judges use

⁷⁸ By virtue of Article 1 of the Constitution, which states: “In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights. Such human rights shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution itself”.

⁷⁹ Suprema Corte de Justicia de la Nación, Líneas generales de trabajo 2019-2022, *Supra*, p. 40.

⁸⁰ Contradicción de tesis 293/2011, September 3, 2013.

⁸¹ Jurisprudencia P. /J. 22/2014 (10a.). The present state of the question of the hierarchy of treaties in Mexican domestic law is the following: human rights treaties are at the same level as the Constitution and are superior to all other internal laws, if there is a constitutional restriction of a human right recognized in a treaty, the Constitution prevails. All other non-human rights treaties are superior to internal laws, but inferior to the Constitution.

⁸² MANUEL BECERRA RAMÍREZ, LAS FUENTES CONTEMPORÁNEAS DEL DERECHO INTERNACIONAL 36 (IIJ- UNAM 2018).

⁸³ MANUEL BECERRA RAMÍREZ, LA RECEPCIÓN DEL DERECHO INTERNACIONAL EN LA CONSTI-

the Constitution as a legal guide for the application and interpretation of international law in their judicial practice, they could have recourse only to treaties as a source of binding international law norms. Custom and general principles of law, as well as other possible sources, would be absent from their case law. As we take a closer look to the case law of Mexican judges analyzed in the previous section, this indeed appears to be true.

As demonstrated in the first part of the article, Mexican judges have protected the private rights and duties of individuals under international law in some recent cases of jurisprudence. In all of these cases, Mexican judges based their protection in an international treaty. Again, the most prominent example is the judicial protection of human rights. All the cases analyzed had to deal with the human rights granted by treaties (especially the American Convention on Human Rights, the International Pact on Civil and Political Rights, the International Pact on Social and Cultural Rights, the UN Convention on the Rights of the Child, and the UN Convention on Prohibition of Torture). Recent jurisprudence by Mexican judges in this field have failed to mention other sources of international law.

The previous section of this article made clear that Mexican judges are interpreters of international law. All the cases where they had recourse to the methods of interpretation of the Vienna Convention on the Law of Treaties and all the cases where they utilized the “consistent interpretation” technique and developed the *pro homine* principle to deal with the interpretation of international treaties. From all the cases included in the first section of the article, none contains an interpretation of international customary law or general principles of law. Mexican judges have mentioned the existence of international customary law in only one case of their jurisprudence; in another case, they asserted the value of a soft law instrument within the Mexican legal order,⁸⁴ and in another they analyzed the existence of a *jus cogens* rule on the prohibition of torture.⁸⁵

The place of treaties as a unique source of international law in the Mexican Constitution can explain why the international judicial function of Mexican domestic judges, at present, is limited to the interpretation and application of treaty law only.

Another possible constraint on the international judicial function of Mexican judges is the special place of human rights treaties in the constitutional design for the reception and incorporation of international law in the inter-

TUCIÓN DE 1917. HACIA UN NUEVO SISTEMA, available at <https://archivos.juridicas.unam.mx/www/bjv/libros/10/4731/3.pdf>.

⁸⁴ According to a circuit court ruling, “the criteria and guiding lines adopted by international organs, intervening in the promotion and protection of fundamental rights are useful for each State, individually, as they should guide state practice and the improvement of the institutions, in charge of the unrestricted promotion, control and guarantee of human rights” (Amparo en revisión 215/2014, October 16, 2014).

⁸⁵ Tesis 1^a. CCV/2014 (10a.), May, 2014.

nal legal order. As explained above, the 2011 constitutional reform in the human rights field elevated those treaties to a constitutional hierarchical level. This reform was particularly significant for Mexican judges with regards to their willingness to apply and interpret international human rights treaties in the performance of their international judicial function.

As shown in the first section of this article, the jurisprudence of Mexican tribunals has been devoted to the protection of individual human rights as set forth in international treaties. Additionally, the decisions examined above demonstrate that the interpretation of international law by Mexican judges has focused almost exclusively on human rights instruments. Mexican judges control over conventionality developed into a judicial review of the conformity of internal acts and legal norms with international human rights instruments. The only exception is the recent compatibility control of the Industrial Property Law with TRIP agreements and supranational bodies like the WTO and NAFTA.

As discussed, the special place of international human rights treaties in the Mexican Constitution seems to constrain the ability and willingness of Mexican judges to act as “ordinary judges of *all* international law”. So far, they have only accepted to be “judges of international human rights law”. The constitutional reform of 2011 significantly altered the place of international human rights in the Mexican Constitution, and Mexican judges became more aware of their international judicial function, in the specific area of human rights protection. Vast segments of general international law and its specialized branches (international economic law, international criminal law, international environmental law, international maritime law, etc) are still completely ignored by the Mexican Constitution and by Mexican federal judges.

Another constitutional constraint on the ability and willingness of Mexican judges to act as judges of international law is the hierarchy of international law in the domestic legal order. As explained above, the text of the Constitution and the jurisprudence of the Supreme Court both affirm the supremacy of Mexican Constitution over treaties, excepting human rights treaties. This situation can predispose Mexican judges to consider international treaties other than human rights treaties and international law in general as a subaltern and subsidiary legal order in its relation to domestic (constitutional) law. Another important consideration regarding the conception of the hierarchy of international law is the recognition, in the Mexican Constitution, and in the Supreme Court’s jurisprudence over the possibility to control the constitutionality of a treaty.⁸⁶

This vision of the supremacy of the Constitution over international law has permeated the lower Courts with regards to the limits of their interna-

⁸⁶ As mentioned above, the Supreme Court has accepted the exercise of this control and has considered that unconstitutional treaties should be cancelled or reservations presented regarding content.

tional judicial function. The case law analysis of the previous section demonstrates that Mexican judges have applied and interpreted the norms of international law through their acceptance in domestic law, and only when they confirm existing provisions of domestic law. In other words, Mexican judges feel bound by domestic law considerations in the fulfilment of their international judicial function. In almost all cases reviewed over the course of this study, Mexican judges have tried to demonstrate that international law can apply because it is consistent with the Constitution. They usually cite constitutional provisions followed by provisions of international treaty law.⁸⁷ When they perform conventionality control, Mexican judges first have to assert that the treaties in question have fulfilled the constitutional conditions for incorporation into the domestic legal order.⁸⁸ When Mexican judges interpret international treaties, they use methods of interpretation of constitutional law only when they conform to constitutional methods of interpretation and are “accommodated” in the hermeneutical techniques of domestic law.⁸⁹ When these judges interpret domestic legislation in conformity with international law, they need to show its conformity with the Mexican Constitution. Thus, from the perspective of Mexican judges, international law appears to be a more persuasive argument, based primarily in domestic constitutional law. The supremacy of the Mexican Constitution over international law can explain why Mexican judges maintain “first loyalty” to domestic law and to the belief that they can apply international law only through the lens of the Mexican Constitution.

Some judges have expressed this clearly. When defining the value of soft law⁹⁰ a circuit court judge argued that the recognition of this value: doesn’t mean the *original* observance of the national legal order is disregarded. The court also insisted on “the *subsidiary nature of supranational norms*, by whose virtue, the international protection of human rights is only applicable after the exhaustion, and with the failure of internal safeguards. During the discussion in the Supreme Court surrounding its last pronouncement on the hierarchy of international human rights treaties, Margarita Luna Ramos, one of few female judges in Mexico said that “To recognize the supremacy of international treaties over the Mexican Constitution is to sell the motherland”.⁹¹

The dualism of the Mexican Constitution has determined the legal mindsets and beliefs of Mexican judges. Mexican judges see themselves as domestic judges and guardians of the Mexican Constitution and the internal legality of Mexican law, and not as “ordinary judges of *all* international law”.

⁸⁷ Amparo en revision 1595/2006, Amparo directo 344/2008.

⁸⁸ Amparo en revision 237/2002.

⁸⁹ Amparo en revisión 402/2001.

⁹⁰ Amparo en revisión 215/2014, October 16, 2014.

⁹¹ See, <https://www.quadratin.com.mx/principal/Traicion-a-la-patria-comparar-tratados-internacionales-con-Constitucion/>.

The sovereign and protective spirit of the Mexican Constitution is a product of many centuries of Mexican social and political history, characterized by foreign invasions,⁹² United States imperialism and foreign interferences of all types in internal affairs. One can easily understand why Mexican judges may harbour an innate instinct of protection and preservation of the autonomy of the Mexican legal order in the face of foreign elements, including international law. The legal nationalism of Latin American countries may be the most important constraint on the fulfilment of an international judicial function by Mexican judges. The loss of sovereignty that this would entail is mixed with the fear and rejection of the legal otherness in Mexico's young and still fragile democracy.

2. *Mexican Judges and Deference to the Executive Branch in Foreign Affairs*

The specific relationship between domestic judges and the executive branch can be decisive for the potential of these judges to become international law judges.⁹³ From a domestic legal perspective, state governments apply laws within the limits established in a national constitution. In international law, governments are political powers that exercise effective control over their territory and citizens. Although international law distinguishes states from their governments, the foreign policy of states is adopted and executed by government officials. It is they who decide to enter in diplomatic and consular relations with other governments; who negotiate and sign international treaties and whose wrongdoing can compromise a state's international responsibilities. Consequently, the norms of international law have to do primarily with the legal regulation of governmental acts at the international and internal level.

In all countries, domestic tribunals are, of course, independent from the executive branch. However, when they control governmental conformity with international law, domestic judges can restrain governmental margin of appreciation in the implementation of foreign policy objectives. Judges can even adopt judicial decisions that contradict those objectives. Thus, the general dynamics of interaction between domestic judges and the executive influences their ability and willingness to assume an international judicial function.

As Benvenisti shows,⁹⁴ when the application of international norms by national courts is sought in an attempt to constrain the activities of the executive branch, domestic judges might be more timid and reluctant regarding their potential in the international arena. In the author's opinion, a judiciary that is formally independent from the executive branch of the government might seem a perfect forum for the application and enforcement of international law in

⁹² BECERRA RAMÍREZ, *Supra*.

⁹³ Eyal Benvenisti, *Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts*, 4 *EJIL* 159 (1993).

⁹⁴ *Idem*.

the domestic legal order. However, the jurisprudence of domestic judges seems to be consistent in protecting short-term governmental interests. Judges are careful not to impinge with their decisions on the international policies and interests of the government.⁹⁵

The tendency for domestic judges to rule on international law issues in favor of the interests of their executive branch has been a driving force behind the creation of various international dispute settlement mechanisms. One of the main reasons for the success of international commercial and investment arbitration is the fact that arbiters are not state agents and are supposed to be more independent than national judges are when they apply or interpret international law.⁹⁶ In the same sense, the International Center for Settlement of Investment Disputes (ICSID) Convention expressly provides for a non-application of the rule of exhaustion of local remedies in international investment arbitration cases. The NAFTA arbitration system and the creation of international courts and tribunals casts doubt on the ability of domestic judges to preserve the efficacy of the norms and objectives of international law when it goes against the will of their own government.

In the Mexican context, the deference of domestic judges to the executive branch in foreign affairs matters is one of the mightier limits to their ability to perform an international judicial function, as well as to their perception of themselves as ordinary judges of international law. This political constraint essentially relates to the capacity of Mexican judges to review foreign policy actions and decisions taken by the executive power under international law. In this sense, the international judicial function of Mexican judges turns out to be, fundamentally, a rule of law function, which seeks the subordination of the executive branch to that of international law.

Mexico is a young democracy. The evolution of the Mexican political system, as a whole, has represented a true challenge to the ability of the judiciary to guarantee the respect for the rule of law. The division of power in the Mexican Constitution is characteristic of a presidential regime. However, the dominance of the hegemonic Institutional Revolutionary Party (PRI) on the political landscape during the second half of the 20th Century distorted the checks and balances of the regime in favor of the executive branch. For many years, Mexico's President has been an all-powerful legal and political figure, this executive "preponderance"⁹⁷ over the other two branches of the state (legislative and judicial) has been called a perfect dictatorship. The omnipresence of the executive in relation to the judiciary⁹⁸ affected the in-

⁹⁵ *Idem*, 161.

⁹⁶ One of the concerns that forced the development of international investment arbitration was the desire to protect international investors from the lack of independence between domestic judges and the executive branch, especially in developing countries.

⁹⁷ Diego Valadés, *Reforma del sistema presidencial mexicano*, 130 *PLURALIDAD Y CONSENSO* 2 (2011).

⁹⁸ Jorge Chaires Zaragoza, *La independencia del Poder Judicial*, 110 *BOLETÍN MEXICANO DE DERECHO COMPARADO*.

dependence of the judicial branch, which was formally recognized in the Constitution but did not exist in reality. Consequently, Mexican judges were not able to develop strong judicial oversight of governmental activities. Their judicial function throughout this period fell away from guaranteeing respect for the rule of law within the Mexican legal order.

Before 1990, the relation Mexican judges had with international law was utterly distant.⁹⁹ The number of international law related questions raised in internal proceedings before Mexican Judges was extremely limited. Additionally, case law decisions from that time showed Mexican judges had serious doubts regarding basic notions of international law. In 1985, the Plenary of the Mexican Supreme Court was still questioning whether international treaties are acts that need legislative motivation¹⁰⁰ and whether these treaties possess a legislative nature.¹⁰¹ In 1990, circuit tribunals had to determine if the existence of a treaty needs to be proven by the party that invoked it, and how treaties were to become part of the domestic legislation.¹⁰²

The judicial reform adopted in 1994 was important because it tried to guarantee the independence of the Mexican federal judiciary. This coincided with a new willingness on the part of Mexican tribunals to deal with international law.¹⁰³ The slow democratization of the Mexican political system was complementary with a modification of the priorities of the foreign policy objectives on the part of the executive branch. In fact, the executive began to adopt a more liberal foreign policy based in a necessary change in the location of international law within the domestic legal order. In 1992, President Carlos Salinas de Gortari decided to open the Mexican economy to globalization. The signing of NAFTA represented an important inflexion point in the move towards a better reception mechanism for international law within the domestic legal order.¹⁰⁴ In 1998, Mexico accepted the compulsory jurisdiction of the IACHR.¹⁰⁵ Those two events sparked a slow internationalization of the Mexican legal order.

⁹⁹ RODILES, *Supra*, 92.

¹⁰⁰ Amparo en revisión 8396/84, May 14, 1985.

¹⁰¹ *Idem*.

¹⁰² Amparo directo 832/90, October 4, 1990.

¹⁰³ Alejandro Rodiles Rodiles et al., *Unity or uniformity? Domestic Courts and Treaty Interpretation*, 27 *LJIL* 93 (2014).

¹⁰⁴ Treaty incorporation in the domestic legal order supposed major legislative reforms in order to harmonize domestic law with NAFTA commitments (BECERRA RAMÍREZ, *Supra*, p. 8).

¹⁰⁵ Curiously, previous to this date, two of the Presidents of the IACHR were Mexicans (Héctor Fix Zamudio and Sergio García Ramírez) even while the country itself was not subject to the Court's jurisdiction. The recognition of the Court's jurisdiction with regards to human rights violations committed by state officials had a great significance for the "internationalization" of the judicial function of Mexican judges and for their public perception as agents able to protect individual rights granted by the American Convention on Human Rights and other human rights treaties.

The Mexican federal judiciary began to perform an international judicial function around the same time. Most of the cases analyzed in this article date from the end of the 1990s and the beginning of the 2000s. The late and slow democratization of the Mexican legal order culminated with the victory of Vicente Fox Quesada of the National Action Party (PAN) in presidential elections in the year 2000, which allowed a more active role for Mexican judges with regards to the subordination of the executive under the law. The internationalization of the Mexican legal system, promoted by the executive branch, brought a change in attitudes among Mexican judges regarding the possibility of ensuring the legality of governmental acts under international law.

However, even after 2000, the jurisprudence of Mexican judges in matters related to international law revived “their previous self-perception as subordinated to the Executive Branch to which deference was owed in questions of international law.”¹⁰⁶

In this sense, my analysis in the previous section demonstrates how decisions adopted by Mexican judges have always narrowly interpreted the articles of the Mexican Constitution that deal with the incorporation and hierarchy of international law in the domestic legal order. In doing so, they have reduced their own possibility of controlling the legality of governmental acts under international law.

The Supreme Court’s refusal to recognize the existence of and to consider sources of international law outside of treaties shows the persisting deference of the Supreme Court to the executive power on foreign affairs. The court only mentions treaties in its case law, because treaties are the best expression of state’s consent to the creation of rights and duties on its governmental power. Mexican judges have thus adopted a positivist vision regarding the sources of international law, which consider the only valid sources of international law as those which express governmental consent as bound by legal rules.¹⁰⁷ This vision expresses the rejection of the possibility of creating legal limits to governmental action in international law against the expression of free will on behalf of the executive branch.¹⁰⁸ This consent is particularly easy to prove in the case of treaties. Treaties are direct expression of the will of states to create reciprocal and binding rights and duties under international law. It is generally admitted that international treaties are analogous with contracts in domestic law.¹⁰⁹ The state’s consent to the two other sources of international law, as stated in Article 38 of the Statute of the International Court of

¹⁰⁶ RODILES, *Supra*, 93.

¹⁰⁷ RAIMONDO FABIAN, GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS 65(Martinus Nijhoff 2013).

¹⁰⁸ Juan Carlos Velázquez Elizarrarás, *Reflexiones generales en torno a la importancia de los principios del derecho internacional*, 12 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 407-453 (2012).

¹⁰⁹ HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES IN INTERNATIONAL LAW (ed. The Lawbook Exchange 2002)

Justice (custom and general principles of law) is more difficult to establish.¹¹⁰ Consequently, Mexican judges have a tendency to apply treaties only in the performance of their international judicial functions, as only this source of international law is government consent friendly regarding the imposition of legal limits to the executive power in foreign affairs related matters.

The refusal of Mexican judges to establish the supremacy of international treaties (including human rights treaties) over the Mexican Constitution demonstrates their unwillingness to reign in governmental power and reduce the government's margin of influence beyond the limits of the domestic constitutional order. Mexican judges will not interpret constitutional provisions regarding the hierarchy of international law in the internal system in a way that would increase their power to influence the executive's respect for international law.

As discussed earlier, the only field where Mexican judges have taken their international judicial function seriously, without deference to the executive branch, is in the protection of human rights. This shows that they have a particular understanding of their role as guardians of the international rule of law. It seems that Mexican judges are willing to control governmental actions related to international law only when those actions constitute human rights violations. In all other cases, they fulfill their judicial review function regarding the legality of the actions of the executive in accordance with domestic law.

IV. CONCLUSION

Mexican judges are not, at present, ordinary judges of *all* international law. Their international judicial function is limited to the interpretation and application of treaties and does not cover any other sources of international law. The judicial protection they afford to individual rights and duties under international law focus almost exclusively on international human rights treaties. The interpretations of Mexican judges concern only human rights conventional norms. The conventionality control they perform is a control of the conformity of domestic legislation with international human rights treaties, and especially with the American Convention on Human Rights. Thus, Mexican judges act only as international treaty law judges and as international human rights judges.

It is possible to envisage the interpretation and application, by members of the Mexican federal judiciary, of other sources of international law. Mexican

¹¹⁰ State consent for the creation of an international custom is implied in the development of a consistent state practice (*consuetudo*) and in the acceptance of its binding legal character (*opinio iuris*). State consent in the creation of general principles of law can be traced back to the recognition by "civilized nations", as well as through their presence *in foro domestic* (in respective domestic national legal orders) (BIN CHENG, *GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 1 (Cambridge University Press 2003) (1951).

tribunals can use international customary law and general principles of law as a legal basis for the resolution of cases brought to their jurisdiction.

Many international treaties codify the pre-existing customary norms of international law, some treaties constitute the *consuetudo* required for the development of a custom at the international level. The benefits of the domestic judicial application of this second formal source of international law are clear. Treaties only legally bind state members, while customary norms can create rights and duties for states that have not participated directly in the law creation process. Thus, through the application and interpretation of customary norms of international law in the cases submitted to their jurisdiction, Mexican judges could fill the gaps that the non-ratification of a treaty would create for the protection of a private persons' rights and duties under international law. As mentioned above, there is already a case where Mexican tribunals had recourse to international custom. We can hope that this case will not be the only one for long, and that Mexican judges will improve their understanding of the system of sources of international law in order to extend their international judicial function to the application and interpretation of customary norms as foundational elements of international law.

Additionally, the interpretation and application of treaties could be enriched by the use of general principles of law as a source of international law. General principles of law are essential for the fulfilment of any judicial function, internal and/or international, as they serve to fill the gaps of other written norms pertaining to a legal system. General principles also guide the interpretation of the provisions of the conventional norms of international law and facilitate the resolution of conflicts. General principles of international law, such as *bona fides*, *pacta sunt servanda*, *rebus sic standibus*, *ex consensu advenit vinculum* o *res inter alios pacta*, and *lex superior derogat legi anteriori* form a general legal background for the efficient application and interpretation of all treaties. Thus, the general principles of law deserve special consideration with regards to the possible extension of the scope of the international judicial function of Mexican Judges.

There are, as well, many new forms international legality is being manifested. In this sense, Mexican judges could have recourse to unilateral acts of states and/or international organizations, including *soft law* and *ius cogens* rules. These contemporary sources of international law can also complement the interpretation and application of treaties in the fulfilment of the international judicial function of the Mexican federal judiciary.

Regarding the material scope of the international norms that are used in the resolution of concrete cases, Mexican judges could extend their judicial function to other branches of international law. The protection of human rights should not be the exclusive field of the exercise of an international judicial function by the Mexican tribunals. Rather, it could also encompass the prevention and punishment of international crimes, environmental protection or the resolution of maritime problems, based on the norms and principles of international law. Regardless, the possibility of extending the scope

of the international judicial function of the members of the Mexican federal judiciary will have to face and surmount many political limitations.

The place of international law in the Mexican Constitution and the traditional deference on the part of Mexican judges to the executive branch are strong constraints on the ability and willingness of Mexican judges to fulfil an international judicial function. The general context of the Mexican political regime has an important impact on the role of the federal judiciary in the promotion of the rule of law, internally and internationally.

One way to foster the performance of an international judicial function by Mexican domestic judges would be to implement reforms regarding the place and significance of international law in the Mexican Constitution. The most important step is to suppress constitutionality control of treaties. In addition, all contemporary sources of international law should be mentioned in the Constitution.¹¹¹ Only after following these steps can conventionality control by Mexican judges recover its true meaning as judicial control of the conformity of international law with domestic law.

A more radical option would be to abandon dualism and to accept a monist system of reception and incorporation of international law in the Mexican legal order. A greater openness in the Mexican Constitution to international law would be an expected consequence of the ongoing process of normative inter-penetration in a legally pluralistic global order.

Another way to extend the international judicial functions carried out by Mexican judges would be to strengthen their familiarity with international law norms and institutions. In this sense, better knowledge and specialized education in international law could significantly improve the scope of their international judicial function. This is true for judges themselves, as well as for private parties and litigants that bring cases to their jurisdiction. If parties were to invoke more international law norms and principles in their demands and defenses, Mexican judges would have more opportunities to develop their potential to act as international law judges.

A lessened deference to the executive branch and the consolidation of the formal and informal independence of the Mexican federal judiciary in domestic and foreign legal affairs would create another important incentive for the development of the international judicial function of Mexican judges.

The increasing acceptance of the performance of an international human rights judicial function is, of course, a sign that Mexican judges are aware of the need to go further in the internationalization of their judicial activity. However, the self-perception of Mexican judges as international human rights judges has advanced only little by little and has begun only recently, especially if we consider the urgent and dramatic situation of human rights protection in Mexico. Thus, we can expect their willingness to act as ordinary judges of all international law will also advance slowly and will not become visible, nor should it be expected to become so in the near future.

¹¹¹ BECERRA RAMÍREZ, *Supra*.