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ENFORCEMENT OF FUNDAMENTAL RIGHTS BY LOWER COURTS: TOWARDS A COHERENT SYSTEM OF CONSTITUTIONAL REVIEW IN MEXICO

Alfredo Narváez Medécigo*

Abstract. *This article reviews the evolution of constitutional judicial review in Mexico. It claims that while the Mexican legal system has fluctuated between two fairly consolidated constitutional review models —the American and the continental European— it has so far disregarded at least one major factor strongly embedded within the rules of both. Stated differently, most constitutional scrutiny regarding fundamental rights —the essential prerogatives and freedoms to which every person as such is entitled under the constitution— should be fulfilled by lower courts empowered for such purpose within ordinary adjudication procedures. For this reason, constitutional jurisdiction should play only a guiding role —even when solving a specific controversy on its merits— in the enforcement of these rights. While the rules of these two models leave the vast majority of legal controversies regarding fundamental rights outside constitutional jurisdiction, they guarantee that the interpretation of the few leading cases that are formally reviewed impact the rest of the legal system. Instead, the Mexican rules of constitutional scrutiny have fostered excessive dependence on specialized constitutional courts. Simultaneously, they have weakened —through artificial differentiations regarding the review of statutes— the guiding role of constitutional interpretation in the legal realm. This results in a complex system that is neither effective in making constitutional rules guide conduct nor in wholly enforcing fundamental rights.*

Key Words: *Constitutional review, fundamental rights, Mexico, lower courts.*

Resumen. *Este artículo analiza críticamente la evolución del control constitucional en México. Argumenta que mientras el sistema mexicano ha fluctuado entre dos modelos bastante consolidados de justicia constitucional —el americano y el europeo continental—, en México se ha descuidado por lo menos una premisa fundamental que se encuentra fuertemente arraigada en las reglas de ambos modelos. A saber, que la gran parte del control constitucional relacionada*

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con la protección de derechos fundamentales debe ser tarea de los tribunales ordinarios —facultados para tal efecto dentro de los procedimientos jurisdiccionales ordinarios— y, por lo tanto, que la jurisdicción constitucional debe jugar sólo un papel de guía —aun cuando resuelva casos concretos— en la tutela de los derechos fundamentales. Así, mientras las reglas de dichos modelos dejan formalmente fuera de la jurisdicción constitucional la gran mayoría de los asuntos relacionados con derechos fundamentales, aquéllas garantizan que la interpretación constitucional —surgida de los pocos casos trascendentales que logran llegar a la jurisdicción constitucional— siempre adquiera generalidad en el orden jurídico. Por el contrario, las reglas mexicanas han fomentado una excesiva dependencia en la jurisdicción constitucional especializada y, simultáneamente, han debilitado, a través de distinciones artificiales, la función de guía en el orden jurídico de la interpretación constitucional. Esta situación resulta en un complicado sistema que no es efectivo en lograr que las reglas constitucionales guíen la conducta ni tampoco en tutelar satisfactoriamente los derechos fundamentales.

Palabras clave: *Control constitucional, México, derechos fundamentales, tribunales ordinarios*.

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I. Introduction

On July 14, 2011 the Mexican Supreme Court determined that all the courts in the country —regardless of their federal or local character— are entitled "*to disapply the general norms that, in their opinion, are considered to be in violation of the human rights contained in the Federal Constitution and in the international treaties to which the Mexican State is a party*."[1] This unusual decision introducing in Mexico

[1] "*Expediente Varios 912/2010* y votos particulares formulados por los ministros Margarita Beatriz Luna Ramos, Sergio Salvador Aguirre Anguiano y Luis María Aguilar Morales; así como votos particulares y concurrentes de los ministros Arturo Zaldívar Lelo de Larrea y Jorge

the so-called "diffused" or decentralized constitutional review[2] was reached by the Supreme Court within days after the enactment of a series of long-awaited constitutional amendments that aimed at more effective enforcement of human rights.[3] Procedurally speaking the Supreme Court's decision originated from an international judgment issued two years before by the Inter-American Court of Human Rights on the case of *Radilla-Pacheco v. Mexico*.[4] Given its proximity to the amendments on human rights, however, the Supreme Court's decision was considered a follow-up to those desired constitutional changes. Correspondingly, its novel conclusions allowing any court to strike down unconstitutional and/or "unconventional"[5] statutes were regarded almost unanimously as a favorable and thus welcome adjustment for human rights protection in Mexico.[6] Many believed it was about time for the Mexican legal system to treat local judges as "grown-ups"; and for Mexicans to be able to enforce their constitutional rights without over-relying on the outdated and highly complex constitutional writ of *Amparo*.[7] Legal scholars

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Mario Pardo Rebolledo" [Miscellaneous File 912/2010], Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], Diario Oficial de la Federación [D.O.], 4 de octubre de 2011, Segunda Sección, p. 75 (Mex.) (author's translation).

[2] Decentralized constitutional review refers to those systems —based on the American model of constitutional scrutiny— where the powers to control the constitutionality of statutes is given to every court in the legal system and not only —as it occurs in systems based on the continental European model— to a specialised constitutional court. For a short comparison in English between both models see Alec Stone Sweet, *Constitutions and Judicial Power*, in Comparative Politics 218-39 (Danièle Caramani ed., Oxford University Press, 2008).

[3] While colloquially these amendments have been handled jointly as the "Constitutional Reform on Human Rights," technically they were approved and published separately. The division was based on whether the articles subject to reform concerned procedural or substantive law. *See*, respectively, "Decreto por el que se reforman, adicionan y derogan diversas disposiciones de los artículos 94, 103, 104 y 107 de la Constitución Política de los Estados Unidos Mexicanos" [Decree to amend, add and derogate several provisions from articles 94, 103, 104, and 107 of the Mexican Constitution] [hereinafter *Reforma constitucional en Amparo 2011*], Diario Oficial de la Federación [D.O.], 6 de junio de 2011, Primera Sección, pp. 2-6 (Mex.) *and* "Decreto por el que se modifica la denominación del capítulo i del título primero y reforma diversos artículos de la Constitución Política de los Estados Unidos Mexicanos" [Decree to modify the name of First Title's Chapter I and amend several articles of the Mexican Constitution] [hereinafter *Reforma constitucional en Derechos Humanos*], Diario Oficial de la Federación [D.O.], 10 de junio de 2011, pp. 2-5 (Mex.).

[4] Radilla-Pacheco v. Mexico, Inter-Am. Ct. H.R. (ser. C) N° 209, Nov. 23, 2009.

[5] The term "unconventional" refers to those acts that are in violation of international conventions or treaties.

[6] For a few dissenting voices against these developments see José Roldán Xopa, *Conjeturas sobre la reforma constitucional III*, Sapere Aude (August 24, 2011) *available at* http://joseroldanxopa.wordpress.com/2011/08/24/conjeturas-sobre-la-reforma-constitucional-iii/ (last visited May 31, 2012).

[7] The writ of *Amparo* —as it will be further explained in some detail— is a constitutional mechanism developed in Mexico for the judicial enforcement of fundamental rights against

and practitioners rejoiced at the inclusion of ordinary courts in constitutional scrutiny; the Mexican Supreme Court had taken a decisive step towards the decentralization of justice and the enforcement of basic rights.[8]

Not even a month went by, however, when —based on the Supreme Court decision— a statute was struck down by a local court. On August 8th, 2011 an appeals court in the state of Nuevo León deemed a provision of the state's criminal code unconstitutional and, as a result, refused to apply it. The verdict —called the *Nuevo Léon* case[9]— emerged in the context of Mexico's "War on Drugs."[10] The case concerned the indictment of two local police officers who had been arrested for supposedly reporting on military activities to criminal organizations. The local policemen had allegedly used their cell phones to inform members of organized crime about a special "anti-drugs" operation being carried out by the navy in a Monterrey suburb. The state prosecutor indicted these men for —among other offences— a felony labeled under state law as "*Crimes against the administration and procurement of justice.*"[11] While the trial judge initially ruled that the suspects were to be held in custody to answer the charges, the state court of appeals carried out *ex officio* the diffused constitutional review and modified the ruling. The appellate judge felt that the code's provisions wrongfully delegated the power to define a felony to an authority different from the legislative power. For this reason, the state code's provisions were a so-called "criminal law in blank"[12] prohibited by Article 14

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acts of authority. It falls exclusively in the jurisdiction of the Federal Judicial Power. *See infra* section III.

[8] *See, e.g.*, José Ramón Cossío, *La descentralización de la justicia*, El Universal, October 18, 2011, at A18 (Mex.).

[9] "TOCA Penal Artículo 43/11" [Crim. App. 43/11], Cuarta Sala Penal Unitaria del Poder Judicial del Estado de Nuevo León [4th Nuevo León St. Crim. Ct. App.], August 8, 2011 (Mex.).

[10] This is the term with which it is referred to the Mexican government's policy against drug trafficking. Since 2006 it has increased substantially the involvement of the military —army, air force, and navy— in the enforcement of drug laws. For a brief overview in English see David A. Shirk, The Drug War in Mexico: Confronting a Shared Threat (New York, Council on Foreign Relations, 2011).

[11] Código Penal para el Estado de Nuevo León [Nuevo León St. Crim. Code] *as amended* January 1997, Art. 224, V, Periódico Oficial del Estado de Nuevo León [Nuevo León St. Official Journal], 26 de Marzo de 1990 (Mex.). ("Article 224. The penalties in this chapter shall be imposed to public servants, whether employees or auxiliary personnel, of the administration and procurement of justice as well as of the administrative courts, who carry out any of the following offences: …V. Not complying with an order issued and legally notified by his/her superior official, without a lawful reason to do so.") (Author's translation).

[12] There is no exact translation in English for the term "*ley penal en blanco*". This concept is related to the criminal law principle *nullum crimen sine lege scripta* (there shall be no felony without a written statute) and refers, in short, to criminal statutes that delegate the power to define punishable offences to another entity. Since the power to define crimes in modern democratic regimes is invested exclusively in the legislator, such statutes are considered invalid. For a suc-

of the Federal Constitution.[13] He concluded that the defendants could not be further prosecuted and ordered their immediate release.[14]

Alarmed by this outcome —*Nuevo León* was not open to further appeal[15]— at a time when Mexican legal institutions were being threatened by organized crime and the government was spending heavily to confront it, a group of federal senators from three major political parties responded in October with a bill "to regulate the exercise of diffused control."[16] The senators were clearly more concerned about the possibility of letting guilty offenders get away unpunished than about individuals imprisoned on the grounds of an article already considered unconstitutional by a court of law. Their intention is that whenever a lower court[17] deems a general norm unconstitutional or unconventional —and therefore refuses to apply it to the controversy at hand— the decision against the validity of such norm can be further reviewed by a federal court. Specifically, the bill proposes a mechanism whereby the federal Attorney General is entitled to challenge before a federal Three-Judge Panel Circuit Court[18] every decision by a lower court that carries out diffused constitutional review. The ordinary judgment will not have any effects until the federal court confirms the invalidation of the general norm or, otherwise, until the federal Attorney General refuses to challenge the judgment[19].This means that the final decision will always rest on a federal organ. This proposal is currently being discussed in the Senate and, as it has support from the three major national parties, is very likely to be approved within the next few months.[20]

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cinct explanation in English see Michael Bohlander, Principles of German Criminal Law 18-27 (Oxford, Hart Publishing, 2008).

[13] *See* "TOCA Penal Artículo 43/2011," *supra* note 9, at 22.

[14] The trial judge had authorized the detention of the defendants only on the basis of the crime contained in Article 192 of the state's criminal code (*i.e.* "*Crimes against official institutions and public servants*"). Even though this part of the ruling was reversed on appeal (which would have turned unnecessary a decision regarding any other offence), the state prosecutor had lodged a joint appeal against the trial judge's exclusion of Article 224, V as basis for the detention. Therefore, the appellate judge was compelled to solve this issue as well. *See id*. at 29-30.

[15] Being a decision on appeal for a felony that lacks a victim as such, it fitted into the few cases that could have not be reviewed by means of *Amparo*.

[16] "Iniciativa que contiene proyecto de decreto por el que se expide la Ley Reglamentaria de los artículos 1° y 133 de la Constitución Política de los Estados Unidos Mexicanos" [Bill to Enact the Regulatory Law of Articles 1 and 133 of the Mexican Constitution] [hereinafter *Iniciativa de Ley de Control Difuso*], Gaceta del Senado [Senate's Gazette], 3 de noviembre de 2011, t. I, p. 111 (Mex.) (author's translation).

[17] This means —in accordance with Article 2 of the proposal— every court that is not dealing with a writ of *Amparo*. *See id*.

[18] These courts belong to the Federal Judicial Power and are essentially responsible for solving the writs of *Amparo* filed against definitive judgments delivered by local judicial authorities. *See infra* section III.

[19] *See Iniciativa de Ley de Control Difuso, supra* note 16, at 112 (Article 6 of the bill).

[20] This manuscript was handed in on June 1st, 2012.

Based on events directly following the Supreme Court's decision authorizing diffused constitutional review, it did not take long for the initial wave of excitement to prove unjustified or, in any case, highly exaggerated. Already before the decision almost every local judgment in Mexico could be reviewed by the federal judiciary through the writ of *Amparo*. If those few judgments that could not be reviewed through Amparo (*e.g. Nuevo León*) will now end up anyway in a federal court (as envisaged in the senators' bill), then it is clear that the establishment of diffused review did not bring the intended judicial decentralization. Someone might argue that the Supreme Court's good intentions are just being blocked by a short-sighted group of congressmen. Not even before the senators presented their proposal, however, it would have been reasonable to think that a solution to the serious deficiency of human rights' enforcement in Mexico could be merely the general authorization of courts to quash legislation. Any legal system that lacks consistency extends an invitation to chaos. In this sense, *Nuevo León* was a fortunate coincidence. Irrespective of whether the judge was right or wrong when he concluded the unconstitutionality of the local criminal code (which is still debated and more a task for criminal law scholars),[21] that controversial ruling touched upon a far more important issue. It showed that the question of which organ should be entitled to strike down unconstitutional statutes in a given constitutional framework —and when it should be able to do it— was not only a matter of whim or "turf" between the ordinary and the constitutional courts. *Nuevo León* evidenced that this problem is also a matter of legal predictability and, for that reason, a fundamental *Rule-of-law* question. As such, constitutional judicial review represents an issue that should have been addressed with thoughtfulness and prudence.

In contrast, the continuous legal adjustments just described —which basically "patch up" previous calculations— suggest a lack of both vision and planning in the restructuring of Mexican constitutional review. For this reason, they raise a red flag about the effectiveness of the system governing the enforcement of fundamental rights in the country. This paper is motivated by this concern and analyzes the Mexican constitutional judicial review system. It specifically explores whether the development of constitutional scrutiny has genuinely succeeded or at least set favorable conditions for enabling Mexico to more effectively enforce fundamental rights —the essential prerogatives and freedoms to which every person as such is entitled under the constitution. While the structure of the Mexican legal system has fluctuated between two fairly consolidated models of judicial constitutional review —the American and continental European models— it has so far disregarded at least one major factor strongly embedded within the rules of both: The bulk of constitutional scrutiny regarding fundamental rights should be a task fulfilled by ordinary courts empowered for such purpose within the ordinary adjudication

[21] *See* Roldán Xopa, *supra* note 6.

procedures. Constitutional jurisdiction, on the other hand, should only play a guiding role —even when solving a specific controversy on its merits— in the enforcement of fundamental rights.[22] While the rules of these two models leave the great majority of legal controversies concerning fundamental rights outside constitutional jurisdiction, they guarantee that the interpretation of the few leading cases that reach the constitutional jurisdiction impact the rest of the legal system. Instead, the Mexican rules of constitutional scrutiny have fostered excessive dependence on specialized constitutional courts. Simultaneously, they have weakened the guiding role of constitutional interpretation in the legal realm. This situation results in an ineffective and complex system of constitutional review that fails both to enforce constitutional guidelines and wholly protect fundamental rights.

Before this assertion is further developed, it is necessary to mention that this work mainly rests on two assumptions which, albeit controversial, cannot be further discussed here. First, the enforceability of fundamental rights is an essential element of the Rule-of-law.[23] Secondly, and of equal importance, is that the Rule-of-law is a virtue of the legal system which is first and foremost —albeit not exclusively— entrusted to the judiciary.[24] Stated differently, an effective justice system is a pre-condition of the Rule-of-law but it is not the Rule-of-law itself. This said, it is appropriate to begin by explaining concisely the two most consolidated models of constitutional scrutiny in the world. Particular emphasis is put on how these prototypes have dealt with the issue of fundamental rights enforcement.

II. Models of Constitutional Review and Fundamental Rights

There are two major consolidated models that serve as prototypes of constitutional scrutiny in modern legal systems. Due to their origins, they are usually referred to as the "American" and the "continental European" mod-

[22] *See* Wolfgang Hoffmann-Riem, *Nachvollziehende Grundrechtskontrolle,* 128 Archiv Des Öffentlichen Rechts 173, 189 (2003).

[23] *See* Ronald Dworkin, A Matter of Principle 27 (Oxford, Clarendon Press, 1985). Against this position see the classical essay of Joseph Raz, *The Rule-of-law and its Virtue*, in The Authority of Law: Essays on Law and Morality 210-29 (Oxford, Clarendon Press, 1979).

[24] *See* Lon Fuller, The Morality of Law 81-2 (New Haven, Yale University Press, 1964); Raz, *supra* note 23, at 225-26 ("It is of the essence of the law to guide behaviour through rules and courts in charge of their application. Therefore, the rule of law is the specific excellence of the law. Since conformity to the rule of law is the virtue of law in itself, law as law regardless of the purposes it serves, it is understandable and right that the rule of law is thought of as among the few virtues of law which are the special responsibility of the courts and the legal profession.") A classic critique to this position comes from the denial of a substantial difference between an administrative act and a judicial decision. *See* Hans Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit,* 5 Veröffentlichungen Der Vereinigung Der Deutschen Staatsrechtslehrer 30, 52 (1929).

els. Whereas the former developed in the United States in the 19th century and goes back to the US Supreme Court's seminal judgment in *Marbury v. Madison*,[25] the latter emerged in Austria and Germany just before World War II and is based instead on the ideas of Hans Kelsen.[26] For this reason, these models are frequently associated with the *common law* and *civil law* traditions. While there is already much literature comparing these two models, most efforts emphasize their differences with respect to the judicial body authorized to review the constitutionality of statutes.[27] Since every court in the US has the power to strike down statutes on the basis of their constitutionality, this model is known as diffused or decentralized. In the continental European model, on the other hand, one single constitutional court has a monopoly on these powers; thus, this model is also called concentrated or centralized.[28] This variation —which results in different ways of attaining consistency in constitutional interpretation— is typically explained as the product of different conceptions of the "separation of powers" based on each legal tradition.[29] In the United States, the judiciary has historically enjoyed equal status before the other two branches of government and, as a result, constitutional review of statutes has been assumed since its establishment as a power of the courts. It is thus usually referred to as *judicial review*. In contrast, European courts have traditionally played a subordinate role with respect to Parliament.[30] In continental Europe there has existed an historic distinction between the notions of judicial review (*richterliches Prüfungsrecht*) and constitutional review (*Verfassungskontrolle*), as well as of the entities empowered to carry them out.[31]

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[25] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[26] *See* Stone Sweet, *supra* note 2, at 232.

[27] For a short yet insightful overview of these approaches see José Ramón Cossío, Sistemas y modelos de control constitucional en México 129-32 (Mexico, IIJ-UNAM, 2011).

[28] While some authors (mostly in Germany) use the terminology "unity model" (*Einheitsmodell*) in reference to the American and "separation model" (*Trennungsmodell*) when referring to the European, this semantic distinction just emphasizes whether the constitutional review is carried out by an organ within the ordinary judiciary or rather by a separated entity. *See* Klaus Schlaich & Stefan Korioth, Das Bundesverfassungsgericht 2-3 (München, Verlag C.H. Beck, 10th ed. 2010).

[29] *E.g.,* Stone Sweet, *supra* note 2, at 223.

[30] "Parliamentary Sovereignty" is a doctrine that recognizes Parliament's right "to make or unmake any law whatever." *See* Albert Venn Dicey, Introduction to the Study of the Law of the Constitution 3-4 (Indianapolis, Liberty/Classics, 8th ed. [1915] 1982). It also bans any other body to overrule such laws. *See id.* ("…no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament"). In continental Europe the supremacy of Parliament was associated to Rousseau's notion of the "general will". This assumed that the power of the people as expressed through its representatives is supreme and thus not subject to any review. See Tom Ginsburg, Judicial Review in New Democracies 1-2 (Cambridge University Press, 2005).

[31] *See* Donald Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 4-7 (Durham, Duke University Press, 2nd ed. 1997).

In the American model the ability to review the constitutionality of legislative action —and directly provide a remedy for a breach— represents a significant judicial power regardless of whether the courts involved are federal or local. Constitutional review is thus carried out directly within ordinary judicial procedures and only insofar it is necessary to solve the legal dispute brought before the court.[32] While these review powers include the ability to evaluate the constitutionality of laws such as statutes, the court's decision regarding the unconstitutionality of a statute has —in principle— only effects *inter partes*. This means, in lay terms, that such a judgment is binding exclusively upon the parties to the litigation.[33] This does not, however, mean that the model disregards predictability or that it fosters unequal treatment before the law. Constitutional scrutiny is carried out within the ordinary trial. This implies that the constitutional interpretation is also subject to the traditional common law mechanisms aimed at achieving consistency "between law as declared and as actually administered."[34] Firstly, a conclusion regarding the unconstitutionality of a statute is subject to revision before a higher court in the judicial hierarchy.[35] Secondly, the equivalent constitutional cases that follow ought to be ruled —in line with the doctrine of *stare decisis*[36]— exactly as the higher court has determined. Logically, as the US Supreme Court is the highest court in the judicial hierarchy, its decisions declaring the unconstitutionality of statutes in fact prevent these laws' further application. Through these mechanisms the American model reaches uniformity in the interpretation of constitutional rules among the different courts of the land. At the same time, it avoids that every controversy becomes an issue of statutory unconstitutionality. To summarize, the diffused model embraces a general duty for the judiciary to safeguard the supremacy of the constitution vis-à-vis the activity of the State. The judgments determining the invalidity of statutes, however, have the possibility to reach a higher court. This higher court's constitutional interpretation —albeit with direct effects only for the

[32] In the American model, "abstract constitutional review" is excluded. *See* Stone Sweet, *supra* note 2, at 222.

[33] To consider the *inter partes* effects unreservedly as a feature of US constitutional judgments —specially regarding decisions made by the US Supreme Court— is a bit to oversimplify. Whereas a decision of the US Supreme Court declaring a statute unconstitutional does not remove it from the books, it does prevent —as it will be explained below— the statute's further enforcement. *See* Vicki Jackson & Mark Tushnet, Comparative Constitutional Law 458 (New York, Foundation Press, 1999). ("…US decisions are frequently described as binding only upon the parties to the litigation. This is far too simplistic and may not be accurate at all with constitutional adjudication in the US Supreme Court…")

[34] Fuller, *supra* note 24, at 81.

[35] *See* 28 U.S.C. § 1257 (2006).

[36] This is the rule —developed in common law systems— which binds courts to the authority of superior courts. It forces them to solve a case in the same way it has been previously decided by a higher authority in the judicial hierarchy. *See* Jackson & Tushnet, *supra* note 33, at 458.

parties within the dispute— spreads to the rest of the legal system through the binding precedent rule.

In the continental European model, on the other hand, the power of review of acts of the executive corresponds to lower courts. The authority to strike down unconstitutional statutes, however, is monopolized by a legal body that —albeit frequently jurisdictional— is structurally separate from the ordinary judiciary. This model assumes only a specialized constitutional body has the authority to review the constitutionality of legislative (or Parliamentary) action. For this reason, lower courts may not directly carry out constitutional review —not even to refuse to apply "unconstitutional" statutes in particular cases— and legislation may only be struck down by the constitutional court by means of specialized procedures.[37] These are extraordinary mechanisms which —though usually related to an ordinary legal controversy— run separately from the ordinary adjudication procedures. Consequently, if the constitutional court invalidates a statute because it is deemed unconstitutional, such statute is immediately expelled from the legal system.[38] Since the constitutional court's judgments are immediately binding upon every authority —executive, legislative, and judicial— its decisions regarding statutes are said to have *erga omnes* or universal effects.[39] This however does not imply that the ordinary judiciary does not play a crucial role in the constitutional review of legislative acts. The constitutional validity of legislation still could be a main factor in establishing the "legal correctness" of an administrative act or even a judgment. For this reason the regular courts are always entitled to initiate a specialized mechanism —also called "referral" procedure— at the constitutional court to review a statute. While this constitutional mechanism is admissible only if this is needed to solve the case at hand, it emphasizes the importance of lower courts in the implementation of the constitutional guidelines.[40] Nevertheless, the model developed within a legal tradition where the character of a judge as a law maker is rather feared

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[37] This is the so-called rejection monopoly (*Verwerfungsmonopol*) proper of the continental European model. *See* Schlaich & Korioth, *supra* note 28, at 99.

[38] In Germany, however, the Federal Constitutional Court (BVerfG) has developed ways to avoid declaring a statute unconstitutional and therefore to immediately expel it from the legal system. The court has, for instance, declared a statute's "incompatibility with the constitution" (*Unvereinbarerklärung)* and provided the legislator with a deadline to overcome the incompatible situation. These cases have typically involved statutes that violated the equality clause by excluding a certain group from a legal benefit that was given to another. See Werner Heun, Funktionell-Rechtliche Schranken Der Verfassungsgerichtsbarkeit 21-4 (Nomos, Baden-Baden, 1992).

[39] *See* Schlaich & Korioth, *supra* note 28, at 244-6.

[40] *See, e.g.*, the procedures of *Vorlageverfahren* in the Grundgesetz [GG] [German Basic Law], Art. 100; *cuestión de inconstitucionalidad* in the Constitución Española [CE] [Spanish Constitution], Art. 163; and, recently introduced, *question constitutionnelle* in the Constitution de la République française [Const. Fr.] [French Constitution], Art. 61-1.

than favored[41] and where the doctrine of binding precedent does not play a predominant role in legal predictability.[42] The invalidity of legislation —even if initially detected by a court within an ordinary trial— should therefore be declared by a specialized organ whose decisions have "force of statute" and thus are immediately binding to every other authority in the system.[43]

For predictability sakes it is necessary to be aware of the different consistency rules surrounding the scrutiny of statutes on each of these two models.[44] Yet to focus exclusively on this difference is definitely too simplistic and could be misleading. The error is especially common when conceptualizing constitutional review in systems following the continental European model. Indeed, the terminology "diffused" versus "concentrated" can lead to the erroneous belief that in concentrated systems constitutional review is monopolized by the constitutional court.[45] However, not even when it provides for the review of legislation the concentrated model depends exclusively on the activity of the constitutional jurisdiction. As mentioned above, while it is true that in centralized systems only the constitutional court may strike down statutes, lower courts play a crucial role in this process by means of the "referral" procedure.[46] Furthermore, in continental European systems the enforcement of constitutional supremacy also goes beyond the acts of the legislative power.[47] As it happens in the US, the ordinary judiciary in the continental European model contributes substantially with constitutional review of other kinds of government activity. It is a precondition for the Rule-of-law that the activity of the State as a whole is legally bound to the "law in the layman sense"[48] (*i.e.* to the Constitution). Consequently, constitutional systems have developed mechanisms to supervise that not only acts of the legislative but also of the executive and even of the judiciary are carried out within the constitutional boundaries. These rules pursue that such acts of authority are in line especially with the constitutional provisions granting fundamental rights. Yet if

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[41] *See* Martin Shapiro, *Judicial Delegation Doctrines: The US, Britain, and France*, 25 West European Politics 173, 174-5 (2002).

[42] *See* Kommers, *supra* note 31, at 42.

[43] *See, e.g.*, Gesetz über das Bundesverfassungsgericht [BVerfGG] [German Federal Constitutional Court Act], § 31.

[44] *See* Jackson & Tushnet, *supra* note 33, at 458. ("If all courts could decide constitutional questions without *stare decisis* effect, Capelletti suggests, a chaotic situation with respect to the validity of laws would result.")

[45] *E.g.* Cossío, *supra* note 27, at 132. As it is shown in *infra* section III, the Mexican evolution of constitutional scrutiny suggests this misunderstanding.

[46] *See* Schlaich & Korioth, *supra* note 28, at 99.

[47] It is often said that the "pure" continental European model excludes constitutional scrutiny of administrative and judicial action. For this reason several scholars refer to centralized systems that allow this rather as "mixed" (*e.g.* Germany, Spain, and Italy). In fact, however, not even the first system to ever adopt the centralized model (*i.e.* Austria 1920-1934) limited this constitutional review to acts of Parliament. *See* Kelsen, *supra* note 24, at 58.

[48] Raz, *supra* note 23, at 213-4.

fundamental rights are actually "rights," this means that someone is legally bound to their enforcement despite a careless legislative, a negligent administration, an arbitrary trial judge, or a combination of all of these.[49] It is only reasonable to expect that a constitutional court alone cannot fulfill all the obligations resulting from these entitlements and, therefore, to conclude that the system has to rely on the ordinary jurisdiction for that matter.[50]

Related and equally mistaken is the idea surrounding the distribution of judicial competences in systems with specialized constitutional jurisdiction. It is frequently affirmed that the distribution of tasks between ordinary and constitutional courts in this model is given by the application, respectively, of ordinary and constitutional law.[51] The fact is that ordinary courts apply constitutional law no less than constitutional courts interpret ordinary law provisions.[52] For this reason, additional criteria apply when distinguishing constitutional and ordinary judicial review. Since constitutional supremacy binds every authority without regard, lower courts must also safeguard fundamental rights as part of their judicial activities. Constitutional primacy is implemented in centralized systems mainly through the general obligation of courts to interpret ordinary laws "*in conformity with the constitution*"[53] and —if such interpretation is not possible— through deferral to the constitutional court. It is also true, however, that "insofar as ordinary law is explicated constitutionally, especially through fundamental rights, the lower courts are functionally also constitutional courts."[54] Stated differently, lower courts can confront at the outset any act of authority with a constitutional rule related to fundamental rights.[55] Nevertheless, the fact that fundamental rights en-

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[49] *See* Dworkin, *supra* note 23, at 27. ("For individuals have powers under the rights conception that they do not have under the rule book conception. They have the power to demand, as individuals, a fresh adjudication of their rights. If their rights are recognised by a court, these rights will be enforced in spite of the fact that no parliament had the time or the will to enforce them.")

[50] *See* Markus Kenntner, *Das BVerfG als subsidiärer Superrevisor?*, 58 Neue Juristische Wochenschrift 785, 786 (2005); Kelsen, *supra* note 24, at 59. Even though this statement sounds at first glance like a *de facto* argument, in its essence it derives from the theoretical impossibility to institutionalize a further obligation in order to review all the acts of the constitutional reviewer. *See* Cossío, *supra* note 27, at 180-1.

[51] *E.g.*, Héctor Fix-Zamudio, *Louis Favoreu, Les Courts Constitutionnelles*, 60 Boletín Mexicano de Derecho Comparado 1005, 1006 (1987). By "ordinary law" it is meant here every legal rule which is not part of the constitution or a product of constitutional interpretation. This includes statutes (federal or local), regulations, delegated legislation, and even international covenants.

[52] *See* Hoffmann-Riem, *supra* note 22, at 181-2.

[53] *See* Kommers, *supra* note 31, at 51. The "constitution" here includes the constitutional interpretation that the constitutional court has established in its judgments.

[54] Hoffmann-Riem, *supra* note 22, at 188 (author's translation).

[55] A fairly good example of this 'direct effect' of the constitution is the collision of fundamental rights carried out by ordinary courts in Germany. *See id.*

forcement is a shared responsibility has an important implication: the only relatively straightforward delimitation of these duties between lower and constitutional courts is given apropos the declaration of invalidity of acts of Parliament.[56] As a matter of fact most systems that follow the continental European model assume that the validity of the constitution can be reinforced by granting *individuals as such* the prospect of enforcing fundamental rights —additionally to the ordinary mechanisms of appeal— through a specific constitutional judicial procedure.[57] It is both practically and theoretically impossible for a constitutional court, however, to review every single action of the State. As the constitutional jurisdiction "cannot and should not be a super jurisdiction of appeals,"[58] more complex criteria are needed to allocate these constitutional responsibilities when the validity of legislation is not at stake.

Particularly in systems following the continental European model —but not exclusively on them— the constitutional jurisdiction's ability to review lower court judgments upon individual challenge has led to the development of further doctrinal standards. They intend to distinguish ordinary from (formally) constitutional issues involving fundamental rights.[59] These standards can either be established directly in the constitutional procedural law or "self-imposed" by the judiciary through constitutional interpretation. They distribute the tasks among lower and constitutional courts based rather on the *role* that each kind of court plays —in view of its specific operational capabilities and status in the constitutional order— in reinforcing the validity of the constitution.[60] On one hand, the enforcement of fundamental rights is assumed first and foremost as a duty of lower courts which are empowered for such purpose within the ordinary procedures. These courts are therefore granted with powers either to "disapply" legislation (in diffused systems) or to refer to the constitutional court (in concentrated ones). The specialized constitutional mechanism, on the other hand, serves principally an *exemplary func-*

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[56] The problem of delimitation of duties in regards to administrative action whose statutory grounds are not contested is said to be solved by the usual requirement "to exhaust all legal remedies." *See* Roland Fleury, Verfassungsprozessrecht 64 (Köln-M, Carl Haymanns Verlag, 7th ed. 2007). However, this does not really solve the problem of distribution of tasks between ordinary administrative courts and the constitutional court. *See* Kelsen, *supra* note 24, at 67.

[57] *See* Alfonso Herrera García, *El recurso de amparo en el modelo kelseniano de control constitucional ¿un elemento atípico?*, in 1 El juicio de amparo. A 160 años de la primera sentencia 601 (Manuel González Oropeza & Eduardo Ferrer-MacGregor eds., IIJ-UNAM, 2011). *E.g*, the German *Verfassungsbeschwerde* and the Spanish *recurso de amparo*. While they can be compared to some extent with the American writ of *habeas corpus*, these are general mechanisms of constitutional protection which are not limited to basic rights in the criminal procedure.

[58] Kenntner, *supra* note 50, at 786 (author's translation).

[59] For a critique to the formulas used so far by the German BVerfG see Wolfgang Roth, *Die Überprüfung fachgerichtlicher Urteile durch das Bundesverfassungsgericht und die Entscheidung über die Annahme einer Verfassungsbeschwerde*, 121 Archiv Des Öffentlichen Rechts 544, 548-52 (1996).

[60] *See* Hoffmann-Riem, *supra* note 22, at 178*;* Heun, *supra* note 38, at 12-6.

tion —comparable to that of a lighthouse[61]— given the authority conferred to the decisions issued by the constitutional jurisdiction: The constitutional interpretation achieves general validity either through the doctrine of *stare decisis* or through the "force of statute" effects of the constitutional judgment.[62] Even when a case is deemed unconstitutional on its merits, this is not considered a subsidiary review whose main purpose is to correct the mistakes of the lower court.[63] Firstly, the constitutional jurisdiction enjoys rejection powers that are highly discretional. The mere individual challenge is not sufficient to compel the court to carry out the review.[64] Secondly, if the case is ultimately admitted for revision, the revision is subject to strict deference rules to the activity of lower courts. The specialized constitutional procedure is thus usually limited to a "comprehensibility" review.[65] Roughly speaking, this means that as long as the lower court's conclusion is comprehensible or reasonable within the acknowledged techniques of interpretation (*i.e.* not arbitrary) the original decision will be affirmed. Irrespective of whether the constitutional jurisdiction would have rather favored another interpretative method —and thus reached a different outcome— a comprehensible ordinary judgment stays untouched.

Ignorance of these assertions risks minimizing the essential role that the ordinary judiciary plays in any system that aims at fulfilling the Rule-of-law. As shown below, this oversight might lead to expect from the constitutional jurisdiction results that it cannot possibly achieve. Put differently, it might mislead law makers to look for solutions in order to improve the justice system where these are not to be found.

III. The Mexican System between Two Models (1847-2011)

Constitutional review in Mexico since as early as the second half of the 19th century has been primarily a function of the judiciary.[66] In reality, the Mexican system has fluctuated between the American and the continental European models without becoming either one completely. The Mexican system initially adopted structures and procedures that —with notable differences regarding the rules to attain consistency in the application of the law— were clearly inspired by the American model. As the Mexican system

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[61] *See* Hoffmann-Riem, *supra* note 22, at 176.

[62] *See id.* at 179; Jackson & Tushnet, *supra* note 33, at 458.

[63] *See* Kenntner, *supra* note 50, at 786.

[64] *See* Schlaich & Korioth, *supra* note 28, at 128-9; Kommers, *supra* note 31, at 51-2. *See, e.g.*, Gesetz über das Bundesverfassungsgericht [BVerfGG] [German Federal Constitutional Court Act], §93 (d), cl. 1; Rules of the Supreme Court of the United States, pt. III, rule 10.

[65] *See* Hoffmann-Riem, *supra* note 22, at 187; 28 U.S.C. § 2254 (d) (2006).

[66] Before 1847 constitutional review was carried out mostly by political organs. *See* Cossío, *supra* note 27, at 42.

evolved, several mechanisms typical of the continental European model were introduced. Even though these additions operated mainly within an American-based structure, by the early 21th century the influence of European constitutionalism on Mexican rules was so noticeable that the Mexican Supreme Court was regarded —at least in the official discourse— as a "genuine constitutional court" in the sense of the continental European paradigm.[67] This drifting between models, however, did not turn the Mexican system into a "best of all worlds" solution. Quite the contrary, it resulted in an almost unintelligible hybrid in which lower courts have been steadily limited in playing any significant role in constitutional review. Stated differently, since only the federal courts in Mexico have been entitled —predominantly through the constitutional writ of *Amparo*— to evaluate the constitutionality of law, the so-called "evolution" of Mexican constitutional review implied a constant expansion in the size, authority and budget of federal tribunals. While the addition of some European-based mechanisms to the powers of the Supreme Court boosted this trend, lower courts have progressively become mere bureaucratic facilities which add little value in the enforcement of constitutional rules. The outcome is an intricate system of constitutional review that relies excessively on the federal judiciary and —in what is the other side of the same coin— fosters unequal treatment before the law.

1. *American Influence on Mexican Judicial Review (1847-1987)*

American-based features within the Mexican system of constitutional review are not hard to disentangle. Even though Mexico has never belonged to the common law tradition, from the very beginning of its independent existence the country has basically followed the judicial model developed by its northern neighbor. Since the enactment of the first Mexican Constitution in 1824, ordinary judicial activities were divided between federal and state courts that coexisted all over the country[68] and —just like in the United States— these federal and state tribunals represented separate judicial spheres responsible for adjudicating controversies arising under either federal or state law, respectively.[69] Given that this federalist arrangement of the courts was basically reiterated both in the Constitution of 1857 —where constitutional

[67] *E.g.,* Mariano Azuela Güitrón, *La Suprema Corte de Justicia de México, genuino tribunal constitucional*, 2 Anuario de Derecho Constitucional Latinoamericano 39, 39-40 (2002).

[68] *See* Emilio Rabasa, Historia de las Constituciones mexicanas 25 (Mexico, IIJ-UNAM, 2nd ed. 2000).

[69] In contrast, in continental European systems that embrace judicial federalism, the bulk of both federal and state controversies are usually solved —in trial and appeal— within the state judicial subsystem. Consequently, in continental Europe the federal courts usually do not have "original jurisdiction" and are rather courts of final appeal. *See* Kommers, *supra* note 31, at 3.

review became exclusively judicial— as well as in the current Constitution enacted in 1917, the judicial structure in which the Mexican rules of constitutional scrutiny for the most part have developed is clearly American.[70] Ever since constitutional review became a judicial task in Mexico, the Mexican legal system only partially adopted the rules of the "diffused" American model. Stated differently, while the powers of constitutional review were given to the judiciary, they were not given to all courts but rather only to federal courts (*Poder Judicial de la Federación*). Moreover, these federal courts could only carry out constitutional review within a specialized procedure known as *Juicio de Amparo*.[71] Based on the European notion regarding the role of legislators that still prevailed in Mexico during the 19th century,[72] the Constitution of 1857 channeled constitutional review exclusively through a specialized constitutional writ instead of making it part of ordinary federal or local judicial procedures.[73]

Ironically, the specialized writ on which the Mexican system based constitutional review was also significantly inspired by the American legal tradition.[74] The generations of scholars who have long venerated the originality of the Mexican *Amparo notwithstanding*,[75] a clear evaluation shows that this writ

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[70] *See* Rabasa, *supra* note 68, at 25. The ephemeral yet important constitutional reforms made in 1847 —which introduced judicial review into the Mexican system to coexist with the political mechanisms of constitutional scrutiny that were valid at that time— did not alter the judicial structure adopted by the Constitution of 1824. *See id*. at 56-8.

[71] There was a theoretical possibility for the Supreme Court to carry out constitutional scrutiny outside *Amparo* by solving the controversies between states or between the Union and the states. *See* Mex. Const. art. 98 (enacted 1857, repealed 1917). However, this mechanism did not play any significant role in the Mexican system of the time. *See* Cossío, *supra* note 27, at 41.The federal courts that traditionally have enjoyed constitutional review powers in Mexico —as they have had either original or appellate jurisdiction on *Amparo*— are the District Courts, the Three-Judge Panel Circuit Courts, and the Supreme Court. Other courts within the Federal Judicial Power —such as Unitary Circuit Courts or the Federal Electoral Court— and courts of federal jurisdiction which organically belong to the Executive Power —such as the Federal Administrative Court or the Federal Labour Court— did not enjoy until recently, given the kind of procedures that they usually solve, powers of constitutional scrutiny.

[72] Mexico is, after all, a country of the civil law tradition. *See* Cossío, *supra* note 27, at 26.

[73] *See id*. at 30-1. Nonetheless, the great mistrust in the authorities of the states was certainly also decisive for such a choice. While in one of the drafts of this constitutional text the jurisdiction on *Amparo* was actually conferred not only to courts within the federal judiciary but also to those of the states, the final text banned the local judiciaries from performing any kind of constitutional control. In my opinion, such a proposal to include state judiciaries on these tasks was not as absurd as it has been often described by Mexican legal scholarship. *Contra, e.g.*, Rabasa, *supra* note 68, at 77.

[74] *See* Jesús Ángel Arroyo Moreno, *El origen del juicio de amparo*, in La génesis de los derechos humanos en México 43, 55-9 (Margarita Moreno-Bonett & María González eds., IIJ-UNAM, 2006).

[75] *E.g.,* Héctor Fix-Zamudio, *A Brief Introduction to the Mexican Writ of Amparo*, 9 California Western International Law Journal 306, (1979).

was actually an adaptation of the American writ of *habeas corpus* to the 19th century Mexican legal system. Whereas habeas corpus had developed mainly as a common law mechanism to avoid arbitrary imprisonment in England (*i.e.* the courts of the King's Bench were empowered to issue the order regardless of written legislation providing for it),[76] its American version had features which were rather attractive for system that —albeit interested first and foremost in legally protecting constitutional rights— had inherited its consistency rules from the civil law tradition. Although habeas corpus was still essentially a common law injunction in the US at the local level and therefore did not require written legislation to be issued by a state court,[77] the writ faced more restrictions at the federal level. The so-called "Article III courts —including the Supreme Court— were powerless to issue common law writs of habeas corpus, and could only act pursuant to express statutory jurisdiction."[78] Put differently, the writ of habeas corpus —through which the American *federal* judiciary safeguarded the constitutional liberty of detainees— was a procedure sanctioned by Congress.[79] Perhaps more important for the Mexican system of constitutional review, however, was the *inter partes* effects of the decisions where the courts in the US declared the invalidity of statutes. The creators of the Mexican constitutional writ saw in the American system —or rather in Tocqueville's description of it— an acceptable solution to overcome the "Separation of Powers" issue that would arise if a court determined that a law was unconstitutional.[80] It is certainly not a coincidence that both jurists who are acknowledged as the architects of the writ of *Amparo* —Manuel Rejón[81] and

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[76] *See* Stephen I. Vladeck, *The New Habeas Revisionism*, 124 Harvard Law Review 941 (2011).

[77] *See* Dallin H. Oaks, *Habeas Corpus in the States 1776-1865*, 32 University of Chicago Law Review 243, 248-9 (1965).

[78] Vladeck, *supra* note 76, at 980.

[79] *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807)*; Ex parte Watkins*, 28 U.S. (3 Pet.) 193 (1830).

[80] *See* Alexis de Tocqueville, Democracy in America 92 (George Lawrence trans., Harper & Row Publishers, 1966) ("If the [American] judges had been able to attack laws in a general and theoretical way, if they could have taken the initiative and censored legislation, they would have played a prominent part on the political scene; a judge who had become the champion or the adversary of a party would have stirred all the passions dividing the country to take part in the struggle. But when a judge attacks a law in the course of an obscure argument in a particular case, he partly hides the importance of his attack from the public observation. His decision is just intended to affect some private interest; only by chance does the law find itself harmed. Moreover, the law thus censured is not abolished; its moral force is diminished, but its physical effect is not suspended. It is only gradually, under repeated judicial blows, that it finally succumbs."). His work was frequently cited in the *Amparo* debates. *See* Arroyo, *supra* note 74, at 57. As mentioned already, the inter partes rule does not apply to the decisions of the US Supreme Court. See Jackson & Tushnet, *supra* note 33, at 458.

[81] He introduced *Amparo* at the state level within his proposal for the Constitution of Yucatán in 1840. *See* José Enrique Capetillo Trejo, *La Constitución yucateca de 1841 y la reforma constitucional en las entidades federativas,* in Derecho constitucional estatal 473, 478-81 (Francisco de

Mariano Otero[82]— made explicit reference to how in American law the individual effects of a constitutional decision prevented the courts from becoming legislators and, accordingly, adopted the *inter partes* rule in their proposals.[83]

The system established by the Constitution of 1857 was based on at least two fundamental misconceptions of the American system that came to influence the subsequent evolution of the Mexican rules of constitutional review. First, even if one accepts the claim that a specialized judicial procedure was needed to safeguard constitutional rights and obligated Mexico to adopt an institution that "in North-America… [had] produced the best effects,"[84] the concentration of this procedure solely within the federal judiciary hints at a misconstrued —or in any case incomplete— picture of the American legal system of that time. While it is undeniable that in the United States the federal courts had habeas corpus jurisdiction, this jurisdiction was so restricted[85] that nearly all habeas corpus litigation took place in state courts.[86] When Mexico granted exclusive jurisdiction on *Amparo* to federal courts[87] in effect ban-

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Andrea ed., Mexico, IIJ-UNAM, 2001). While Rejón also participated in the debates that gave way to the federal constitutional reforms of 1847 and there he explicitly suggested local court involvement in constitutional scrutiny, he abandoned the discussions abruptly and his ideas where only partially adopted. *See id.*

[82] He is considered the main developer of *Amparo* at the national level. As part of the group in charge of the federal constitutional amendments of 1847, he presented a famous dissenting opinion against the majority's conclusions. *See* Mariano Otero, *Voto Particular*, in Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], La Suprema Corte de Justicia, sus leyes y sus hombres 127 (Mexico, 1985). His arguments caused the majority to reconsider and Otero's proposals —including a combined system of constitutional scrutiny to be carried out both by judicial and political organs— were approved almost word for word as constitutional amendments. *See* Rabasa, *supra* note 68, at 56.

[83] *See, e.g.,* Arroyo, *supra* note 74, at 57-9. This is also the reason why the *inter partes* effects of *Amparo* judgments are commonly —yet misleadingly— called the "Otero formula." *See* Cossío, *supra* note 27, at 31-2.

[84] Otero, *supra* note 82, at 137 (author's translation).

[85] At the time the Mexican *Amparo* was created the federal writ of habeas corpus in the United States was not effective to review convictions. *See* Rex Collings Jr., *Habeas Corpus for Convicts*, 40 California Law Review 335, 351 (1952). Whereas in 1867 —after the American Civil War— the federal writ was extended by Congress to those *detainees* held in custody by the states, as of the 1940s the so-called "Warren Court" broadened the scope of federal habeas corpus also to *convicts* under state law. *See*, among many, *Waley v. Johnston*, 316 U.S. 101 (1942); *Brown v. Allen*, 344 US 443 (1953).

[86] *See* Oaks, *supra* note 77, at 246. As a matter of fact state courts issued habeas corpus writs against federal jailers on a regular basis until this was banned by the Supreme Court in 1859. *See* Vladeck, *supra* note 76, at 981-2.

[87] The monopoly of the federal judiciary on *Amparo* jurisdiction can be traced back to Otero's proposal from 1847: "I still have not found a solid reason against this way of putting the rights of man under the aegis of the general power, but those [reasons] which have made me decide in favour of it are not few… because of this I have not vacillated in proposing Congress to elevate greatly the Federal Judicial Power, giving it the right to protect all the inhabitants

ning state courts from any serious involvement in constitutional review,[88] the Mexican rules completely overlooked the fact that —at least as far as the protection of individual constitutional rights is concerned— the much admired American system heavily relied (and still does) on the activity of state judges. The mechanisms through which the American model attained consistency in constitutional interpretation throughout the different courts of the country went equally unnoticed by the Mexican framers of 1857. Fixated on the "advantages" that the *inter partes* effects in American constitutional decisions could bring vis-à-vis "Separation of Powers," the Mexican deliberations disregarded the precept of binding precedent that served as a basis for common law.[89] The later establishment of an *inter partes* procedure like *Amparo* as practically the only available mechanism of constitutional review —deliberately excluding other procedures that could have made up for the lack of *stare decisis* doctrine in Mexico[90]— instead served to fragment the Mexican legal order.[91] This situation institutionalized at the outset a system that fostered unequal treatment under the same constitution.

After *Amparo* was left as the only available mechanism of constitutional review within the Mexican system, this constitutional writ started —so to speak— to adjust to the Mexican reality. It began to develop, understandably, substantive and procedural rules of its own.[92] Nonetheless, the Mexican legal

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of the Republic in the enjoyment of the rights assured to them by the Constitution and the Constitutional Laws, against every attack of the executive or the legislative, whether from the states or from the Union." Otero, *supra* note 82, at 131-7 (author's translation). His ideas in this regard —unlike those concerning constitutional review by political organs— were retaken by those who enacted the Mexican Constitution of 1857. *See* Rabasa, *supra* note 68, at 77.

[88] There were in fact several interesting proposals at the time that would have granted state courts some jurisdiction on the writ of *Amparo*. *E.g., compare* Arroyo, *supra* note 74, at 59*;* Ponciano Arriaga & others, *Proyecto de Constitución Política de la República Mexicana (16 de Junio de 1856)*, in Suprema Corte de Justicia de la Nación [S.C.J.N.] [Supreme Court], *supra* note 82, at 165-6 *with* Mex. Const. art. 101 (enacted 1857, repealed 1917).

[89] *See supra* section II. *Cf.* Jackson & Tushnet, *supra* note 33, at 458.

[90] Two of these mechanisms were contained in Otero's proposal from 1847. They included —parallel to judicial review through *Amparo*— the constitutional review of state legislation by the federal Congress and, conversely, of federal statutes by state legislatures. *See* Otero, *supra* note 82, at 140. While these mechanisms coexisted with judicial review for a few years, the Constitution of 1857 completely eliminated them from the Mexican system. *See, e.g.,* Cossío, *supra* note 27, at 31-2; Rabasa, *supra* note 68, at 77.

[91] *See* Cossío, *supra* note 27, at 42.

[92] This is most probably where the veneration to the "originality" of the Mexican writ comes from. Some of the better known principles ruling the *Amparo* procedure include the following: relativity of judgments (i.e. *inter partes* or *relatividad*); standing to the offended party only (*parte agraviada*); decisions based exclusively on the complaint (*estricto derecho*); exhaustion of ordinary legal remedies (*definitividad*), and statutory continuation (*prosecución*). The literature concerning this writ is abundant, quite technical, and frequently specialized into the particularities that have developed within each sub-subject of the constitutional mechanism. For a succinct account of *Amparo* in English see Fix-Zamudio, *supra* note 75.

system continued to follow for decades the evolution of American legal institutions and tried to use them as a prototype — albeit with major differences. While most of the specific rules of *Amparo* were defined largely through the continuous amendments that took place during the second half of the 19th century,[93] many of these changes —particularly those regarding the acts open to review, but also some concerning the rules to attain consistency in constitutional interpretation— were still based on what Mexican legislators assumed to be the trend in the United States. For instance, both the antebellum judgment in *Martin v. Hunter's Lessee*[94] as well as the misinformed belief that American laws granted federal courts habeas corpus jurisdiction to state prisoners,[95] contributed in Mexico to the extension of *Amparo* to challenge judgments.[96] Consequently, a mechanism that was originally conceived to protect individuals solely from executive or legislative power[97] was rapidly widened to include judiciary acts.[98] Since *Amparo* was not restricted —as American habeas corpus was— to safeguard individual liberty and Mexican local courts lacked any jurisdiction for constitutional review,[99] the decision to include judgments as part of *Amparo* opened the gate to the establishment of a hierarchy between federal and state courts for non-criminal issues. This subsequently gave way to the use of the writ as an ordinary mechanism in civil appeals.[100] Not sur-

[93] During the validity of the Constitution of 1857 —which despite several interruptions due to foreign invasions lasted until the outburst of the Mexican Revolution in 1910— statutes regulating *Amparo* were enacted in 1861, 1869, 1882, 1897, and 1908. Most of the rules developed during this period outlived the Constitution and are still valid today. *See* Cossío, *supra* note 27, at 34-7.

[94] Martin v. Hunter's Lessee, 14 U.S. 304 (1816).

[95] *See* José Barragán, Proceso de discusión de la Ley de Amparo de 1869, 189-90 (Mexico, IIJ-UNAM, 1987). It is very unlikely those who rooted for the American model in the Mexican Congress of 1869 —Mariscal and Velasco— were aware of their American counterpart granting the federal courts habeas corpus jurisdiction over state prisoners' claims just two years before through the Habeas Corpus Act of 1867. Still, this authority was exercised in the United States only for "jurisdictional challenges" until the 1940s. *See* Vladeck, *supra* note 76, at 946.

[96] Even though in January 1869 —after a long and heated debate— legislation had explicitly made the writ inadmissible to challenge acts of the judiciary, in July of that same year the Supreme Court admitted and granted in a controversial ruling —without even invalidating the respective statute— the first *Amparo* against a judgment of the Superior Court of Sinaloa. This view finally prevailed and the "judicial *Amparo*" was allowed explicitly in the statute of 1882. *See* Manuel González Oropeza, *Protection in Judicial Business: The Case of Miguel Vega*, 3 Mexican Law Review (2005), *available at* http://info8.juridicas.unam.mx/cont/mlawr/3/arc/arc6.htm (last visited May 31, 2012).

[97] *See* Otero, *supra* note 82, at 137.

[98] *See* Ley de Amparo [L.A.] [Amparo Law], as amended, art. 8, Diario Oficial de la Federación [D.O.], 14 de Diciembre de 1882 (Mex.).

[99] An exception was introduced in 1882 to allow for state courts to issue some provisional injunctions in *Amparo* when there was no federal court in the district where the violation had taken place. *See id.* art. 4.

[100] *See* José Luis Soberanes, *Surgimiento del Amparo Judicial*, in 2 El juicio de amparo. A 160

prisingly, it was also during this period that Mexican federal legislators gave up on their resistance towards legal precedent and developed the concept of *Jurisprudencia*.[101] In contrast to the *stare decisis* doctrine that inspired this idea, however, this interpretation (decided by the Mexican Supreme Court) had to be repeated several times to achieve authoritative force and become binding.[102]

While it is remarkable that the rules of constitutional review which were developed even before the outburst of the Mexican Revolution (1910-1917) outlived this difficult period, it is perhaps more astonishing that they remained essentially the same for almost another century.[103] Indeed, the continuous adjustments carried out in Mexico after the enactment of the Constitution of 1917 and throughout most of the 20th century mostly involved the redistribution of *Amparo* jurisdiction among the federal courts.[104] Notably, they did not include greater participation of state courts in the direct enforcement of the Constitution nor did they represent any significant change to the "*Amparo*-centered" system that had emerged during the previous judicial regime.[105] In order to deal with the enormous caseloads that resulted from such an expansive Amparo policy, the Mexican Supreme Court had already by 1934 been divided into four specialized chambers (*i.e.* civil, criminal, administrative, and labor) and the number of associate Justices had doubled.[106] Since the effects of this internal reorganization were barely noticeable in the face of increased backlogs in the Supreme Court, the Mexican Congress in 1951 decided to rely once again on the American experience. Inspired by the reform that had created the United States Courts of Appeals sixty years earlier— Mexican

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AÑOS DE LA PRIMERA SENTENCIA 465, 475-9 (Manuel González Oropeza & Eduardo Ferrer-MacGregor eds., IIJ-UNAM, 2011).

[101] *See* José María Serna, *The Concept of Jurisprudencia in Mexican Law*, 2 MEXICAN LAW REVIEW 131, 132-3 (2009).

[102] *See id.* at 133.

[103] Even though the Mexican Senate was reinstated in 1872 and this organ was granted some sort of constitutional control, by that time *Amparo* had already consolidated as the only mechanism of review and this new possibility had in fact very few practical applications. *See* COSSÍO, *supra* note 27, at 51-3.

[104] Within the 70 years that followed its enactment, Article 107 of the Mexican Constitution —the article regulating the writ of *Amparo*— was amended in 1951, 1962, 1967, 1974 (twice), 1975, 1979, 1986 and 1987. *See id.* at 87.

[105] *See id.* at 86-8.

[106] After the incorporation of the so-called social rights to the Mexican Constitution of 1917, the Supreme Court had jurisdiction through *Amparo* practically against any act of any authority in the system. While on the one hand it had original jurisdiction on the one-instance writ (*Amparo directo*) against ordinary civil and criminal judgments, on the other hand it enjoyed appellate jurisdiction on the two-instance writ (*Amparo indirecto*) that was filed against legislative and/or administrative acts —including the quasi-judicial decisions of administrative and labor courts— before the federal District Courts. *See* Héctor Fix-Zamudio, *Ochenta años de evolución constitucional del juicio de amparo mexicano*, in OCHENTA AÑOS DE VIDA CONSTITUCIONAL EN MÉXICO 371, 376 (Jaime García ed., IIJ-UNAM, 1998).

legislators established the federal Three-Judge Panel Circuit Courts (*Tribunales Colegiados de Circuito*).[107] Initially six for the whole country, the so-called *Colegiados* were assigned to take over —in a scheme that brings to mind the American writ of *certiorari*— *Amparo* cases of lesser significance that had quickly overwhelmed the Supreme Court.[108] As one might expect of procedural rules that remain essentially unchanged, however, the number of *Amparo* writs filed did not drop at all; during the following years these new federal courts rapidly increased both in number and authority.[109] Meanwhile, state courts —just like any other court not dealing with *Amparo* cases— were explicitly banned from any kind of constitutional interpretation within their ordinary activities.[110]

2. *A "Turn" towards Continental Europe (1987-2011)*

While it is commonly assumed that the failure to reduce backlogs in the federal judiciary led the Mexican system to change its orientation and transform the Mexican Supreme Court in 1987 into a specialized constitutional court,[111] the amendments enacted that year did not radically alter the trend already started with the creation of the Three-Judge Panel Circuit Courts. To be precise, what was officially praised as a new system of responsibilities for the Supreme Court "that would restore (*sic*) its status as the *sole* and supreme interpreter of the constitution"[112] represented in fact the mere transfer of most of the court's *Amparo* jurisdiction —original and appellate— to the already large and growing number of *Colegiados*.[113] As the Supreme Court only

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[107] *See id.* at 386.

[108] After a series of intricate formulas that initially distributed *Amparo* jurisdiction between the Supreme Court and the Three-Judge Panel Circuit Courts depending on whether the alleged violations were, respectively, substantive or procedural, in 1968 the basic criterion of distribution surrounded the economic or social relevance of the specific *Amparo*. *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* October 25, 1967, art. 107, V-IX, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.). Additionally, the administrative chamber of the Supreme Court could take over cases discretionally. *See* Ley de Amparo [L.A.] [Amparo Law], *as amended*, art. 84, I (e), Diario Oficial de la Federación [D.O.], 30 de Abril de 1968 (Mex.).

[109] By 1986 there were already 35 federal Three-Judge Panel Courts distributed in 18 circuits. *See* Fix-Zamudio, *supra* note 106, at 395.

[110] *See* David García Sarubbi, *Federalism and Constitutional Review in Mexico and the United States*, 4 Mexican Law Review 35, 42 (2011).

[111] *E.g.,* Fix-Zamudio, *supra* note 106, at 394-395.

[112] Miguel de la Madrid, Fifth State of the Nation Report to the Mexican Congress 29 (Mexico, Office of the President, 1987) (emphasis added). This document uses explicitly the wording "Constitutional court." *See id.* at 28.

[113] In contrast to the United States —where lower federal courts are established by Congress— the number and distribution of inferior federal courts in Mexico can be determined by the federal judiciary itself since 1987. *See* Héctor Fix-Fierro & Héctor Fix-Zamudio,

kept appellate jurisdiction on *Amparo* writs in which the constitutional validity of general laws had been challenged,[114] many commentators concluded that the court was mainly taking on the functions of a constitutional court. None of these adjustments regarding the writ of *Amparo*, however, actually represented a continental European review mechanism. Most importantly, none of them touched upon the roots of the caseload problem either. For instance, Mexican state courts were not empowered to review the constitutional validity of any ordinary statute by means of a "referral" procedure. Neither could they directly refuse to apply any general law already found unconstitutional by the federal judiciary's *Jurisprudencia*. In addition, these amendments did not include any real deference rule for the *Amparo* judges to the activity of lower courts. The interpretation of ordinary law decided by non-federal courts within ordinary adjudication could therefore easily be turned into a constitutional dispute. In sum, it is clear that the initial characterization of the Mexican Supreme Court as a "constitutional court" in the late 1980s was misinformed, as it did not involve any intention —either structurally or procedurally — to adopt the continental European model of constitutional review.[115]

The Mexican government's discourse regarding a specialized constitutional court —already quite popular in other Latin-American countries[116]— quickly extended to Mexican scholarship as well. Suddenly well-known legal scholars and practitioners began to favor the adoption of the continental European model and described Mexican judicial reform as a process headed inevitably in that direction.[117] This understanding —whether accurate or not— significantly shaped the evolution of the Mexican system. Indeed, a series of constitutional amendments approved in 1994 gave the Supreme Court a pair of mechanisms that were characteristic of European constitutional courts.[118] In conjunction with a significant reduction in the number of associ-

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El Consejo de la Judicatura (IIJ-UNAM, 1996), *available at* http://www.bibliojuridica.org/libros/libro.htm?l=86 (last visited May 31, 2012).

[114] *See* Constitución Política de los Estados Unidos Mexicanos [Const.], as amended August, 10, 1987, Art. 107, VIII, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.); Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* October 25, 1967, art. 107, IX, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.). The Supreme Court, however, could still take on discretionally a "transcendental case" whose original jurisdiction corresponded in principle to the Three-Judge Panel Circuit Courts. *See* Lucio Cabrera, *La Jurisprudencia de la Suprema Corte de Justicia y aspectos de sus facultades discrecionales*, in 1 Derecho constitucional comparado México-Estados Unidos 477, 482-484 (James Frank Smith ed., IIJ-UNAM, 1990).

[115] *See* Cossío, *supra* note 27, at 105-6.

[116] *See* Héctor Fix-Zamudio, *Los tribunales y salas constitucionales en América Latina*, in Estudios en homenaje a don Santiago Barajas Montes de Oca 59 (IIJ-UNAM, 1995).

[117] *E.g.*, Héctor Fix-Zamudio, *La reforma en el derecho de Amparo*, in Ensayos sobre el derecho de amparo 479, 502 (Miguel López Ruiz ed., IIJ-UNAM, 1993).

[118] *See* "Decreto por el que se declaran reformados diversos artículos de la Constitución

ate Justices,[119] these reforms gave the Supreme Court exclusive jurisdiction on "abstract constitutional review" of statutes (*acciones de inconstitucionalidad*)[120] as well as on a wide range of controversies between elected bodies (*controversias constitucionales*).[121] These procedures nonetheless entailed significant variations from the European model which bore heavily on the consistency of constitutional interpretation throughout the whole Mexican system; particularly with respect to the enforcement of fundamental constitutional rights. Even though both of these new mechanisms empowered the Supreme Court to invalidate with effects *erga omnes* unconstitutional statutes and thereby expel laws from the legal system, a qualified majority of *eight* Justices out of eleven was necessary.[122] Whatever its official purpose,[123] this majority requirement implicitly made the constitutional validity of a general rule depend on the nature of the challenging entity and, consequently, created a somewhat artificial distinction between constitutional review of legislation within the Supreme Court. In

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Política de los Estados Unidos Mexicanos" [Decree to amend several articles of the Mexican Constitution] [hereinafter *Reforma Constitucional 1994*], Diario Oficial de la Federación [D.O.], 31 de diciembre de 1994, Primera Sección, pp. 2-11 (Mex.).

[119] By means of this reform the Supreme Court returned to its original configuration of eleven members. *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* December 31, 1994, Art. 94, Diario Oficial de la Federación, Art. 94 (Mex.).

[120] The so-called "abstract constitutional review" (*abstrakte Normenkontrolle*) is the procedure by which certain political bodies (*e.g.* the Senate, a minority in Parliament, the state government, a state Parliament, etcetera) have the ability to challenge at the constitutional court the validity of laws before —or irrespective of— their application. *See* Stone Sweet, *supra* note 2, at 224. The procedure introduced in Mexico included not only statutes bot also other kinds of general norms such as regulations. *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* December 31, 1994, Art. 105, II, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.)

[121] *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* December 31, 1994, Art. 105, I, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.). While this mechanism already existed as a normative possibility of constitutional review since the Constitution of 1857 and was retaken almost in the same terms by the framers of 1917, its limited wording had resulted in a lack of practical application. *See* José Ramón Cossío, La controversia constitucional 108-11 (Mexico, Porrúa, 2008).

[122] *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* December 31, 1994, Art. 105, I-II, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

[123] The statement of legislative intent of President Zedillo did not give any argument to justify the need for a qualified majority for such a decision to achieve *erga omnes* effects. While the original bill actually envisaged a majority of nine Justices, the Senate reduced it to eight arguing the need for the new mechanisms to be "viable." *See* "Decreto que reforma y adiciona diversos artículos de la Constitución Política de los Estados Unidos Mexicanos" [Decree to amend and add several articles to the Mexican Constitution], Diario de los Debates del Senado [Senate's Congressional Record], LVI Legislatura, Año I, Primer Periodo Ordinario, Diario 14, Diciembre 16 de 1994, (Mex.), *available at* http://www.senado.gob.mx/index.php?ver=sp&mn=3&sm=3&lg=LVI_I&id=303 (last visited May 31, 2012).

other words, a statute challenged on identical grounds before the same Justices could be considered both unconstitutional and constitutional depending on whether the suit is brought by an individual in *Amparo* or by an agency in a procedure of "abstract constitutional review." Aside from the evident problem this poses for legal predictability, it misrepresents the European model as well as perverts the exemplary or guiding function that —as mentioned above— specialized constitutional mechanisms should play in the enforcement of fundamental rights.[124]

Even though the Supreme Court already had discretion to take over jurisdiction on any *Amparo* case that corresponded to the federal Three-Judge Panel Circuit Courts[125] and could exercise —in "proper constitutional questions"— additional appellate jurisdiction regarding their judgments (*Amparo directo en revisión*),[126] the Mexican Congress assumed that a further increase of the Supreme Court's control over its own docket would allow it "to perform its constitutional court function more efficiently."[127] As a consequence, the 1994 reforms also entitled the Supreme Court to delegate —through general rules (*acuerdos generales*) issued by the court sitting *en banc*— its *Amparo* jurisdiction to the Three-Judge Panel Circuit Courts on all cases dealing with issues in which *Jurisprudencia* (*i.e.* binding precedent) had already been established.[128] The authority to delegate jurisdiction was soon extended to other *Amparo* disputes. This was allowed if the Supreme Court considered —regardless of the existence of binding precedent— that it facilitated "a better administration of justice."[129] It is clear nonetheless that these powers did not represent discretional rejection powers like those granted in other countries to the constitutional jurisdiction when ordinary judgments are challenged for alleged fundamental rights violations.[130] In fact, the quasi-legislative abilities of the

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[124] *See supra* section II. *Cf.* Hoffmann-Riem, *supra* note 22, at 189.

[125] *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* August 10, 1987, Art. 107, VIII, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

[126] *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* October 25, 1967, Art. 107, IX, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

[127] "Decreto que reforma y adiciona diversos artículos de la Constitución Política de los Estados Unidos Mexicanos" [Decree to amend and add several articles to the Mexican Constitution], Diario de los Debates del Senado [Senate's Congressional Record], LVI Legislatura, Año I, Primer Periodo Ordinario, Diario 14, Diciembre 16 de 1994, (Mex.) (author's translation).

[128] *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* December 31, 1994, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

[129] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* June 11, 1999, Art. 94, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.) (author's translation). Whereas these amendments were argued again under the discourse of the specialized constitutional court, the Senate mentioned that the idea was rather inspired by the American writ of *certiorari*. *See* Cossío, *supra* note 27, at 115-116.

[130] *Cf.* Kommers, *supra* note 31, at 51-52.

Mexican Supreme Court to transfer its *Amparo* jurisdiction to the *Colegiados* implied instead that all individual claims alleging the violation of a constitutional right were to be solved by a constitutional authority in the formal sense. In this way, the idea that ordinary jurisdiction had no role in constitutional interpretation was reinforced. So was, implicitly, the notion that the mere filing of an *Amparo* by an individual should be sufficient to compel the constitutional court to deliver a judgment.[131] Furthermore, the writ of *Amparo* —whose regulation had not experienced significant transformation[132]— continued to be the only mechanism by which individuals could challenge directly the constitutional validity of any act.[133] As the Supreme Court could already influence the amount and specialization of lower federal courts,[134] these delegation powers contributed to boost the *Amparo* caseloads and the exponential growth of the federal judiciary. It was certainly not a coincidence that just during the 15 years following the introduction of these arrangements the number of *Colegiados* increased by 137%.[135]

While it is evident that the Mexican system's "turn" towards the continental European model did not represent a complete transformation but rather a selective adoption of a few mechanisms, this somewhat ideological change of direction in Mexico's constitutional review paradigm undoubtedly helped question —though not eliminate— several myths that had been built around the writ of *Amparo*. In the beginning of the 21st century —as the idea of the constitutional court became widespread within Mexican jurisprudence— more scholars and practitioners started to insist on the need for a major transformation of this writ as well.[136] This in turn resulted in a series of reform proposals endorsed by the Supreme Court[137] which aimed at "modernizing

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[131] *Cf.* Schlaich & Korioth, *supra* note 28, at 128-129.

[132] *See* Fix-Zamudio, *supra* note 106, at 407.

[133] *See* García Sarubbi, *supra* note 110, at 42.

[134] While the organ responsible for the administration of the federal judiciary is —also since 1994— the Federal Judicial Council (*Consejo de la Judicatura Federal*), one of its seven members is the Chief Justice of the Supreme Court itself and three more are appointed by the Supreme Court sitting *en banc*. *See* Fix-Fierro & Fix-Zamudio, *supra* note 113. Furthermore, a qualified majority of the court can overrule the council's decisions. *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, June 11, 1999, art. 100, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

[135] Whereas in 1994 there were 83 Three-Judge Panel Circuit Courts distributed in 23 federal circuits, in 2009 there were 195 of these courts distributed in 31 federal circuits. *See* Consejo de la Judicatura Federal [Federal Judicial Council], Atlas Jurisdiccional 2009: conformación de distritos y circuitos judiciales federales 8 (Mexico, 2009).

[136] *E.g.*, Arturo Zaldívar, Hacia una nueva Ley de Amparo 2-13 (IIJ-UNAM, 2002).

[137] In 1999 the Supreme Court had appointed a commission of academics and practitioners to elaborate a draft for a new *Amparo* bill. In 2001 the commission's proposal was fundamentally approved by the court and it was sent —as the judiciary lacked initiative right— to the other two federal powers. However, it was not until 2004 that a group of senators actually introduced the court's draft as a bill. *See* Cossío, *supra* note 27, at 118.

and enabling it [*Amparo*] to become once again an effective instrument for the protection of fundamental rights."[138] Though it took several years for these specific suggestions to have an impact on the agenda of Mexican legislators,[139] they established the basis for modifications to *Amparo* which —in light of the highly regarded "Constitutional Reform on Human Rights"— were finally enacted in June 2011.[140] These constitutional amendments —as well as the writ's regulations currently being discussed by Congress[141]— are largely based on proposals that had been sponsored by the Supreme Court a decade earlier.[142] These adjustments widened specifically the Amparo's scope of protection to International Human Rights Law;[143] extended its object of scrutiny to challenge omissions;[144] broadened the concept of standing to those with an "individual or collective legitimate interest";[145] redefined the criteria to issue temporary injunctions;[146] and —in writs against ordinary final judgments— compelled the *Colegiados* to solve every claim contained in the constitutional submission (*i.e.*, not to remand the decision to the lower court immediately

[138] Zaldívar, *supra* note 136, at 10 (author's translation).

[139] *See* Cossío, *supra* note 27, at 118; "Dictamen de las Comisiones Unidas de Puntos Constitucionales; y de Estudios Legislativos, el que contiene proyecto de decreto por el que se reforman, adicionan y derogan diversas disposiciones de los artículos 94, 100, 103, 104 y 107 de la Constitución Política de los Estados Unidos Mexicanos" [Opinion of the Constitutional and Legislative Congressional Commitees to the decree to amend, add, and derogate several provisions of articles 94, 100, 103, 104, and 107 of the Mexican Constitution] [hereinafter Dictamen *de reforma constitucional en Amparo*], Gaceta del Senado [Senate's Gazette], 10 de Diciembre de 2009, Tomo I, pp. 66-97 (Mex.).

[140] *See Reforma constitucional en Amparo 2011*, *supra* note 3; *Reforma c*onstitucional en Derechos Humanos, *supra* note 3. *Compare* Zaldívar, *supra* note 136, at 10-13 (a summary of the Supreme Court's draft of 2001) *with* "Iniciativa de los senadores Manlio Fabio Beltrones Rivera, Jesús Murillo Karam, Fernando Castro Trenti y Pedro Joaquín Coldwell, del grupo parlamentario del Partido Revolucionario Institucional, la que contiene proyecto de decreto por el que se reforman y adicionan los artículos 94, 100, 103, 107 y 112 de la Constitución Política de los Estados Unidos Mexicanos" [Bill of senators from the Institutional Revolutionary Party to amend articles 94, 100, 103, 107, and 112 of the Mexican Constitution] [hereinafter *Iniciativa de reforma c*onstitucional en Amparo], Gaceta del Senado [Senate's Gazzette], 19 de Marzo de 2009, Tomo I, pp. 80-99 (Mex.) (the senators' bill that resulted in the constitutional amendments of June 6, 2011).

[141] *See* "Dictamen de las Comisiones Unidas de Gobernación; de Justicia; y de Estudios Legislativos, Segunda, el que contiene proyecto de decreto por el que se expide la Ley de Amparo" [Opinion of the Government, Justice, and Legislative Congressional Commitees to the decree to enact the Amparo Law] [hereinafter Dictamen de Reforma a Ley de Amparo], Gaceta del Senado [Senate's Gazette], 6 de Octubre de 2011, Tomo II, pp. 221-395 (Mex.).

[142] *See id.* at 229.

[143] *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, art. 103, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

[144] *See id.*

[145] *Id.*, art. 107, I (author's translation).

[146] *See id.*, art. 107, X.

after having detected the first violation).[147] Furthermore, the Supreme Court was empowered —once more under the constitutional court rationale[148]— to declare with *erga omnes* effects (*i.e.*, binding upon everyone in the legal system) the unconstitutionality of statutes challenged in *Amparo* procedures. In order for this general declaration to actually take place, however, the norm in question cannot be related to tax law; *Jurisprudencia* must have already been established (*i.e.*, it cannot occur with one judgment); and —as it was stipulated already for procedures of "abstract constitutional review" of statutes and for controversies between legislative bodies— a qualified majority of eight Justices is required.[149]

As one can notice, the evolution of the Mexican system of constitutional review not only steadily excluded lower courts from any direct involvement in constitutional interpretation and, consequently, in the enforcement of fundamental rights.[150] It also increasingly depended for these activities on a complicated arrangement of specialized procedures. Mainly because its rules of constitutional review give differentiated treatment to mechanisms that all the same define the constitutional validity of general norms, the Mexican legal system resulted in an "exception regime." Stated bluntly, it became a system that fosters unequal treatment before the law.[151] Even though the recently enacted constitutional amendments to *Amparo* will probably speed up this procedure, they do not contain any measure that will reverse the trend of specialized constitutional jurisdiction progressively becoming a "super jurisdiction of appeals" that solves ordinary legal disputes.[152] While the new constitutional rules did not include a mechanism that authorizes ordinary courts to carry

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[147] *See Id.* art. 107, III (a). This new requirement aimed at reducing the length of ordinary procedures. For a succinct explanation of the specific reasons that led to this change see ZALDÍVAR, *supra* note 136, at 129-33.

[148] *See* Iniciativa de Reforma Constitucional en Amparo, *supra* note 140, at 81.

[149] *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended,* art. 107, II, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

[150] *See* García Sarubbi, *supra* note 110, at 42.

[151] This criticism applies both to the different treatment of the same statute within two constitutional procedures (i.e. *Amparo* and abstract control of norms) as well as to the differentiation of unconstitutional tax laws from other unconstitutional laws.

[152] *Cf.* Kenntner, *supra* note 50, at 786 (author's translation). Whereas for reasons that had more to do with judicial federalism than with the enforcement of fundamental rights, the senators' bill that proposed the constitutional amendments to *Amparo* explicitly addressed this problem. They originally suggested —naming several examples from centralized systems of constitutional review— the establishment of discretional rejection powers for the Three-Judge Panel Circuit Courts in order to limit the filing of *Amparo directo* against judgments of state supreme courts. *See Iniciativa de reforma constitucional en Amparo, supra* note 140, at 82-9. Nonetheless, specifically that part of the proposal was rejected by the congressional commissions in charge of giving the first opinion to the draft and, consequently, it was removed from the bill. *See Dictamen de reforma constitucional en Amparo, supra note 139*, at 79-80. ("…however, these commissions do not share the proposal contained in the bill in the sense of limiting in some cases

out constitutional review directly within ordinary procedures (*i.e.*, a "referral" right), they did reduce the already meager deference of Amparo judges to ordinary tribunals. With the excuse that these constitutional procedures took way too long,[153] the new rules of Amparo curtailed even more lower courts' authority as final arbiters of ordinary legal disputes.[154] In addition, the creation of new federal bodies called "*Plenos de Circuito*" —or Circuits *en banc*[155]— will hopefully solve potential contradictions between the different federal courts of a same circuit.[156] This measure, nonetheless, also hints towards a system in which the federal judiciary —ironically under the discourse of judicial decentralization[157]— will more and more determine through Amparo the meaning of state laws. In sum, these changes did not alter the prevailing notion of the role that specialized constitutional procedures should play in the enforcement of fundamental rights. They did not foster the exemplary function of the constitutional jurisdiction with respect to fundamental rights protection.[158]

After continuous reforms Mexico in 2011 still departed substantially from any of the two consolidated models of constitutional review that —at different periods and for different reasons— officially served as its inspiration. The Mexican legal system steadily demanded from the specialized constitutional courts results which they could not possibly deliver. By doing so, it jeopardized the effective enforcement of fundamental rights in the country. As shown below, however, those were not the last relevant changes to the system.

IV. The *Varios File 912/2010* and the Incorporation of Diffused Constitutional Review in Mexico

Within days after the approval of the "Constitutional Reform on Human Rights" —and of the long-awaited modification of the writ of *Amparo*— the Supreme Court gave an additional twist to the Mexican system of constitutional review. As mentioned above, on July 14, 2011 the court reached a decision that introduced diffused constitutional review onto the Mexican legal system. Though technically not a legal judgment, the Supreme Court's resolution in *Expediente Varios 912/2010*[159] explicitly authorized all Mexican judges

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the admissibility of amparo directo (*sic*), setting as admission criteria [the cases'] *importance* and *transcendence*.") (Author's translation, emphasis on the original.)

153 *See* Zaldívar, *supra* note 136, at 129.

154 *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, art. 107, III, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

155 *See id.* art. 94.

156 *See id.* art. 107, XIII.

157 *See Iniciativa de reforma constitucional en Amparo, supra* note 140, at 93-4*;* Cossío, *supra* note 8, at A18.

158 See *supra* section II. *Cf.* Hoffmann-Riem, *supra* note 22, at 176.

159 Expediente Varios 912/2010, *supra* note 1, at 51.

to "disapply" legislation if they considered —*ex officio* within their ordinary activities of adjudication— that such laws violated the human rights granted by the Constitution and/or the international covenants ratified by Mexico.[160] Since a significant part of this decision was grounded on the new wording of Article 1 of the Constitution,[161] the Supreme Court's conclusions were regarded almost undisputedly by Mexican academics as a welcome follow-up to the recently approved constitutional amendments.[162] The quasi-judicial incorporation of diffused review into the legal system was instantly celebrated by scholars and practitioners as a necessary step towards the effective enforcement of fundamental rights in Mexico.[163] A more careful analysis, both of the legal context in which this particular verdict was reached and the immediate consequences that followed the court's decision, shows that the initial euphoria was in fact unjustified. Since this resolution introduced even more exceptions into an already inconsistent scheme, the resulting system of constitutional review —described by the Mexican Supreme Court as "concentrated on one part and diffused on the other"[164]— threatened legal predictability and thus the nation's Rule-of-law. Since the Supreme Court's decision did not affect in any way the dependence position that the Mexican legal system had built upon the constitutional writ of *Amparo* the benefits of this supposed empowerment of lower courts to enforce fundamental rights were only apparent.

1. *The "Judicial" Incorporation of Diffused Review*

Procedurally speaking, the Supreme Court's resolution authorizing diffused constitutional review goes back to an international judgment issued in

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[160] *See id.* at 75. While this complicated resolution included different majority constellations depending on each of the multiple issues that were dealt with, the specific decision concerning the introduction of diffused control into the Mexican system was only approved by a majority of seven Justices. *See id.* at 77-8.

[161] *See id.* at 68-9. The new constitutional wording is the following: "Article 1. In the United Mexican States all the persons will (*sic*) enjoy the human rights acknowledged in this Constitution and in the international treaties to which the Mexican State is a party, as well as the guarantees for their protection, whose enjoyment cannot be encroached or suspended but in the cases and under the circumstances that this Constitution establishes.

The norms related to human rights will be interpreted in conformity with this Constitution and with the international treaties on the subject favouring at all times the widest protection to the persons.

All the authorities, *within the framework of their competences*, have the obligation to promote, respect, protect and guarantee human rights in conformity with the principles of universality, interdependence, indivisibility and progressivity. Consequently, the State shall prevent, investigate, punish and repair the violations to human rights, *in the terms the law establishes*…" (Author's translation, emphasis added).

[162] *E.g.*, Héctor Fix-Zamudio, *Las reformas constitucionales mexicanas de junio de 2011 y sus efectos en el sistema interamericano de derechos humanos*, in 1 El juicio de amparo, *supra* note 57, at 462.

[163] *E.g., id.* at 471; Cossío, supra note 8, at A18. *But see* Roldán Xopa, *supra* note 6.

[164] *Expediente Varios 912/2010*, *supra* note 1, at 70 (author's translation).

2009 by the Inter-American Court of Human Rights on the case of *Radilla Pacheco v. Mexico*.[165] This case dealt with the forced disappearance of Rosendo Radilla Pacheco by members of the Mexican Army in the state of Guerrero in 1974. Almost 35 years later —after a long and complicated trek before domestic and international tribunals by Mr. Radilla's relatives— the Mexican State was found internationally responsible for multiple violations to the American Convention of Human Rights as well as the Inter-American Convention on Forced Disappearance of Persons. In a nutshell, Mexico was found accountable for the use of military jurisdiction to hinder the swift prosecution of crimes of a non-military nature.[166] Accordingly, the Inter-American Court ordered the Mexican State to carry out several activities —including specific amendments to its internal regulation— as a form of reparation to the victims.[167] Not long after the international judgment was published in the official domestic journal, the Mexican Supreme Court took the initiative and opened a rather uncommon procedure to help determine whether the international verdict contained specific obligations for the Mexican federal judiciary.[168] The Supreme Court concluded not only that *Radilla* required that the federal judiciary undertake certain actions, but also that these obligations included more than just the specific measures ordered in the operative paragraphs of the international judgment. According to the Mexican Supreme Court the obligations to the federal judiciary could be deduced also from the Inter-American Court's reasoning to the case.[169] As the Inter-American Court had held in one of its considerations that *"the Judiciary shall exercise a 'control of conventionality' ex officio between domestic regulations and the American Convention [of Human Rights],* evidently within the framework of its respective competences and the corresponding procedural regulations,"[170] a majority of the Supreme Court Justices gathered from this statement —interpreted in conjunction with the new wording of the Mexican Constitution that had been approved in June 2011[171]— an obligation to authorize every court in the country to strike down

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[165] Radilla-Pacheco v. Mexico, *supra* note 4.

[166] All crimes that imply violations of human rights are considered of a non-military nature. *See id.* at 82.

[167] *See id.* at 91-105.

[168] The issue was brought up originally in May 2010 by the Chief Justice of the Supreme Court as a consultation to the court sitting *en banc*. *See Expediente Varios 912/2010, supra* note 1, at 51.

[169] The opinion holding that alleged obligations could be deduced from the international judgment as a whole and not only from its operative paragraphs was shared by eight of the court's Justices and had been decided already in September 2010. *See id.* at 52. Nonetheless, the full resolution with the extent of these obligations was voted by the Supreme Court only after the "Constitutional Reform on Human Rights" had already been approved. *See id.* at 64-5.

[170] Radilla-Pacheco v. Mexico, *supra* note 4, at 95 (emphasis added).

[171] *See Expediente Varios 912/2010, supra* note 1, at 69-71;Fix-Zamudio, *supra* note 162, at 470-1.

unconstitutional and/or "unconventional" legislation. This unusual conclusion received widespread academic and media support for it was valued as an important "adjustment towards judicial decentralization."[172]

No matter how inconvenient someone might have considered the traditional exclusion of lower Mexican courts from any constitutional review, it is highly debatable whether the Supreme Court's switch represents a necessary legal conclusion from the amendments to Article 1 of the Constitution or —what appears even more difficult— from *Radilla*. Even if one accepts that a constitutional court should be able to declare on its own initiative (*i.e.* outside of a legal procedure) the model of constitutional scrutiny that a country has to follow,[173] the truth is that neither the constitutional reforms nor considerations of the Inter-American Court on *Radilla* support the diffused model. On the contrary, it is fairly clear that the new wording of Article 1 binds all Mexican authorities to protect and guarantee human rights "*within the framework of their competences*."[174] The constitutional amendments of Amparo that were enacted simultaneously did not contain —as mentioned above[175]— any specific competence adjustment in order to reduce the Mexican system's reliance on the specialized constitutional mechanisms or on the federal judiciary.[176] If the amendments lacked any modification of competences regarding the existing mechanisms of constitutional review, then it appears rather problematic to justify such a radical change of model on the basis of the constitutional reform.[177] A similar objection applies to the Mexican Supreme Court's reading of *Radilla*. While an obligation is nowhere to be found in that judgment —not even implicitly— that requires the Mexican State to establish

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[172] Cossío, *supra* note 8, at A18 (author's translation).

[173] This was precisely one of the reasons for three Justices to vote against the majority's opinion. *See, e.g., Expediente Varios 912/2010, supra* note 1, at 110-1 (Justice Pardo Rebolledo, dissenting).

[174] Constitución Política de los Estados Unidos Mexicanos [Const.], as amended, art. 1, Diario Oficial de la Federación [D.O.], 10 de Junio de 2011 (Mex.). (Author's translation.) A full transcription of the paragraph is provided at *supra* note 161.

[175] *See supra* section III. 2.

[176] What is more, the few proposals that —to some extent— could have been interpreted this way were deliberately eliminated from the bill. *See Iniciativa de reforma constitucional en Amparo, supra* note 140, at 82-9*;* Dictamen de reforma constitucional en Amparo, *supra* note 139, at 79-80.

[177] *See Expediente Varios 912/2010, supra* note 1, at 93-4 (Justice Aguirre Anguiano, dissenting). This is independent of the fact that the constitutional amendments also introduced in the same paragraph an explicit duty for the State "to prevent, investigate, punish, and repair the violations to human rights, *in the terms the law establishes.*" Mex. Const. Art. 1. (Author's translation, emphasis added). This requirement for a regulatory legislation has been rather understood only related to State liability (*i.e.* damages) and not to the rules of constitutional scrutiny. *See Reforma constitucional en Derechos Humanos*, *supra* note 3, at 5. Still, the fact that after the amendments regulatory legislation is required for pecuniary reparation does not mean that such legislation is now unnecessary when it comes to the specific mechanisms to grant relief.

a diffused or decentralized system of constitutional review,[178] the Inter-American Court unambiguously held that the "conventionality review" between domestic regulations and the American Convention of Human Rights was to be carried out by the judiciary "*evidently within the framework of its respective competences and the corresponding procedural regulations*."[179]

This paragraph of the international judgment —which was rather an *obiter dictum* remark in matters of military jurisdiction[180]— was taken completely out of context to justify diffused review. As mentioned, *Radilla* dealt with the illegitimate use of Mexican military tribunals to prevent the swift prosecution of crimes of a non-military nature. The Inter-American Court held that cases dealing with human rights violations should only be heard in civilian courts. The international court considered that Mexican regulations that transferred criminal proceedings in relation to the "forced disappearance of persons" to military courts in detriment of the victim's rights violated two international conventions.[181] In line with the Inter-American Court's opinion, the "unconventional" domestic provisions that should have never been applied by the Mexican judiciary were those that transferred such cases to the military courts. The only domestic regulations that could have been subject to further adjustment based on this paragraph[182] were —at the most— Article 57 of the Code of Military Justice and Article 10 of the Amparo Law.[183] The former gave military courts jurisdiction over non-military crimes when the perpetrator was a member of the Mexican armed forces; the latter (apparently) prevented the victims of such crimes from challenging —for being contrary to the American Convention— the allocation of military jurisdiction through the writ of *Amparo*—.[184] The fact that —for better or for worse— con-

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[178] *Contra, e.g., Iniciativa de Ley de Control Difuso, supra* note 16, at 107.

[179] *See* Radilla-Pacheco v. Mexico, *supra* note 4, at 95.

[180] *See id.* at 94-6. Obiter dictum (or plainly dictum) is a statement that —albeit included in the body of the court's opinion— is not an essential part of the court's decision. In systems that are based on judicial precedent it is therefore not considered to be an argument binding for further cases. See William Burnham, Introduction to the Law and the Legal System of the United States 67-8 (St. Paul, Thomson/West, 4th ed. 2006).

[181] *See* Radilla-Pacheco v. Mexico, *supra* note 4, at 75-82.

[182] This statement of course does not pretend to imply in any way that the respective amendments should be a task of the Supreme Court.

[183] *See* Radilla-Pacheco v. Mexico, *supra* note 4, at 75-82. The references to the Federal Criminal Code within the judgment were made in regard to the material definition of the crime "forced disappearance of persons". *See id.* at 88-91.

[184] The Inter-American Court was not categorical on this regard. While it concluded that the writ of *Amparo* was in this case not an effective mechanism to challenge military jurisdiction —which constituted a violation of Article 25 (1) of the American Convention—, the court did not censor explicitly the rules that led to this lack of effectiveness. *See id*. at 82-4. The judgment's reasoning suggests that the *Amparo* writ through which Radilla's daughter had challenged the allocation of jurisdiction to military courts failed because Article 10 of the valid Amparo Law banned victims to file this writ on issues that did not relate directly to the repara-

stitutional and conventional review of statutes in Mexico was concentrated in the specialized procedures before the federal judiciary was however never depicted as a violation. Put differently, the model of constitutional review was never described as the reason for which the cases dealing with human rights violations ended up at military courts. At no time did the Inter-American Court deem the Mexican constitutional review system contrary *per se* to any applicable convention. It is nonetheless surprising that the Mexican Supreme Court went on to overrule its own *Jurisprudencia* (i.e. precedent) regarding the system of constitutional review[185] based on an international judgment that had barely anything to do with the system as such.

2. *The* Nuevo León *Judgment and the Bill on Diffused Control*

The Supreme Court's resolution on *Expediente Varios 912/2010* had not even been officially published before a lower Mexican court carried out diffused constitutional review for the first time specifically based on that decision. Due to the state in which the case originated, this controversial verdict was soon branded by academia as the *Nuevo León* judgment. Indeed, on August 8, 2011 a state court of criminal appeals in the city of Monterrey established within an ordinary proceeding that article 224, part V, of the Criminal Code for the State of Nuevo León[186] violated "the human right to penal legality (*sic*) established in Article 14, paragraph 3, of the Federal Constitution."[187] In short, the local appellate judge deemed the state criminal code unconstitutional as it delegated the power to define a criminal offence to an authority different from the legislative.[188] The case dealt with the trial

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tion of the damage. *See id.* at 82-3. The final dismissal of the *Amparo en revisión* filed by Radilla's daughter against this military allocation was nonetheless based exclusively on the grounds that this issue had already been resolved by the same Three-Judge Panel Circuit Court in a former "conflict of jurisdiction" (i.e. in an ordinary federal appeal that was filed independently by the military prosecutor against the initial referral of the case to military courts). *See id.* at 83. If that previous "conflict of jurisdiction" was of a non-constitutional nature, then the final dismissal of the *Amparo* filed by Radilla's daughter was evidently a mistake from the corresponding Three-Judge Panel Circuit Court and thus not necessarily a legislative flaw. It was perhaps for this reason that the Inter-American Court did not make further reference to the Amparo Law in the operative paragraphs of the judgment. *See id.* at 105-7.

[185] *See Expediente Varios 912/2010, supra* note 1, at 76-7.

[186] For a full transcription of this article in this paper see *supra* note 11.

[187] *See* "TOCA Penal Artículo 43/11," *supra* note 9, at 22; Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended* February 19, 2005, art. 14, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.). ("…In criminal trials it is forbidden, either through analogical reasoning or even through majority of reason, to determine a penalty which is not established by a statute that is exactly applicable to the respective felony…") (Author's translation.)

[188] *See* "TOCA Penal Artículo 43/11," *supra* note 9, at 23-4; BOHLANDER, *supra* note 12, at 18-27.

of two local police officers who had been arrested while apparently reporting on military activities to unidentified members of organized crime. The policemen had allegedly used their cell phones to inform others of the exact position of a naval convoy in direct violation of an internal police directive that prohibited the use of non-official communications equipment while on duty.[189] As the state criminal code penalized any public servant related to the procurement and administration of justice who "[did] not comply with an order issued and legally notified by his/her superior official, without a lawful reason to do so,"[190] the state prosecutor indicted the suspects and requested that they be tried.[191] On appeal, however, the state judge ruled that such provision gave to the administrative authorities the power to establish a criminal offence which, pursuant to the Mexican Constitution, corresponded solely to the legislature.[192] Since the unconstitutionality of the article implied that it should not be applied to this specific case, the appellate judge held that the two defendants could not be further prosecuted and ordered their immediate release.[193]

Had it been delivered within a coherent diffused system of constitutional review, *Nuevo León* could have represented the paragon of the Rule-of-law. Regardless of its conclusions,[194] this case would have evidenced a legal system in which constitutional law prevailed over all other jurisdictions; where basic rights were enforced despite statutes that may encroach upon them.[195] In Mexico, however —already crammed with forced distinctions about constitutional scrutiny— the case revealed the importance of mechanisms to ensure the consistency of constitutional interpretation; specifically with respect to the enforcement of fundamental rights. To be precise, *Nuevo León* involved an undeniably constitutional question that was decided "diffusely" by the highest criminal court of a state. For this reason, the case should have been able to be further reviewed by the final arbiter of the constitution (*i.e.*, by the Mexican Supreme Court).[196] If the final arbiter's interpretation would have been in accord with that of the state court —or if it would have decided not to admit the case for review— the corresponding verdict should have become a precedent binding for every other court within that state.[197] Instead, within the mixed

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[189] *See id.* at 3-5.

[190] Código Penal para el Estado de Nuevo León [Nuevo León St. Crim. Code.], *as amended*, Art. 224, Periódico Oficial del Estado de Nuevo León [Nuevo Léon Official Journal], 29 de Enero de 1997, V (Mex.) (author's translation).

[191] *See* "TOCA Penal Artículo 43/11," *supra* note 9, at 8.

[192] *See id.* at 24.

[193] *See id.* at 29-30.

[194] As mentioned above, these are still being debated and are more a task for criminal law scholars. *See* Roldán Xopa, *supra* note 6.

[195] *Cf.* DWORKIN, *supra* note 23, at 27.

[196] *Cf., e.g.*, 28 U.S.C. § 1257 (2006).

[197] *Cf.* JACKSON & TUSHNET, *supra* note 33, at 458.

system introduced by *Expediente Varios 912/2010*,[198] the verdict in *Nuevo León* exemplified both unequal treatment before the law and impunity. First, the case showed that there were no adequate mechanisms to provide for all other individuals convicted or accused pursuant to an article held unconstitutional to be released from prison.[199] If the article was indeed contrary to the Constitution, such a general measure would have not only been fair from an equality point of view. It would have also reinforced the supreme character of the constitutional guidelines in the Mexican legal system.[200] On the other hand, *Nuevo León showed* that the novel hybrid system did not allow for a hypothetically "flawed" invalidation to be corrected by the constitutional jurisdiction either. Stated differently, a potentially mistaken declaration of unconstitutionality carried out *ex officio* by merely one state judge[201] could not be overturned by the specialized constitutional courts. Since the felony for which the suspects were accused did not have a victim (who might have challenged the verdict) and state prosecutors lack standing within *Amparo* procedures, the constitutional interpretation of *Nuevo León* was not subject to any further review.[202] If *Nuevo León's* interpretation of the Constitution was actually mistaken, then the State was wrongfully affected in its ability to punish crimes effectively.

It was apparently this last impression —at a time when Mexican legal institutions have been seriously threatened by organized crime and substantial financial and human resources have been invested in the so-called "War on Drugs"— that led to immediate legislative action with regard to the new system of constitutional review. On October 26, 2011 a group of senators from the three major political parties in Mexico presented a bill intended "to regulate the exercise of diffused control."[203] The senators are obviously concerned about the possibility of letting guilty offenders get away rather than the prospect of individuals being imprisoned pursuant to an article held unconstitutional by a court of law. Their intention is that whenever a lower court deems a law unconstitutional or "unconventional" —and therefore refuses to apply it to the controversy at hand— the decision against the validity of such law can be further reviewed by a federal Three-Judge Panel Circuit Court. The proposed bill specifically proposes a mechanism that permits the federal Attorney General (*Procurador General de la República*) to challenge —at

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[198] *See Expediente Varios 912/2010, supra* note 1, at 70.

[199] Whereas those affected could have probably filed a writ of *Amparo*, this mechanism —as it has been explained with some detail above— falls within the exclusive jurisdiction of federal judges who might or might not share the state court's interpretation.

[200] *Cf.* Hoffmann-Riem, *supra* note 22, at 179.

[201] *See* "TOCA Penal Artículo 43/11," *supra* note 9, at 20.

[202] Still, if there would have been a victim, such *Amparo* would have probably been dismissed on the grounds of Article 10 of the Amparo Law. As mentioned before, this rule bans the victims of a crime to file *Amparo* when the challenged decision does not relate directly to the reparation of the damage. *See* the explanation given at *supra* note 184 of this paper.

[203] *See Iniciativa de Ley de Control Difuso, supra* note 16, at 111 (author's translation).

his or her discretion— any decision in which a lower court carries out diffused constitutional review.[204] Since ordinary judgments do not take formal effect until the *Colegiado* confirms the invalidity of the general norm —or the federal Attorney General refuses to challenge the verdict[205]— the final decision will always depend on a federal body. This proposal is currently being discussed in Senate committees. Since it receives support from the nation's three major parties, the bill will probably be approved and become law within this legislative period. Clearly, this proposed "regulation on diffused constitutional review" will in effect open the gate to federal review of all judgments[206] that could not have been formerly challenged before the federal judiciary.

If one of the reasons for integrating diffused constitutional review into the Mexican system —and what led to its overwhelming approval by legal scholars— was the decentralization of Mexican justice,[207] then the target was clearly missed. Indeed, the Supreme Court's attempt to decentralize constitutional interpretation among state judiciaries will result, ironically, in even more dependency on the federal judiciary. In other words, if nearly every lower court ruling could be challenged through the writ of *Amparo*; and those few cases that could not be challenged before (*e.g.*, *Nuevo León*) will now inevitably wind up before a federal body; then the integration of diffused review into the Mexican system would represent a strengthening of judicial centralization. If one adds to this the fact that the latest constitutional reforms on *Amparo* do not modify in any way the dominating role of this writ in the Mexican system, then one thing becomes evident: The integration of diffused review in Mexico contributed to make the intervention of federal *Colegiados* more of a rule than an exception. It is clear that even after the "Constitutional Reform on Human Rights" the trend in Mexico is still to rely increasingly on constitutional jurisdiction for tasks that in both the American and continental European models correspond primarily to lower courts. Putting aside the fact that the use of constitutional jurisdiction as a "subsidiary super jurisdiction of appeals" for fundamental rights' violations is doomed to failure right from the start,[208] then an additional distinction regarding constitutional interpretation further complicates the Mexican system's capacity to provide legal predictability.[209] The constitutional interpretation carried out by a Three-Judge Panel

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[204] *See id.* at 112 (Art. 5 of the bill).

[205] *See id*. (Art. 6 of the bill).

[206] These judgments are in any case a minority given the all-inclusive nature of *Amparo directo. See* Cossío, *supra* note 27, at 179.

[207] *E.g.,* Cossío, *supra* note 8, at A18*;* Fix-Zamudio, *supra* note 162, at 471.

[208] *Cf.* Kenntner, *supra* note 50, at 786.

[209] So far this work has referred to the different treatment to constitutional control of general norms when the Supreme Court solves an *Amparo* by a qualified majority of eight votes; when the same court solves an *Amparo* by just a simple majority; when it solves a mechanism of abstract control of norms, and when it solves an *Amparo* related to tax law. *See supra* Section III.2.

Circuit Court may only become *Jurisprudencia* in case of unanimous ruling.[210] This prevents the constitutional interpretation decided by lower courts from spreading to the rest of the legal system: as long as only a simple majority within the Colegiado (*i.e.*, two judges) affirms the lower court's decision, this interpretation will not become binding upon the courts of the circuit.[211]

In sum, the integration of diffused constitutional review into the "*Amparo*-centered" Mexican legal system creates even more fragmentation and uncertainty. The system still fosters the creation of multiple regimes under the same Constitution: There will be, on the one hand, unconstitutional laws still applying to the many who cannot afford to bring a legal suit; and there will be, on the other hand, perfectly constitutional laws not applying to the few who manage to convince a judge of their invalidity. For that same reason, the system can neither wholly protect fundamental rights nor facilitate the rule of constitutional law. Whereas predictability serves as the basis of any legal system congruent with the Rule-of-law,[212] Mexican constitutional review does not seem to be moving in that direction either. Though impossible to analyze in this work, specific reform solutions are needed to make of the Mexican system a coherent one. The ideas just presented give a good basis to think about some of the measures that law makers should be considering. These might include the modification of *Amparo* procedures to turn the writ exclusively into a mechanism for "arbitrariness control" like other more consolidated systems do. The measures could also include the establishment of discretional rejection powers in *Amparo directo* when filed against judgments of the supreme courts of the states. This would reduce the caseload of federal courts while empowering local judiciaries. There are also a few ideas regarding the consistency in the constitutional interpretation that should be considered. For instance, to establish the same majority requirement to all the Supreme Court judgments —regardless of the procedure in which a judicial decision is taken— could be a step forward against artificial differentiations in constitutional review of statutes. Both the inclusion of unconstitutional tax legislation as subject to the Supreme Court's *erga omnes* or universal decisions and the recognition of constitutional interpretation as binding (*i.e.* the establishment of *Jurisprudencia*) as of the first judgment are also steps in that direction. If "diffused" constitutional review is eventually confirmed by the federal Congress, the so-called *Amparo "contra leyes"* (against statutes) should be

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[210] *See* Ley de Amparo [L.A.] [Amparo Law], as *amended*, art. 193, Diario Oficial de la Federación [D.O.], 24 de Junio de 2011 (Mex.); *Dictamen de Reforma a Ley de Amparo*, *supra* note 141, at 365 (Art. 224 of the new bill).

[211] Even though there is a procedure to denounce two contradictory interpretations called *contradicción de tesis*, the decision that solves the contradiction cannot have effects within the specific controversies that generated them. *See* Ley de Amparo [L.A.] [Amparo Law] *as amended,* art. 197, Diario Oficial de la Federación [D.O.], 24 de Junio de 2011 (Mex.); *Dictamen de Reforma a Ley de Amparo, supra* note 141, at 366 (art. 226, paragraph 3, of the new bill).

[212] *See, e.g.,* Raz, *supra* note 23, at 213-4.

eliminated and the state's highest court's decisions regarding the constitutionality of a federal or local statute may only be challenged by individuals before the Supreme Court. In sum, any analysis of these and other proposals should be realized keeping in mind always that rights conferred by a constitution are aimed for everyone and not just a few. If the constitutional rights of individuals cannot be judicially enforced, then these are not really "rights". Similarly, if rights are not universal, then they should not be called "fundamental".

V. Conclusions

Regardless of the chosen model of constitutional review, the bulk of judicial constitutional scrutiny concerning fundamental rights should be carried out by lower courts empowered for such purpose within ordinary adjudication procedures. Correspondingly, the procedural rules should guarantee that the interpretation of the few leading cases that are reviewed by the constitutional jurisdiction impact the rest of the legal system. For predictability sakes it is necessary to be aware of the different consistency rules surrounding constitutional review of statutes in the American and the continental European models. To focus exclusively on this aspect, however, could be misleading when conceptualizing the enforcement of fundamental rights. Once these are taken into consideration, it becomes clear that constitutional scrutiny may not be either wholly monopolized by a specialized constitutional tribunal nor channeled through ordinary adjudicatory procedures only. The distribution of fundamental rights' issues between ordinary and constitutional jurisdiction in both models is therefore a functional one. It is based rather on the role that each kind of court plays —in view of its specific operational capabilities and status in the constitutional order— in reinforcing the validity of the Constitution. Stated differently, constitutional scrutiny concerning fundamental rights is in the first place a task for lower courts empowered for such purpose within ordinary adjudicatory procedures. Depending on the model of constitutional review, this lower court empowerment is implemented either by granting courts a "referral" right or by conferring them the power to "disapply" laws directly. The specialized constitutional procedures, on the other hand, serve rather an exemplary function given the authority conferred to the decisions of a constitutional court. The interpretation decided by the constitutional jurisdiction has general validity either through "force of statute" effects in the judgment or through the doctrine of *stare decisis*. Even though constitutional jurisdiction deals with individual cases on their merits, which could lead to the subsequent overruling of ordinary judgments, constitutional review of judgments is not considered a subsidiary revision or an appeal. Its main purpose is not to correct the mistakes of a lower court in the application of ordinary laws. First, the mere challenge of an ordinary judgment by an individual is never sufficient to compel the constitutional tribunals to carry out a review.

Second, if the case is ultimately admitted for revision, the review process is subject to strict deference rules towards the ordinary courts. This means that such analysis is usually limited to a "comprehensibility" review.

The system established in Mexico during the second half of the 19th century had at least two fundamental misconceptions of the American system that would mark the subsequent evolution of the Mexican rules of constitutional scrutiny. This misunderstanding fostered, from the very beginning, an excessive dependency on the federal judiciary for the enforcement of fundamental rights. It also led to the fragmentation of the constitutional order. It is undeniable that in the United States the federal courts at that time had habeas corpus jurisdiction. This jurisdiction, however, was so restricted that actually almost all of the habeas corpus litigation took place before the state judiciaries. In Mexico the jurisdiction on *Amparo* was given exclusively to courts within the federal judiciary and, conversely, state courts were implicitly banned from any serious involvement in constitutional review. With this choice the Mexican framers overlooked completely that —at least regarding the protection of constitutional rights— the much admired American system relied heavily (and still does) on state judges. What is more, the mechanisms through which the American model attained consistency in constitutional interpretation throughout the different courts of the land went equally unnoticed by the Mexican framers of that time. Fixated on the "advantages" that the *inter partes* effects in American constitutional decisions could bring vis-à-vis "Separation of Powers," the Mexican deliberations disregarded the rules of binding precedent that served as a basis for common law. The subsequent establishment of an *inter partes* procedure like the writ of *Amparo* as practically the only mechanism of constitutional review —deliberately excluding other procedures that could have made up for the lack of *stare decisis* doctrine in Mexico— brought therefore fragmentation to the Mexican legal order. It also institutionalized at the outset a system that fostered unequal treatment under the same constitution. Whereas the multiple conditions set to the *Jurisprudencia* limited its capacity to compensate for this fragmentation, the whole system fostered the dependence on the *Amparo* procedure. This caused an inconvenient overreliance on the federal judiciary for the enforcement of fundamental rights.

The so-called transformation of the Mexican Supreme Court into an "authentic constitutional court" during the last years of the 20th century did not represent the adoption of the continental European model of constitutional review but rather the selective incorporation of a few of its mechanisms to the existing judicial structures. While these changes boosted even further the number of federal courts and the Mexican system's dependency on the Amparo procedure for fundamental rights' enforcement, they also generated artificial differentiations in regards to the constitutional interpretation of statutes which gave way to an "exception regime". This change of direction in the Mexican system towards a specialized constitutional court represented, on one hand, the transfer of most of the Supreme Court's *Amparo* jurisdic-

tion to federal Three-Judge Panel Circuit Courts and, on the other, the incorporation of a few mechanisms typical of continental European systems. Lower Mexican courts, however, were not vested with a referral mechanism to question the constitutional validity of a statute within ordinary procedures, nor were they empowered to carry out the disapplication of general norms held unconstitutional by the federal judiciary's *Jurisprudencia*. Similarly, these amendments did not include any real deference rule for the *Amparo* judges as to the interpretation of ordinary law carried out by non-federal courts through ordinary adjudication. Not surprisingly, during the 15 years following the introduction of these arrangements the already significant number of Three-Judge Panel Circuit Courts increased more than twofold. Even though the Supreme Court was finally empowered to declare the unconstitutionality of statutes with binding effects to everyone (*i.e.*, with effects *erga omnes*), majority requirements and procedural exceptions created a somewhat artificial distinction between the constitutional review of legislation. Aside from the evident problem that this poses for legal predictability, it denotes a misrepresentation of the European model as well as the guiding function that a specialized constitutional jurisdiction normally plays in the enforcement of fundamental rights. The exclusion of unconstitutional statutes related to tax law from this general invalidation possibility —established within the latest reforms to the writ of *Amparo*— just confirms this Mexican trend of exceptions.

Aside from failing to decentralize the judicial system, the highly-praised integration of diffused constitutional review into the Mexican system resulted in a confusing arrangement that threatens legal predictability and the foundation of Rule-of-law. While this measure brings even more exceptions into a scheme that already lacked constitutional review consistency rules, the dominating nature of the current Amparo rules render this so-called empowerment of lower courts merely an illusion and useless in reinforcing constitutional law. No matter how pointless one might have considered the traditional exclusion of Mexican lower courts from constitutional review, it was highly questionable for a constitutional court to have declared *on its own initiative* the model of constitutional scrutiny that a country should follow. Even if one accepts that the Supreme Court could have such ability outside of a strictly adjudication procedure (*i.e.*, outside of a legal controversy), neither the longed-for "Constitutional Reform on Human Rights" nor the arguments of the Inter-American Court of Human Rights on *Radilla* supports the diffused model conclusion. Contrary to what is sustained by the Supreme Court's majority in the resolution on *Expediente Varios 912/2010*, the constitutional reform —for better or for worse— actually reinforced the Mexican system's reliance on specialized constitutional mechanisms. Similarly, it is highly debatable that the international judgment could generate specific obligations outside of its operative paragraphs and, furthermore, that the actions to undertake should be responsibility of the Supreme Court. Even supposing this could be the case, *Radilla* did not consider the Mexican system of constitutional review—

concentrated through specialized mechanisms before the federal judiciary—per se as a violation to any of the applicable conventions. On the other hand, the "judicial" incorporation of diffused review opened the gate for any ordinary court —federal or state, judge-panel or unitary— to invalidate unconstitutional statutes. The existing rules of constitutional scrutiny, however, did not give the possibility of such interpretation to spread to the rest of the legal system. The rules do not provide for "correct" constitutional interpretation decided by lower courts to become binding precedent directly. Neither they provide for "incorrect" constitutional interpretation to be overturned by the constitutional jurisdiction). While this situation might be partially corrected if the bill recently presented by senators in October 2011 is finally approved, this will happen only at the expense of even greater dependence on the federal judiciary. The system, however, will still be an overly complex arrangement where constitutional interpretation can hardly impact the legal order as a whole. For this reason, Mexico will still have a system of constitutional review that fosters unequal treatment under the same Constitution.

Finally, fundamental rights are an essential element of the Rule-of-law insofar they allow predictability within the legal realm. A legal system whose procedural rules cannot provide individuals with the certainty that the State will enforce his or her constitutional prerogatives cannot expect the law to successfully guide conduct. For this reason the enforcement of fundamental rights must be guaranteed in spite of a careless legislative, a negligent administration, an arbitrary trial judge, or a combination of all of the above.[213] Although a coherent system of constitutional review cannot guarantee that the law will be able to guide people's conduct, an incoherent one certainly guarantees that it will not. A mix of constitutional review procedures based on elements from different legal traditions is not necessarily wrong (*e.g.*, the continental European model has more American influence than usually acknowledged).[214] What is clearly flawed is the belief that constitutional rules in favor of individuals should serve different purposes in different traditions. In other words, it is a mistake to act as if the fundamental rights conferred by a Constitution were for just a few and not universal. If a constitutional rule in benefit of an individual cannot be judicially enforced, then it should not be called a "right". Similarly, if this "right" is not applicable for everyone, then it should not be called "fundamental". At a time in which Mexican legal institutions are being severely challenged by organized crime and when the capacity of the Mexican State to enforce fundamental rights —both of victims and perpetrators— has been questioned, the call for a coherent system of constitutional review is more necessary than ever.

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[213] *See* Dworkin, *supra* note 23, at 27.

[214] *See* Marcel Kau, United States Supreme Court und Bundesverfassungsgericht 1-2 (Heidelberg, Springer-Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht, 2007).

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PUNITIVE DAMAGES AND THEIR ALTERNATIVES IN MEXICAN ENVIRONMENTAL LAW

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Abstract. *This article reviews the general bases of class actions in Mexico. It also examines national legislators' decision not to include punitive damages in the current Mexican law, and places special emphasis on the global need for effective legal instruments to prevent and redress ecological disasters. Finally, this article proposes what could be the elementary basis for a legal alternative to overcome the lack of punitive damages in terms of environmental law.*

Key Words: *Collective actions, mass torts, punitive damages, environmental law, tort law, illegitimate enrichment.*

Resumen. *Este artículo analiza las bases generales de las acciones colectivas en México y en Estados Unidos. Estudia, asimismo, la decisión del legislador nacional de no incorporar los daños punitivos dentro del actual marco jurídico mexicano, y realiza un especial énfasis en la necesidad mundial de instrumentos legales eficaces para impedir desastres ecológicos. Finalmente, propone lo que podrían ser las bases elementales para encontrar una alternativa jurídica para superar la falta de dicha figura jurídica en materia de daños ambientales.*

Palabras clave: *Acciones colectivas, daños y perjuicios colectivos, derecho civil y ambiental mexicano, enriquecimiento ilícito.*

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I. Introduction

In the U.S. legal system, *compensatory* damages are a financial award in civil litigation, aimed at redressing the harm done to a person or private property. These "are intended to represent the closest possible financial equivalent of the loss or harm suffered by the plaintiff, to make the plaintiff whole again, to restore the plaintiff to the position the plaintiff was in before the tort occurred."[1] This type of awards is the general rule in tort litigation, as in most cases these are sufficient to compensate the plaintiff for the damage caused by the responsible party.

Originally developed by British Common Law, vindictive, exemplary or *punitive* damages are a kind of financial award not for the purpose of acting as compensation for the plaintiff, but rather to punish the defendant for malicious conduct and whose action is beyond the scope of criminal law. Punitive damages "are an additional sum, over and above the compensation of the plaintiff, awarded in order to punish the defendant, to make an example of the defendant, and to deter the defendant and others from committing similar torts."[2]

As Judge Richard Posner asserts, punitive damages are a kind of civil fine that embodies the "community's abhorrence at the defendant's act."[3] Hence, punitive damages are used in civil litigation when the act is exceptionally reprehensible and redress is difficult to quantify using traditional tangible standards of compensatory damages. Posner and William M. Landes argue that punitive damages are useful when there is a lack of market information that could be used to award an objective amount.[4] Posner proves his point by affirming that "If you spit upon another person in anger, you inflict a real injury but one exceedingly difficult to quantify."[5] Likewise, damages caused to

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[1] John W. Wade, Victor E. Schwartz, Kathryn Kelly, David F. Partlett, Prosser, Wade and Schwartz's on Torts 508 (The Foundation Press, 9th ed, 1994).

[2] *Id.*

[3] Kemezy v. Peters, 79 F.3d 33 (7th Cir. 1996) (Posner. J).

[4] William M. Landes and Richard Posner, The Economic Structure of Tort Law 161 (Harvard University Press, 1987).

[5] Kemezy v. Peters, 79 F.3d at 4.1.

the environment may be difficult to measure, as these are not guided by commercial parameters. It is easier to measure the damage done after a car crash than it is to measure the pollution in a lake and its consequences on human life. This last scenario is now possible in Mexico, thanks to the newly created collective actions, which allow entitled subjects to sue polluters for damages done to the environment.

With the 2011 collective actions reform in Mexico, one could think it was the proper moment to analyze the viability of this figure in order to redefine exemplary damages in the Mexican system. Nevertheless, the Congress decided not to incorporate punitive damages into Mexico's legal framework or even in matters dealing with environmental law, a branch of law in which having powerful instruments to prevent and redress damages, as well as to deter reckless respondents, are indispensable.

Throughout this essay, punitive damages, mass torts, class or collective actions and ecological law will be analyzed within the Mexican legal structure, and contrasted with U.S. legal framework, without losing sight of the global need for unambiguous instruments to avoid pollution and toxic disasters while reprimanding those responsible for these damages.

II. Punitive Damages, Mass Torts and Environmental Law in the United States

Some modern precedents of punitive damages may be found in *Day v. Woodworth*[6] and in *Jones v. Kelly*,[7] which expressed the implied duty of not to harm others, and the concomitant legal possibility to penalize malicious acts in civil adjudication. This implied legal protection independent of any printed document was expanded in *Comunale v. Traders*.[8] Other landmark decisions have arisen from the California high court, such as *Crisci v. Security*,[9] *Gruenberg v. Aetna*,[10] *Ins. Co,* and *Richardson v. Employers Liab*,[11] which laid down that even in contractual relations there is an implied covenant of good faith imposed by law. A breach in these cases arises from nonconsensual sources. Hence, when an enterprise acts in bad faith, this act is translated into a tort, a financial obligation intended to reprimand the responsible.

Unlike compensatory damages, punitive damages are an additional sum payable by the respondent. This action seeks to *punish* an improper act and discourage similar attitudes, rather than to *restore* things the way they were be-

[6] *Day v. Woodworth 54,* U.S 363 (1851).

[7] *Jones v. Kelly* (1929) 208 Cal. 215 [280 P. 942]. In this case, the plaintiffs sued their landlord in tort after the landlord had intentionally cut off the water supply to the leased dwelling.

[8] *Comunale v. Traders & General Ins. Co*. (1958) 50 C2d 654.

[9] *Crisci v. Security Ins. Co.* (1967) 66 Cal.2d 425.

[10] *Gruenberg v. Aetna* (1973) 9 C3d 566.

[11] *Richardson v. Employers Liab. Assur. Corp*. (1972) 25 Cal.App.3d 232.

fore the act. Consequently, these torts are aimed at decreasing social inequality between citizens and entities.

The common law doctrine of torts is complemented with the statutory provisions from some states of the Union, like that in the Civil Code of the State of California, section 3281 of which defines the general concept of damages, as well as the duty to repair damages. In addition, section 3294 provides a definition of exemplary damages: "In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, *in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant*."

These damages are treated differently depending on the state and are generally awarded, at least in first instance, by a citizen jury. This characteristic of civil procedure can lead to excessive awards.

One case that contributed to the unfavorable perception of this type of lawsuits was *Liebeck v. McDonald's Restaurants*,[12] a lawsuit regarding third-degree burns caused by an involuntary spill of the fast food chain's coffee on a 79-year-old woman that ended in an out-of-court settlement in favor of the wounded woman for about $600,000 USD. Similar cases may have contributed to the association of punitive damages with frivolous litigation or excessive lawsuits. However, without analyzing the controversy behind punitive damages in strictly commercial relations, we should point out that punitive damages may be required in some cases to satisfy basic elements of justice and prevent malicious actions committed by powerful entities, such as transnational companies.

Damages in the United States may be claimed either individually or by a single mass tort lawsuit signed by a collective through class or collective actions. Mass torts can also be claimed through a joinder of several distinct cases filed by different individuals against the same respondent and caused by the same act, but whose damages must be determined individually. Mass torts usually deal with environmental disasters (such as mass toxic torts or mass disaster torts) or products that have injured several plaintiffs (product liability torts).

One example of a mass torts case is that of *Exxon v. Baker*.[13] In 1989, an Exxon supertanker ran aground on a reef in Alaska, and spilled millions of gallons of crude oil into Prince William Sound. Hence, several civil cases, including the one brought forward by Grant Baker, were consolidated to claim compensatory and punitive damages since the plaintiffs depended on Prince William Sound for their livelihood. In first instance, the jury ruled that Exxon was to pay 5 billion USD in punitive damages. In the appeal, these were reduced to 2.5 billion USD. In the end, the United States Supreme Court (USSC) revoked the second instance ruling and determined that in maritime tort cases, the amount awarded for punitive damages should not be higher

[12] *Liebeck v. McDonald's Restaurants, P.T.S., Inc.*, No. D-202 CV-93-02419, (1995) WL 360309.

[13] *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

than that for compensatory damages. In view of this 1:1 ratio between punitive and compensatory, the latter were reduced to $505.7 million USD.

One instance of the necessity of punitive damages is the 1984 Bhopal disaster in India. In consequence of poor planning, negligence and misinformation, a toxic gas leak at a Union Carbide plant caused the death of around 20,000 people and exposed almost 200,000 people to a fatal gas.[14]

Immediately after the tragedy, civil legal actions in the United States were filed against Union Carbide India Limited (UCIL) and Union Carbide. However, under *the forum non conveniens doctrine*, the respondents argued that the Indian Supreme Court was the proper forum in which the case should be handled. This motion to dismiss was considered appropriate; thus, litigation was transferred to the Government of India, whose domestic law system did not award, at least at that time, punitive damages.[15] The legal quarrel began with a $3 billion USD claim, an amount that given the human and environmental costs of the calamity seemed reasonable. Nevertheless, UCIL rejected all legal responsibility regarding victims' health and reached a settlement with the Government of India for only $470 million USD.[16]

On the one hand, it is not unreasonable to say that the settlement could have represented a more onerous financial obligation if UCIL was liable not only for compensatory, but also punitive damages. The possibility of obtaining punitive was conceivable under U.S. tort law since that 50.9% of UCIL's stock was owned by Union Carbide, a New York City corporation.[17]

On the other hand, the *ratio decidendi* in the U.S. court decision is also logical as most of the evidence was in India and it would, therefore, be much more practical to hold the procedure there.

This dilemma between punitive damages in the United States and procedural difficulties might well have been overcome through the use of exemplary damages in India. Punitive damages are useful legal instruments, which together with the class and collective actions lawsuits, should be employed to seek compensation and punishment for negligent accidents, injuries caused by medicines and toxic damage.[18] If Indian jurisprudence had recognized punitive damages before the trial, the victims could have received a more satisfactory response; although it is likely that UC's litigation strategy would have been different.

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[14] Roli Varma and Daya R. Varma, *The Bhopal disaster of 1984*, 25 Bulletin of Science, Technology & Society 1, 37-45 (2005).

[15] *In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984, MDL No. 626; Misc. No. 21-38 (JFK) ALL CASES 634 F. Supp. 842; (1986).*

[16] John Eliot, *Bhopal's continuing disaster*, FT.com, Dec. 2, 2009. Available at http://www.ft.com/cms/s/0/f73a81ec-df0e-11de-be8e-00144feab49a.html#axzz2JsWF0vrS (last visited Feb. 4 2013).

[17] *Supra* note 15.

[18] John G. Fleming, *Mass Torts*, 42 (3) The American Journal of Comparative Law 507, 508 (Summer, 1994).

In addition to tort law, administrative law implemented by state agencies and citizen lawsuits play an important role in the enforcement of U.S. environmental law. The Environmental Protection Agency (EPA) is a federal state agency whose main functions are to regulate standards of environmental law, monitor compliance with environmental laws and regulations and sanction infringements of said laws.

Administrative law enforcement is complemented by "citizen suits", which proceed once the alleged violation has been notified to state administrators.[19] If said infringement continues, any citizen is entitled to initiating civil actions at district courts against any person who violates environmental law standards set forth in the Clean Water Act or the Endangered Species Acts, among other statutory provisions. It is not necessary for the suit to be filed by a group of persons; even a single individual is entitled to bring environmental civil action against any individual or entity that ignores environmental regulations. It is even possible to sue the EPA Administrator for omissions or passive acts. The function of the EPA is similar that performed by certain Mexican agencies, like SEMARNAT (Ministry of Environment and Natural Resources) and PROFEPA (Federal Bureau of Environmental Protection). To a certain extent, U.S. citizen suits have some points in common with Mexican legal institutions as the *denuncia popular* (collective claim available at administrative environmental law), and with the now available diffuse action (accessible through federal litigation).

III. Class Action Reform in Mexico

On August 30, 2011, pursuant to the constitutional amendment of Article 17 of the Federal Constitution of Mexico, the Mexican President published the statutory reform of substantive and procedural law which now regulates collective actions. The legislative act consisted of the formal amendment of seven statutes, including the Federal Civil Code (FCC) and the Federal Code of Civil Procedure (FCCP). These legislative measures were expressively aimed at limiting the use of representative actions only for matters of consumer relations or environmental law.[20] The federal amendment changed over 50 articles in federal civil procedural rules, and six other federal acts, including the organic law of federal judicial system, which now authorizes Civil District Courts to hear collective actions.

The Mexican Federal Congress (MFC) classified class lawsuits into three categories: diffuse actions, collective actions in the strict sense, and individual homogeneous actions.

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[19] 505 (b) 1 (A) of the Clean Water Act 86 Stat. 816 (1972) provides a deadline of 60 days, for the perpetrator to take actions to redress the damage, and only then, the citizen suit may be filed.

[20] *See* Código Federal de Procedimientos Civiles [C.F.P.C.] [Federal Civil Procedure Code], *as amended*, art. 578, Diario Oficial de la Federación [D.O], 30 de Agosto de 2011 (Mex.).

The first type of action is designed for collective rights with an *undetermined* entitled party. Collective action (in the strict sense) is the appropriate action to protect the aims of a *particular* group of people. Individual homogeneous action is used for contractual *individual* interests connected by common circumstances that have been affected by a third party. All collective actions (in broad sense) are only available for citizens when 30 people or more sign the lawsuit.

The MFC emulated some elements of Rule 23 of the U.S. Federal Rules of Civil Procedure,[21] such as the need of class action certification, the burden for the plaintiffs to prove the appropriateness of the collective action instead of individual litigation, and the notification to potential class members.

Perhaps, it would be more accurate to talk about the Mexican *collective*, rather than class actions, since legislators followed the "opt-in" model of U.S. collective actions, rather than the "opt-out" of class actions. This is the model provided by U.S. Fair Labor Standards Act (FLSA). The opt-in procedure means that whenever a collective action is filed, potential plaintiffs must be notified, and it is their decision whether to give their consent to adhere to the suit and its legal consequences.[22] Conversely, in class actions following the opt-out model, the general rule is that all potential members of the class are included in the process, thus the judgment would bind all members unless they express their intention to opt-out.[23]

The "opt-in" model was implemented by MFC, and is now expressly provided in Article 594 of the FCCP. Potential members of the collective have up to 18 months after the judgment is issued, or the out-of-court settlement is reached, to adhere to the lawsuit and be bound by its outcome.

Other new developments of the reform are the admission of *amicus curiae* briefs, the courts' ability to issue positive preliminary injunctions or interim measures,[24] the reinterpretation of standing requirement which allows civil associations to intervene in collective actions, the presence of experts at the judges' discretion and most importantly, the creation of a national judiciary fund to handle the financial resources derived from diffuse actions in cases of economic fulfillment of the judgments.

According to Article 585 of the FCCP, any group of thirty persons, the Attorney General, non-profit associations whose purpose is to protect the environment or to claim consumer rights violations and four other specialized state agencies have the standing required to sue collective actions at federal civil courts. The amendment is so relevant that a completely new part was added to the FCCP.

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[21] Fed, R. Civ. P. Rule 23 dictates the requirements for federal class action lawsuits.

[22] Daniel C. Lopez, *Collective confusion: FLSA collective actions, Rule 23 class actions, and the Rules Enabling Act*, 61 Hastings Law Journal 1, 277 (2009).

[23] *Id*. at 278, 284.

[24] As opposed to the traditional negative injunctions, in which the courts were only allowed to stop parties from acting, but was not empowered to force parties or authorities to do positive actions.

Damages that harm the environment in general in such a way that it is impossible to determine a specific number of aggrieved individuals is claimed by filing a diffuse class action, which is now defined by Article 581 I of the FCCP as follows:

> I. Diffuse action: Is one of an *indivisible nature* that is exercised to protect the rights and *diffuse interests of an undetermined collective*, for the purpose of legally suing the respondent to redress the damage caused to the collective, consisting of the restoration of things to the state as they were before the harm done, or otherwise claim alternative compliance with the judgment according to the impact had on the rights or interests of the collective, *without the need of any contractual link whatsoever between that collective and the respondent*.

Sections II and III of Article 581 define the two other types of collective actions thus:

> II. *Collective action in the strict sense*: is one of an indivisible nature that is exercised to protect the collective rights and interests, *held by a specific collective* or determinable based on common circumstances, which aims to legally sue the respondent, to repair the damage caused, consisting of carrying out one or more actions or refraining from doing so, as well as covering damages to individual members of the group derived from *a common legal relationship mandated by law between the collective and the respondent*.
>
> III. Homogeneous individual action: is one of a *divisible nature*, that is exercised to safeguard individual rights and interests of harm with a collective impact, whose holders are individuals that are grouped based on common circumstances, which aims to legally sue a third party *for the mandatory compliance of a contract or its termination with the consequences and effects under applicable law*.[25]

Environmental collective actions can be filed either by a group of thirty individuals, non-lucrative associations, or by public agencies, such as the Federal Bureau of Environmental Protection (PROFEPA), a federal agency under the Ministry of Environment and Natural Resources (SEMARNAT). Together, both agencies perform similar functions to those executed by the U.S. EPA, although the U.S. agency does not have legal standing for environmental class actions, but rather protects the environment through administrative procedures.

Unlike the more in-depth modifications made to the Federal Code of Civil Procedure, environmental statutes were not equally transformed. Only two reforms were made to Article 202 of General Law of Ecological Balance and Environmental Protection regarding PROFEPA's powers to initiate lawsuits. One of said modifications consisted of adding the possibility of collective

[25] Código Federal de Procedimientos Civiles [C.F.P.C.] [Federal Civil Procedure Code], *as amended*, Art. 581, Diario Oficial de la Federación [D.O.], August 30, 2011 (Mex.). All translations are made by the author unless otherwise indicated.

actions claimed by either the PROFEPA or any other subject with legal standing by the addition of a second paragraph. The addition of a new third paragraph of said article now places environmental collective actions exclusively under federal jurisdiction, even if the violations apparently arise from state environmental law.

These reforms have created the possibility for a state agency, which usually acts as an authority in administrative law, to be transformed into an entity that represents and claims civil damages caused to the environment. Lawsuits of this nature would take the place of or have equal rank as private law proceedings and be decided by a civil district judge, who will also analyze administrative infractions, *i.e.* public environmental law based on legal ties between authorities and citizens in a vertical legal relationship.

This public-private transformation of collective action lawsuits already has an interesting precedent ruled by the First Chamber of the Mexican Supreme Court (SCJN). In *PROFECO v. CTU*,[26] the Chamber analyzed two *Amparos* derived from a collective action filed by the Federal Agency of Consumer Rights (PROFECO) against a construction company whose actions caused harm to at least 82 consumers, who complained to the PROFECO office in the State of Chihuahua. In this homogenous individual action case, the SCJN then recognized that the PROFECO was the only entity empowered to initiate collective actions regarding consumer rights violations.

In *Amparo* 14/2009, the Chamber highlighted the elements of this collective action procedure which included that: (a) mass torts, regardless of the legal relationship from which they arose, are a civil law institution; (b) the PROFECO's has the authority to claim consumer right violations in detriment of a collective; (c) it is necessary to demonstrate harmful conduct, without having to identify all of those affected; and (d) the objective of a judgment is to declare that collective harm has been caused by the defendant and that this tort must be redressed.[27]

Furthermore, in *Amparo* 15/2009, the Chamber recognized the need to guarantee collective rights and that the effects of the judgment must be *ultra partes*, *i.e.* the sentence must protect all of those affected, and not only those who complained before the PROFECO. This was established to achieve a comprehensive restitution of the violated collective right.[28] Nevertheless, this judicial interpretation has now been overcome by the "opt-in" model provided for in statutory provisions.

Hence, in collective action lawsuits filed by state agencies or other plaintiffs, the agency becomes a sort of Ombudsman while the federal judiciary acquires full jurisdiction over consumer rights and now over environmental

[26] Amparo directo 14/2009. Primera Sala de la Suprema Corte de Justicia de la Nación [First Chamber of Mexican Supreme Court] (2010) (Mex.).

[27] *Id.* at 86-99.

[28] Amparo directo 15/2009. Primera Sala de la Suprema Corte de Justicia de la Nación [First Chamber of the Mexican Supreme Court] 36 (2010) (Mex.).

law. Thus, judges are empowered to issue collective judgments to protect collective and diffuse rights.

IV. The Omission of Punitive Damages

The collective action reform was a historic opportunity to revitalize civil litigation according to international commercial relations and inherent Mexican needs. Nonetheless, the reform on its own may not be enough to satisfy national needs, especially that of social inequality between the parties in litigation.

Some of the measures taken by the MFC may be an obstacle for citizens to attain effective judicial protection. These include the difficulty of issuing judgments in diffuse actions;[29] the loophole regarding alternative compliance with the ruling, the ratio or way to measure damages in environmental actions; and especially, the exclusion of punitive damages.

An important position regarding collective actions and exemplary damages in Mexico is that of Jorge Gaxiola Moralia, former dean of the "*Escuela Libre de Derecho*" Law School in Mexico City. Gaxiola's opinions on punitive damages were expressed on April 7, 2010, in a paper presented at the Collective Actions Forum on State Policy Reforms from an Environmental Perspective at the Chamber of Deputies. He was concerned about the negative influence of class actions on the market, as enterprises transferred the cost of said damages to the consumer.[30] He expressed his fears of citizens' abuse of representative actions lawsuits in detriment of enterprises, such as claims for excessive compensations; the instability the threat of class actions can have on shareholders, owners and employees; unfair out-of-court settlements, and so on. Finally, he stated that "there should be no punitive damages."[31] According to Gaxiola, these damages are measured not by the harm done, but by the size of the enterprise. Thus, plaintiffs may use punitive damages to unfairly threaten companies. Moreover, he believed that exemplary damages are only measured according to the size or economic prosperity of the responsible party, and in extreme cases, relatively minor damage could mean the bankruptcy of an innocent enterprise.[32]

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[29] The new wording of Article 604 of Mexican Federal Code of Civil Procedure states that the general rule will be to restore things to the way they were before the convicted respondent committed the actions, and this is not possible, redress would take the form of an alternate form of compliance with the ruling based on the harm caused to the collective.

[30] Jorge Axiola Moraila, Cámara de Diputados, Foro de Acciones Colectivas en la Reforma Política del Estado desde la perspectiva ambiental 41-50 (April 7, 2010) (trascript available in http://archivos.diputados.gob.mx/comisionesLXI/medioambiente/foros/04.pdf) (last visited Feb. 4 2013).

[31] *Id.* at 49.

[32] *Id.* at 46.

This portrayal of punitive damages may be true in some cases, but it is not entirely accurate since there are numerous restrictions both for claiming punitive damages and for measuring these. Thus, Section 3294 of the California Civil Code requires determined *malicious* acts to have "clear and convincing" proof and that "no claim for exemplary damages shall state an amount or amounts."

Some torts regulations, such as those in the State of Georgia, provide that vindictive damages may be awarded, and call for an "entire want of care which would raise the presumption of conscious indifference to consequences."[33] Furthermore, the cited law orders that 75% of the punitive damages must be paid to the state coffers, making such lawsuits instruments to protect the collective, instead of malicious threats guided by individual greed against blameless companies. Similar models of split of punitive damages between the plaintiff and the state are followed in other nine U.S. states.[34] Other statutes prevent juries from awarding excessive punitive damages by limiting the frequency and setting a maximum permissible amount. Colorado state law, for instance, provides that the amount of punitive damages should not be higher than compensatory damages, and can only be awarded in cases of "fraud, malice, or willful and wanton conduct."[35]

Other aspects of punitive damages worth considering are that they may be necessary when the harm is difficult to measure or when the damage done cannot be appropriately redressed by criminal law. Diffuse actions on environmental issues seem to coincide with these two possibilities since judges may lack objective evidence to award damages that fully compensate a diffuse collective for a harm done to natural resources that are not available on the market. Moreover, administrative and criminal fines are limited by abstract upper limits which may be insufficient to punish the polluter and deter others from committing similar actions. For example, criminal fines for damages to the environment are limited to 3000 days of minimum wage; these are around $180,000 Mexican pesos or $14,000 USD. These fines can be increased up to 4000 days or approximately $240,000 Mexican pesos or $18,000 USD,[36] an amount that may be inadequate to reprimand the defendant in cases of gross negligence or wanton disregard.

Just as collective actions were adapted according to the context of Mexico, vindictive damages could have likewise been transformed into a deterrent

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[33] (O.C.G.A.) § 51-12-5.1 (2002).

[34] Doug McQuiston, *Splitting Punitive Damages With the State An Idea Whose Time Has Come (Again)*, 38 The Colorado Lawyer 105, 109 (2009). The author notes that in addition to Georgia, Alaska, California, Georgia, Illinois, Indiana, Iowa, Missouri, Oregon and Utah currently have some form of "split statute". State assemblies follow this strategy to award punitive damages without turning them into an incentive for frivolous litigation.

[35] Colo.Rev.Stat.Ann § 13-21-102 (1) (a).

[36] *See* Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, arts. 414-423, Diario Oficial de la Federación [D.O.], 14 de Agosto de 1931 (Méx).

for irresponsible entities without affecting the legal certainty and welfare of enterprises and employees. However, legislative reform has not yet addressed this adjustment.

The MFC adapted representative actions by granting exclusive federal jurisdiction and limiting the abuse of lawsuits and frivolous litigation. Even though Mexican Constitution states that all citizens have the obligation to act as members of a jury, both criminal and civil trials are brought directly before a judge, and a jury never issues a verdict. Hence, in Mexico, there is no possibility of juries awarding inflated damages that will later be lowered or declared unconstitutional by higher courts. Additionally, mass torts are regulated restrained by a single civil code, and only federal courts are empowered to handle this kind of action. This sole regulation and jurisdiction implies that there is only one type of case-law regarding mass torts, which will in turn make it more practical and predictable for the parties involved.

If all these circumstances were redefined in the Mexican legal system, and given the need of punishment and prevention of natural disasters and pollution, it would not be for Mexican legal scholars and congressmen to create an institution to function as a civil penalty. This is particularly important in cases of diffuse actions in which plaintiffs can act on behalf of the community and the environment in a subordinated substantive *de facto* relationship between powerful corporations and weak individuals, or even voiceless entities.

The amended Article 625 of the FCCP may still resemble split-recovery statutes like the one enacted in Georgia. Article 625 provides for the creation of a fund made up of the financial awards in diffuse actions to be managed by the federal judiciary. These resources must be used to pay court costs and the fees of plaintiffs' representatives while the rest should be invested in research and the dissemination of collective rights. Hence, a portion of the damages is distributed in favor of the plaintiff to recover the expenses initially assumed and the rest is distributed publicly through the promotion of diffuse actions. Thus, there is no lucrative incentive for plaintiffs that could be used to pressure innocent responsible parties. This would in fact contradict the diffuse nature of the action and the non-profit role of most of the entitled entities. Even then, fines and compensatory damages may be insufficient to punish the defendant and redress mass and diffuse environmental torts.

One alternative would be to reform civil and environmental statutes to allow for an extra fine during the collective action procedure when it is a case of gross negligence or wanton disregard on the part of the defendant and when administrative and criminal fines are not proportional to the damage done. The extra amount could deter similar cases in the future without turning collective actions into speculative litigation and the resources could be managed as part of the judiciary fund. Another option for implementing punitive damages or similar disincentive instruments in the Mexican system would be for the plaintiffs of collective actions to claim an additional amount under the concept of moral damage or illicit enrichment. These possibilities are discussed below.

V. Relevant Legal Framework for Environmental Torts in Mexico

The FCC establishes the obligation of not harming others, as well as different non-contractual theories for one individual to claim damages from by one particular against another. These causes of action refer to objective or subjective liability, as well as moral damage.

According to Article 1913, civil objective liability is caused by objects which are dangerous in themselves, regardless of whether or not there was an element of fault or negligence. Thus, the owner responds to the victim to repair the damage caused by the object. Conversely, Article 1910 is the basis for civil subjective liability, in which the notion of culpability and remissness is essential.

Furthermore, Article 1916 of the cited statute provides independent compensation known as moral damage, which is defined as:

> Moral damage is understood as a harm a person suffers in his or her feelings, affections, beliefs, propriety, honor, reputation, private life, milieu and physical appearance, or how that person is perceived by others. It is presumed that there was moral damage when a person's freedom or psychological integrity is illegitimately harmed or diminished.[37]

Moral damage is more abstract and subjective than the other two kinds of torts. It is also complicated to determine a fair amount that could repair the harm caused. In fact, the fourth paragraph of the mentioned article requires that the compensation "must consider the injured rights, the degree of responsibility, the financial situation of the person responsible and of the victim, as well as other circumstances of the case."

Moral damages have some points in common with punitive damages. Moral damages demand an autonomous compensation regarding the rights of personality, a civil law concept that involves emotional aspects. This intangible aspect makes it very difficult to calculate a specific amount. In fact, both punitive and moral damages take into account the degree of responsibility and the defendant's wealth as parameter to award extra damages for incorporeal torts caused to the plaintiffs.

In addition to tangible damages, moral damages can be claimed in collective actions and therefore have a similar function to punitive damages. Its implementation can be useful to redress intangible damages and to deter similar acts carried out by the responsible party or others.

Regarding diffuse actions, once the defendant is convicted and it is proven that such party cannot redress its action the judge must order an alternative to

[37] Código Federal de Procedimientos Civiles [C.F.P.C.] [Federal Civil Procedure Code], *as amended* 14 de Junio de 2012, art. 1916, Diario Oficial de la Federación [D.O.], 30 de Agosto de 2011 (Mex.).

fulfill the judgment by awarding damages that will be managed by the fund. Once the stage of alternative fulfillment has been completed, it would be interesting to claim the concept of diffuse moral damage. Ultimately, moral damage is found under the category of damages, and in cases of environmental harms, there can be an injury to intangible rights. The important issue would be to prove a causal link between the defendant's actions and the harm caused to the intangible rights of the collective.

As to collective actions in the strict sense and individual homogeneous actions, Article 605 provides that the court ruling may simultaneously order the responsible party to carry out of an action, refrain from doing an action, and pay damages in favor of the collective.

Thus, it would be a matter of court's interpretation to ascertain whether the claim of moral damage is consistent with the collective action reform or if it designed just to protect corporeal rights. If the judiciary opts for a broad interpretation, moral damage may well perform a more or less similar function to that of punitive damages without the need for statutory reform. In cases of diffuse actions, moral damages would be managed by the fund, while in the other two scenarios, these would be awarded to the plaintiffs.

Diffuse actions embody a new kind of procedural relation at civil litigation. Before the collective actions reform, civil adjudication referred to a relationship between two or more concrete legal subjects. This controversy could arise between individuals, corporations or state agencies defending their particular interests. Nowadays, an environmental diffuse action lawsuit is triggered by a group of individuals or a non-profit entity that has *legitimatio ad processum*, acting as the plaintiffs that represent a diffuse collective, an entitled body with *locus standi* or *legitimatio ad causam.* Therefore, it is no longer traditional litigation since the rights of a diffuse collective are being claimed instead of those of specific individuals as normally regulated by civil law.

Besides, determining an amount of damages in environmental diffuse litigation is more complicated than in similar civil cases since the ruling will not only aim at redressing a conventional dispute between individuals, but also between the ecosystem and its polluters. The environmental harm represents a hybrid of civil and administrative law and meeting the individual's and society's demands can be solved through a civil fine.

In view of the peculiarities of environmental damage, the addition of a single article in the Federal Civil Code looks incomplete,[38] a loophole which can be overcome through federal case law.

Another alternative for environmental exemplary damages is the possibility that not only could all the subjects with standing claim compensation through traditional damages, but also that the plaintiffs could sue the responsible parties for illegitimate enrichment. Article 1882 of the FCC dictates "Whoever

[38] There is only one reform in the substantive federal rules: Article 1934 Bis that actually refers to the Federal Code of Civil Procedure.

becomes enriched at the expense of another shall indemnify that person for his or her impoverishment to the extent in which he has been enriched."

Article 1882 implies that if one individual is enriched at the expense of the environment, any illicit revenue must be nullified since it was outside the scope of the Rule of Law, and the collective and the environment are affected by these damages.

The penalty for illicit enrichment is to give, not the obligation to act. Thus might not order an action be aimed to restore the things they were before the act committed. This redress is only achieved through actions and not through monetary fines, which are obligations to give. Once it is proven that it is impossible to redress the damage through actions, the legal remedy is achieved by awarding damages. However, a restrictive interpretation of Articles 604 and 605 may deem illicit enrichment not as a kind of damages, but rather as an independent source of obligations, not claimable in collective actions procedures. Hence, one interpretation could be that illicit enrichment cannot be claimed through collective actions, but only damages.

Another reading can be arisen from Articles 5 and 70 of the FCCP which orders that all the issues surrounding controversies must be discussed at one trial. Thus, plaintiffs at collective actions could argue that illicit enrichment is an issue that must be discussed in the same procedure because it is closely related to the facts of the case since such profits could not have been generated but for the systematic carelessness or indifference of the respondents in detriment of the collective. A contrary interpretation may allow responsible party to keep the revenues even if these were a direct consequence of an illicit action.

Our Constitution (MC) is the Supreme Law of the land. Below it, there statutes, regulations and federal standards issued by administrative agencies like the SEMARNAT. Codified law is supplemented with case law, which is almost monopolized by the federal judiciary since most court decisions are reviewed by federal courts through the constitutional remedy of *Amparo*.

Through the *Amparo*, a vast number of the constitutional duties performed by any act by an authority are subject to review by constitutional courts, provided it is a state agency involved and functioning as such, in a vertical legal relationship. Administrative law is also a branch of the legal system that deals with vertical relationships enforceable by government agencies, but is determined by legal instruments rather than constitutional ones, and only as an exception are administrative acts directly reviewable through the *Amparo*.[39] Conversely, as a general rule, horizontal legal relationships, *i.e.* between particulars, are limited by infra-constitutional sources, such as federal acts and codes.

[39] Some of the exceptions provided by Article 107 of Mexican Constitution are: when there is a direct violation of the Constitution, when the action initiated by an authority lacks of any legal base or when the law on the matter requires higher requirements than an *Amparo* to obtain injunctions.

Article 4, fifth paragraph of MC gives all inhabitants the basic right to a healthy environment, and as of February 8, 2012, this article also recognizes the accountability of all persons who harm the environment. If any state agency violates this right, the corresponding claim would be enforceable through an *Amparo* in federal courts to restore the constitutional damage claimed by the aggrieved. In short, the intervention of an authority is needed to analyze any potential infringement of fundamental rights, a principle of jurisprudence similar to the State Action doctrine.[40]

The concept of justiciability is important for claiming constitutional prerogatives, including social and diffuse rights. The right to effective legal protection is provided in first two paragraphs of Article 17 of MC, which imply that any injury must be redressed once it is proven. Hence, prior to the reform, the only legal entity entitled to set the courts in motion for torts against the environment was the PROFEPA.

In the third paragraph of said Article 17 also forced the MFC to develop mechanisms to redress damages that arise from class actions. However, the legislative measures taken seem inadequate as it is not clear how environmental damages are to be quantified and repaired by federal courts. Additionally, the sixth paragraph of the same article establishes the obligation all legislatures have to ensure the exhaustive execution of judgments. This implies that the right to a healthy environment must be restored by the condemned party pursuant to the rulings on collective actions, and in the case that it is physically impossible to restore the damage done, the federal government must guarantee that the respondent has been fairly punished and that similar disasters do not happen again.

Along the same lines, the sixth paragraph of Article 25 and third paragraph of Article 27 of MC state that the national economy must be guided by environmental conservation. Thus, punitive damages may be used as a foil to stop abuses by companies that enrich themselves at the expense of processes that neglect the environment. Furthermore, sections XVI and XXIX-G of Article 73 empower the MFC to legislate on general health matters and the preservation and restoration of the environment. This last power shared with state and municipal governments and is regulated by the General Law of Ecological Balance and Environmental Protection (GLEBEP).

Until the class actions reform, the environmental law and its enforcement was monopolized by state agencies through either a coercive economic procedure to monitor and inspect potential polluters or an *Amparo* if it was a public act to the detriment of an individual. Hence, the access for citizens or non-profit entities to fight against ecological abuses was limited to filing a complaint before the corresponding authority.

At the present, there is the constitutional responsibility of providing all the legal devices to penalize, restore and prevent future wrongful acts in detri-

[40] *See* Shelley v. Kramer, 334 US 1 (1948) and the Civil Right Cases, 109 US 3 (1883).

ment of the environment. It is a commitment already assumed by the three branches of government: the legislature established the basic guidelines for collective actions, the executive will do its part through the SEMARNAT and the PROFEPA either as administrative agencies or plaintiffs in collective actions, and the judiciary will complete this work in favor of diffuse rights.

The GLEBEP establishes the concurrent obligation of all the branches of government at all levels and of citizens to respect the right to a healthy environment. Article 15 sets the general bases of an environmental policy that must be followed by the Federal Executive. Among other aspects, Section I of the GLEBEP states that ecosystems are public heritage and Section III provides that the protection of the environment is the responsibility of both authorities and individuals. Moreover, Section IV states that:

> Whoever does any work or activities that affect or may affect the environment is required to prevent, minimize or repair the damage caused, and to bear the costs that this involvement entails. Likewise, whoever protects the environment promotes or carries out actions to mitigate and adapt to the effects of climate change makes use of natural resources in a sustainable manner should be encouraged to do so.

Moreover, the law determines that accountability does not only respond to current conditions, but also those that affect the quality of life of future generations; that prevention is the most effective means and that natural resources should be used so as to prevent their depletion and adverse ecological effects.[41]

Article 171 establishes the possible sanctions to environmental infractions in which contaminants may be liable to a fine of fifty thousand days of minimum wages, *i.e.* around three million Mexican pesos, which can be doubled in cases of repeat offenders. These amounts may too low to punish or redress ecological catastrophes the likes of Bhopal or Chernobyl, a situation in Mexico, which may use punitive damages as an extraordinary sanction. At the same time, Article 153 section VIII provides that in cases involving hazardous materials in particular are liable to pay for damages in addition to administrative sanctions.

The above statutory provisions imply that Mexican environmental law pursues at least three different goals: to prevent, to restore and to deter damages to the ecosystem. Thus, a fine or penalization is aimed at sanctioning the defendant and giving an example to society, unlike common damages, which are addressed at repairing the harm done.

Violations of administrative ecological law are already punishable under current state law. State agencies are responsible for enforcing environmental

[41] *See* Ley General de Equilibrio Ecológico y Protección al Ambiente [L.G.E.E.] [Enviroment Protection Law], *as amended*, art. 15, sections V to XII, Diario Oficial de la Federación [D.O.], 28 de Enero de 1988 (Méx.).

law, an act of authority in the field of administrative law which occurs regardless of the harm caused to the collective. The main purpose of administrative fines is to punish and avoid imminent similar harms, but not to repair the damage.

The SEMARNAT is the federal agency whose main functions are to protect natural resources, to develop and implement national environmental policy, as well as to establish environmental quality standards. Within the organization of the SEMARNAT, there is the PROFEPA, an entity which according to the ministry bylaws,[42] is one of its specialized or decentralized GLEBEP agencies whose main functions are to monitor, evaluate and punish violations of environmental law, as well as to initiate legal actions against criminal or administrative law infringements.[43]

Moreover, Article 189 of the GLEBEP establishes a procedure for public complaint, a legal figure through which any individual can file claims against any actual or possible damage to the environment. This can result in originating an administrative procedure against the apparent offender, and can also end in a non-binding recommendation if the lawbreaker is an authority or in a binding resolution if the subject is an individual.

What, then, could be the usefulness of environmental class actions? For the sake of judicial economy, it would be to use a single action to analyze administrative and civil damages, whose effects fall onto a collective, and must be claimed in a collective action lawsuit. Therefore, both legal institutions, sanction and compensation, already coexist in conventional ecological law, *i.e.* the environmental rules regulated by administrative law dealing with legal relations between state agencies and individuals or civil law entities. In the administrative procedure conducted by the SEMARNAT, one state agency may impose an administrative fine as punishment for the defendant in the process in the name of the entire nation, in view of the agency's status as higher legal body. Damages may also be claimed to restore the injury caused to certain individuals or a diffuse group of people.

VI. The Need of Punitive Damages

Collective actions are useful procedural figures that make judicial protection accessible to disadvantaged social groups or voiceless entities like the environment and future generations, whose legal representation or standing

[42] *See* Reglamento Interior de la Secretaría de Medio Ambiente y Recursos Naturales [R.I.S.M.A.R.N.] [Internal Regulations of the Ministry of Environment and Natural Resources], *as amended*, art. 2 XXXI C, 118 to 140, Diario Oficial de la Federación [D.O.], 21 de Enero de 2003 (Méx.).

[43] Under Mexican Administrative Law "*órganos desconcentrados*" are agencies without legal autonomous personhood that form part of a ministry, and that are empowered to perform particular exclusive functions but remain subject to the scrutiny of the ministry as its superior.

had been an obstacle in enforcing collective and diffuse rights. These requirements for this legal instrument may be complemented by punitive damages used as administrative fines. Meanwhile, civil damages may be insufficient to repair ecological damages and guarantee the non-recurrence of the offender or the non-repetition of similar acts by another entity.

When a violation of ecological law is as serious as the Bhopal or Exxon Valdes cases, it is essential to calculate a legal figure that can cover the civil and administrative damages in a civil procedure, but to also perform the administrative function of deterring and preventing similar catastrophes.

Alternative compliance of judgments in environmental diffuse actions or in collective environmental actions rising from environmental damages is a *sui generis* procedure, which must be dealt with differently than that designed for traditional civil damages.

There are several particularities which differentiate this diffuse legal relationship from others:

a) The standing of the PROFEPA, non-profit associations and citizens is a legal fiction resulting from the need to give a voice to the environment, an entity from which we all receive benefits but which also lacks legal personality. This fiction does not represent a concrete subject, nor is it an authority or an individual; it is a diffuse entity that represents the entire community;
b) Environmental damages represent the convergence of two kinds of damages: a civil tort that must be redressed, and an administrative infraction which must be punished;
c) Potential polluters can be companies with *de facto* political power. This is an obstacle for plaintiffs to confront the companies directly by means of conventional civil law remedies;
d) Traditional compensation of civil damages is not sufficient to discourage similar environmental damages; hence companies are probably not afraid of acting maliciously;
e) Environmental damages are a much more sensitive aspect of law; the quantification of this kind of damage is far more complex since ecological injures are frequently irreparable, and their consequences can be difficult to predict and measure.

The challenge of quantification has yet to be solved by federal legislators, especially in view of their enacting unclear guidelines for diffuse actions judgments. Article 604 of FCCP provides that:

> Article 604. In diffuse action, the judge may order the defendant to repair the damage caused to the collective, consisting of the restitution of the things as they were before the harm was done, if possible. This restitution may include performing one or more actions or abstaining from doing a given action.

> If the above is not possible, *the judge shall order an alternative compliance according to the effects on the rights or interests of the collective. Where appropriate, the resulting amount will be allocated to the Fund referred to in Chapter XI of this Title.*

The cited provision orders responsible parties first, to restore the damages done by establishing an obligation to take action. In case it is materially impossible to repair said damages, the responsible parties must award damages in favor of the community. However, this provision does not offer any guideline on how the damages will be determined, and nor is this parameter established in Chapter XI of the FCCP which defines the nature of the national fund.

This legal uncertainty may be overcome by developing federal jurisprudence through alternative compliance to the court's ruling, which could consider compensatory and moral damages, as well as illegitimate enrichment.

Mexico has a strong trade relationship with Canada and the United States, a relation which has led to the ratification of important agreements like NAFTA. This agreement, together with globalization and the restructuring of the Mexican system to a neoliberal economy, has strengthened market relations among the three countries. Canada and the United States both recognize punitive damages, but this is not the case of Mexico. This absence of exemplary damages may put Mexican firms and society in a situation of inequality. For instance, a Mexican enterprise with presence and assets in the United States could be liable for punitive damages; conversely a Canadian company may cause an ecological disaster in Mexico without being held accountable for any punitive damages.

The *forum non conveniens* doctrine of common law nations, along with the current Mexican legal framework, make it likely that in the event of an environmental disaster on Mexican territory, the forum chosen will be the place where the acts were committed. The omission of punitive damages and the concurrent disadvantage that this represents to Mexico are more tangible when taking into account the relevant provisions of the "North American Agreement on Environmental Cooperation" (NAAEC), which includes the right of citizens to sue for damages.[44] This right would be exercised differently under Mexican law, since a same act would be punishable differently depending on the place where it occurred, despite the implicit context of equality in which NAFTA and NAEEC were drafted.

Therefore, it is a matter of domestic law to implement legal instruments that are similar to the ones developed in the other two countries. This implementation must be constructed according to the characteristics of Mexican legal system, and aware of the nation's ecological needs, without losing sight of the fact that the main goal is for transnational corporations to respect the law of each country equally, and thus, they must legally respond in the same way.

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[44] 6 S 1 (a) of North American on Environmental Cooperation (NAAEC).

Another example for the need of legal measures to enforce environmental regulations and guarantee the reparation of damages is the *Lago Agrio* case in Ecuador. In 1964, Texaco Petroleum Company (TexPet) began extracting oil in Lago Agrio, in the *Sucumbios* and *Orellana* provinces. TexPet drilled hundreds of wells and built alongside hundreds of open toxic waste pits, an irregular measure attributed as the cause of massive pollution and cancer. TexPet, together with the national oil company, now *Petroecuador,* formed an oil consortium. But in 1990, Texaco left the premises and the oil extraction in the hands of *Petroecuador*. In 1993, the inhabitants of Sucumbio filed suit against TexPet for the devastating consequences of dumping toxic waste throughout the area without proper control measures. According to *El Pais*, five indigenous communities used to live in the area; now two of them the *Tetetes* and the *Sansahuaris* are gone forever.[45]

In 1993, a class action lawsuit in the name of Ecuadorians was filed against Texaco in a New York court. However, in 2002, after the respondent argued the *forum non con conveniens doctrine* in view of the fact that the act had taken place in Lago Agrio, it was ruled that the proper forum to litigate was in Ecuador. In 1995, Texaco agreed to settle out of court with Ecuador and Petroecuador for 40 million dollars to clean Lago Agrio.[46] However, Ecuador does not recognize this settlement as an official government declaration or State action in the name of all Ecuadorians;[47] otherwise, this would be an obstacle for the *locus standi* of the current Ecuadorian plaintiffs.

As Texaco was purchased in 2001 by Chevron, a new lawsuit against the latter was presented in Ecuador in 2003. In 2011, an Ecuadorian court ruled against the responsible parties and ordered Chevron to pay more than eight billion dollars in punitive damages.

Chevron sought a preliminary injunction against the Ecuadorian ruling in the United States, arguing that the entire procedure was biased[48] and therefore the judgment could not be enforceable in the United States, an argument that was upheld by a district judge, but later annulled by the Second Circuit Appeal Court.[49]

Last January 2012 in Ecuador, the court ruling against Chevron in the Lago Agrio Case was upheld in the appeal, and Chevron was ordered to pay

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[45] Pablo Ximenez de Sandoval, *El hombre que humilló a Chevron*, El País, Jun. 6, 2011.

[46] Bob Tippe, *Fraud litigation turns up heat in Lago Agrio case*, 108 Oil and Gas Journal 27 (2010).

[47] Sala Única de la Corte de Sucumbios, 106/2011 *Maria Aguinda y otros v. Chevron Corporation,* Third recital of judgment, January 3, 2012 (Ecuador).

[48] *Chevron Corp. v. Donziger,* 768 F. Supp. 2d 58. Judge Lewis Kaplan considered, among other things, that the work done in favor of plaintiffs by expert witness Richard Stalin Cabrera was "anything but independent." However, Cabrera's work was not taken into account in the Ecuadorian judgment. The district judge also suggested that the role of Lawyer Steven Dozinger in Ecuador's judgment may constitute fraud.

[49] *Chevron Corp. v. Hugo Gerardo Camacho Naranjo* et al., 11-1150-cv (L) 11-1264-cv (CON (2011) U.S. App.

8.5 billion dollars, a sum that could double if the respondent refuses to offer a public apology and comply with the judgment.

The company sought for the ruling to be vacated by arguing that Chevron has no registered office in Ecuador and has never operated there, as well as that there has been a denial of justice and therefore the entire trial should be declared void. On appeal, the Court of Sucumbios applied the corporate veil doctrine and concluded that Chevron Corporation is liable for Texaco's actions in Ecuador.

The court upheld the judgment and asserted that there was a popular action granted to any individual in cases of contingent damage caused by negligence or carelessness that threatened unspecified persons.[50] This is the equivalent of punitive damages in diffuse actions that seek to punish the responsible party and redress the damage done to a diffuse collective.

Chevron filed a cassation appeal against the second instance ruling. It will correspond to the Supreme Court of Ecuador to confirm the sentence and either declare it *res judicata,* or vacate the ruling. Unlike that which is being argued by the *ad quem*, Chevron found serious violations, such as the lack of jurisdiction of Ecuadorian courts, the misinterpretation of the corporate veil doctrine, procedural fraud, and public order violations concerning evidence and how damages should be measured.[51]

The legal battle for harms that commenced 50 years ago has lasted over 20 years. Regardless of the fraudulent or malicious actions by plaintiffs and responsible parties alike and regardless of whether the accountable entity is Texaco, Chevron or Petroecuador, it is clear that there is a global need for clear and certain legal framework to prevent, punish and eradicate toxic pollutants given international business relations.

The Ecuadorian case can be used as an example for Mexico's need for punitive damages to avoid abuses in detriment of the environment and future generations. Both enterprises and public owned companies must be sanctioned provided that there is a legal procedure that can be clearly, fairly, quickly and predictably followed.

VII. Punitive Damages and their Alternatives

1. *Legal Reforms*

At least two questions arise regarding environmental action rulings: to what degree is it possible to restore things to the state in which they were previously kept? And how can we put a price on an environmental violation?

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[50] *Código Civil Ecuatoriano*, Article 2236 (Ecuador). Ecuadorian law does not differentiate civil and environmental damages, as in the case of civil diffuse actions in Mexico.

[51] *Recurso de Casación en contra de la sentencia dictada por la Sala Única de la Corte Provincia de Sucumbios de 3 de enero 2012*, docket no. 106/2011 [Appeal against final ruling issued by the Sole Chamber of the Court of Sucumbios, January 3, 2012] (Ecuador).

The FCC contains some parameters to regulate the awarding of civil damages; however, these considerations are designed to deal with conventional torts in private law relations and not for environmental damages, which entail administrative and civil violations, and harm caused to the environment. In some cases, this harm represents gigantic catastrophes, the quantification and punishment of which goes beyond repairing damages and interest lies outside the scope of civil law since not just two parties are involved, but rather the entire community seeks reparation and the prevention of ecological offenses.

Corporations may prefer facing and paying public fines than preventing the potential damage because the first would be a more profitable decision, even if said income is generated at expense of potential victims' health and the environment. Another possibility of sanction is corporations' criminal liability. Judges are empowered to order the dissolution or suspension of legal entities whenever crimes are committed on behalf of or with the support of said entities.[52] Nonetheless, this sanction does not have a bearing on the responsible parties' economic welfare itself and may leave the company's earnings almost untouched. Therefore, civil adjudication could complement the function of public law.

In other continental law jurisdictions like Argentina, punitive damages have been deemed an invasion of civil law in the scope of public law.[53] Nonetheless, there are several factors in the Mexican legal system that may help the use of punitive damages be seen more as an enhancement of administrative law than an invasion. In cases of environmental law, a tort is not only caused by the traditional civil law duty of not causing harm to others, but also by the violation of environmental law regulations. Such public violation is no longer claimed through an administrative procedure, but via civil litigation. Yet the outcome of the trial affects not only the parties, but also an undetermined collective because the diffuse right to a healthy environment is what has been affected.

Furthermore, in collective actions, public agencies like the PROFEPA leave aside their role as authorities to become the representatives of the collective. It is a legal fiction in which public entities act as if they were individuals who intervene not to protect private interests, but the rights of a collective, as happens in criminal or administrative procedures.

Punitive damages may be used as an additional amount awarded and quantified by a judge whenever there is adequate material evidence to measure the damage done in economic terms (*i.e.*, when there are not only tangible but intangible damages caused by the respondent). Once it is proven that the alternative compliance of the decision must be fulfilled, the judge, at

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[52] Código Penal Federal [C.P.F.] [Federal Criminal Code], *as amended*, 14 de Junio de 2012, art. 11, Diario Oficial de la Federación [D.O.], 14 de Agosto de 1931 (Méx).

[53] Luis Eduardo Sprovier, *La multa civil (daños punitivos) en el derecho argentino*, IV Jurisprudencia Argentina Fascículo 5 Section VII, Nov. 3, 2010, http://www.fsdalegal.com.ar/index.php/la-multa-civil-danos-punitivos-en-el-derecho-argentino/ (last accessed on July 9, 2012).

his or her discretion, may award not only compensatory damages limited by tangible data, but also punitive damages based on impalpable evidence, as in the case of moral damages.

The possibility of awarding punitive damages and increase plaintiff's patrimony may contradict the non-profit aspect of Mexican collective actions. However, the already existing public fund managed by the judiciary may be used to manage compensatory damages in diffuse actions, as well as additional punitive damages in general. This fund could be used whenever it has been proven in a collective actions procedure that the respondent acted with gross negligence or wanton disregard toward the collective, and when public sanctions are insufficient to punish the responsible party and prevent similar cases in the future. The fund could be also used to include exemplary damages in the Mexican legal system, so these can be used as a deterrent for careless responsible parties, without have to turn these damages into a motivation for lucrative litigation.

Punitive damages must be awarded as an exception rather than a rule. Thus, legislators could order judges to apply punitive damages in addition to compensatory damages when these are insufficient to redress the damage done. In cases of mass torts, proven gross negligence or wanton disregard by the responsible party, traditional tangible damages seem inadequate to measure the damage or insufficient to deter the responsible party or others from committing similar actions. Besides, exemplary damages could be appropriate when the responsible party keeps the profits that would not have generated had it not been for the illicit act.

Another option for legislators is to incorporate punitive damages into environmental law, not as an instrument to protect the collective from harms, but to protect the environment as an autonomous subject of rights, regardless of the damages caused to physical persons. Thus, the responsible party would need to repair the damages caused not only to the collective, but also to the environment, as another legal entity with its own rights. This is the approach proposed in 1972 by Christopher D. Stone, who has advocated for a voice for inanimate objects, so that said objects could have an entity to speak on their behalf and on that of future generations.[54]

In Mexican environmental actions, compensatory damages would be awarded based on tangible data and managed by the fund in diffuse actions or incorporated into plaintiff's patrimony in collective actions in strict sense or individual homogenous action. In addition to these damages, judges could award punitive damages which would always be managed by the public fund, and these resources could be used not only to promote diffuse rights, but also to protect and repair the environment.

Stone argues that considering the environment as a person would be an appropriate legal fiction to protect nature and future generations. It is a legal

[54] Christopher D. Stone, Should Trees Have Standing? 103-114 (Oxford University Press, 3rd ed., 2010).

obligation to respect nature and so it is not unreasonable to believe there is an independent relation between the polluter and the environment under the circumstances of a violation, although there may be cases in which there are both damage to the environment and damage to individuals, as in the case of catastrophes.[55]

Stone's proposal has even resonated in the US Supreme Court, in the dissenting opinion of William O. Douglas in *Sierra Club v. Morton*.[56] The Sierra Club, a membership corporation, tried to block the construction of a skiing development in Mineral King Valley in the Sequoia National Forest in California. The Sierra Club did not claim it was a violation of personal interests, but rather asserted that the project would have a negative impact on the local environment. The majority ruled that the Sierra Club, in its corporate capacity, lacked standing, but it could sue on behalf of any of its members who had an individual interest. Douglas did not share the majority opinion and asserted that individuals may have standing, but that the defense of the environment should correspond to nature itself. Thus, rivers, valleys or beaches could be plaintiffs in cases aimed at defending the interest of said ecological entities and that of every creature dwelling therein, instead of only in the defense of the rights of people.

Overcoming the anthropocentric legal perspective and inspired by the world views of the Aimaras and the Quechuas, the 2008 Ecuadorian Constitution now recognizes *Pacha Mama* or Mother Nature as an autonomous entity with its own legal personhood.[57] This legal text expressly states that Nature is entitled to restoration, irrespective of other subjects' obligation to indemnify individuals and groups who depend on the affected ecosystems.

What is really distinctive about the legal relation between polluter and the environment is the way damages are measured. Most natural resources are outside the scope of the market and harms caused to it are difficult to measure. Therefore, Stone proposes that environmental damages should be based on law decrees, rather than proven like traditional civil damages are.[58]

Based on the constitutional right to a healthy environment, Mexican legislators could adapt the figure of punitive damages as an independent amount to be paid by the responsible party, but is awarded in favor of not the plaintiff, but the environment and managed by the national fund. The method for quantifying said damages could be limited by statutory law and guided by

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[55] *Id.* at 1-41.

[56] 405 U.S. 727 (1972) (Douglas J). He asserted that "[t]he critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage."

[57] Constitución del Ecuador [Constitution of Ecuador], Chapter Seventh, articles 71 to 74 (2008).

[58] Stone, *supra* note 54, at 168-169.

environmental experts at the civil procedure. Legislators could force judges to consider the fines already paid for public procedures with the object of not punishing twice or excessively, but to redress the damage done to individuals and the environment, and to adequately punish in exceptional cases.

Such measures can find express constitutional authorization in the recently reformed fifth paragraph of Article 4 of Mexican constitution, which states that environmental damages generate liability for the polluter.[59] One interpretation of this amendment could suggest that this liability is separate from that caused to the collective. Otherwise, the amendment would be repetitive because the domestic system already recognized civil liability for damages done to the environment provided that these torts affected individual plaintiffs.

2. *Case Law*

In the interval in which punitive damages are implemented in Mexico or if legislators decide not to incorporate them, moral damages and illicit enrichment could be established as transitory measures through adjudication to fulfill similar functions to those of exemplary damages.

Moral damages could be claimed as an additional sum in collective actions, whenever environmental damages also cause a negative effect on the intangible rights of personality of a collective. Likewise, illicit enrichment could be an accessory claim whenever a polluter generates profits at expense of the environment or by endangering or affecting the collective's health and the right to a healthy environment.

Moral damages of civil law jurisdictions share some aspects of punitive damages: both institutions address intangible damages that are difficult to measure, and both take into account the economic welfare and the responsibility of the defendant to confer said amounts. However, as noted by Jorge A. Vargas, moral damages have not been designed by legislators or interpreted by courts as a punitive instrument, but rather as an equity remedy.[60] Furthermore, moral damages are not aimed at increasing the patrimony of the plaintiff, but to redress a damage done to moral patrimony. Thus, moral damages could perform a similar role to that of the U.S. civil fine, but these are not equivalent. In Argentina, both institutions, together with traditional compensatory damages, already coexist.[61]

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[59] The amendment published on February 8, 2012, recognized the constitutional right to a healthy diet and established that environmental damages would generate liability for the responsible according to law. Federal legislators have a six-month term to legislate on environmental damages.

[60] Jorge A. Vargas, *Moral Damages under the Civil Law of Mexico: Are These Damages Equivalent to U.S. Punitive Damages?*, 35 The University of Miami Inter-American Law Review 183, 267 (2004).

[61] Law Nº 24.240, Oct. 15, 1993, B.O. 27.744, art. 52 Bis (Arg.).

Punitive damages have been implemented in Argentina under the scope of consumer rights. These consist of an amount of money, in addition to the compensatory damages for the harm actually caused that is incorporated into the plaintiff's patrimony and which proceeds at the request of the latter whenever the supplier fails to meet its obligations in detriment of the consumer.[62] Argentinean courts have already granted moral and punitive damages in the same decision. In the *Machinandiarena* case,[63] the court awarded $30,000 Pesos for moral damages and an identical amount for punitive damages in favor of the plaintiff. The claimant was a person with disabilities who was unable to file his consumer complaints against a telephone company because the corporation did not assist the plaintiff by attending his complaint, and refused to adapt its premises by building a ramp for the disabled.

Hence, if the MFC decides to implement punitive damages, this remedy could be compatible with moral damages. The first is aimed at punishing the responsible party for unusually severe torts while the second is to redress intangible damages caused to plaintiff's feelings.

Moreover, the non-profit aspect of Mexican collective actions, together with the public fund controlled by the judiciary, may be used to avoid one of the most controversial issues of punitive damages, *i.e.* the fact that the amount is awarded to the plaintiff despite the lack of a causal link between punitive damages and the plaintiff if not for the reason that the latter put his or her time and effort into filing the lawsuit. In Mexico, plaintiffs would be motivated by duty, in the case of public agencies, and by collective interest, in the case of non-profit associations. Therefore punitive damages could be used to deter responsible parties and potential wrongdoers, without encouraging lucrative litigation.

Moral damages could be an additional economic award applied in diffuse actions when the responsible party is sentenced to fulfill the judgment through alternative economic compliance, as well as in regular collective and individual homogeneous actions. In diffuse actions, compensatory and moral damages would be managed by the fund, and in other cases, these would be incorporated into the plaintiffs' patrimony.

The gap in the law regarding alternative compliance of diffuse actions could be filled by establishing case law similar to what happens in the constitutional remedy of *Amparo Indirecto* when it is physically impossible to repair the damage by restoring the enjoyment of fundamental rights. Even when this repair is possible, the material compliance of the judgment could be more harmful to society than the benefit to the aggrieved. In this last case, federal

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[62] Osvaldo Héctor Bassano & Graciela Gloria Pinese, *El daño punitivo: disuasión y punición a favor del débil jurídico*, XXIII Jornadas Nacionales de Derecho Civil, Comisión 8, 10 (2011).

[63] Nº 143.790 - "*Machinandiarena Hernández Nicolás c/ Telefónica de Argentina s/ reclamo contra actos de particulares",* Cámara de Apelaciones en lo Civil y Comercial de Mar del Plata [Chamber of Civil and Commercial Matters of Mar del Plata, Argentina], May 27, 2009.

courts could commute the obligation to do for an obligation to give. Thus, judges are allowed to determine an alternative compliance by requiring the responsible authority to repair the harm by paying damages to the petitioner instead of restoring the violation by performing an activity.

The possibility of the alternative execution of judgments is the *Amparo* procedure, which is provided by law as the equivalent of environmental law. However, the method in which damages are determined is guided by case law and solved as an interlocutory decision. An alternative to exemplary damages can be found in moral damages and illicit enrichment. Federal courts can develop these concepts into collective actions procedures through case law.

The alternative compliance of *Amparo* rulings is prescribed in section XVI of Article 107 of the Mexican Constitution. Alternative compliance of a judgment in an *Amparo* is the exception, not the rule, just like the subsidiary fulfillment contemplated in Article 604 of the FCCP. Thus, economic awards in environmental diffuse actions would be rare, applicable only when it is impossible to repair the damage done.

The alternative execution of constitutional judgments is determined incidentally, after it is proven that it is the only way in which the constitutional protection can be granted. This duty may be met through a transaction between the responsible party and the applicant, which in somewhat is equivalent to out-of-court agreements regarding punitive damages, only that in the Mexican constitutional procedure, this agreement can be drafted only once it is evident that the traditional execution is not practical or optimal for society.

Considering that neither the incidental procedure nor the agreement is delineated in the act of *Amparo,* they are regulated as a supplement by federal jurisprudence and the FCCP.[64] Hence, the plaintiff must prove what the appropriate economical amount which will substitute the original obligation for damages liability will be. Thus, any entitled party could sue the presumed tortfeasor for tangible damages, as well as for illegitimate enrichment or moral damages. The first will be the amount for the material damages in the case that the harm to the environment can be reversed, and the latter could perform a similar function to that of exemplary damages in a civil law jurisdiction.

There is no doubt that environmental damages affect the patrimonial interest of individuals, but it is also plausible to argue that the negative effects can also harm moral rights. One toxic spill in the ocean could damage the interests of a collective of fishermen whose patrimonial rights have been affected, but their intangible rights as feelings can also be affected when the ocean is devastated by irresponsible polluters. This in turn deprives them of

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[64] *See* EJECUTORIAS DE AMPARO. ANTE LA IMPOSIBILIDAD DE SU CUMPLIMIENTO OPERA EL CUMPLIMIENTO SUSTITUTO MEDIANTE EL INCIDENTE DE DAÑOS Y PERJUICIOS O EL CONVENIO, Segunda Sala de la Suprema Corte de Justicia [S.C.J.N.] [Second Chamber of the Supreme Court], Semanario Judicial de la Federación y su Gaceta, Novena Época, tomo XXIX, Mayo de 2009, Tesis: 2a./J. 60/2009, Página 140 (Mex).

a natural resource that contributed, indirectly and aesthetically, to the wellbeing of the people who live near the ocean.

The Mexican courts would have to solve the issue on whether to ascertain moral damages or illicit enrichment as appropriate pretensions claimable through collective actions. Moral damages may be necessary to remediate the difficulty of measuring intangible harms. Similarly, illicit enrichment may be necessary to eliminate the illicit profits generated by the tortfeasor. Thus, a restrictive interpretation that only damages can be claimed in collective damages, but not so that unjust enrichment has the effect of letting the polluter go almost unpunished, leaving its profits intact.

The underlying justification of illicit enrichment is that by neglecting environmental law, the responsible party harmed the environment and other individuals. This detriment which once translated into a profit for the offender must be repaired not only to the extent in which the complainants were injured, but also to the extent in which the offender obtained economic benefits by compromising the safety of others and the ecological balance.[65]

Environmental illegitimate enrichment will be proven in trial simply by proving that the responsible party gained profits in detriment of the environment or of the right to a healthy environment, as well as by proving that this detriment was not justified by law.

An administrative fine of six million pesos is appropriate for most environmental infractions, but it will be insufficient for environmental disasters. Thus, even when applied together, ordinary damages and administrative fines will not be sufficient to counteract the bad faith of pollutants. It is indispensable to take into account consider the illicit profits derived from corporate savings in security measures and bad planning.

Hence, through the figure of illegitimate enrichment, this claim would be appropriate only in exceptional cases, such as environmental catastrophes, and the amount of damages would be guided by experts and determined by judges in an interlocutory procedure. Far from being an unreasonable or spurious act on behalf of the judiciary, similar legal instruments have been constructed or implemented by Mexican judges through case law. This is the case of the implementation of the "corporate veil doctrine,"[66] the doctrine of

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[65] This is the same *ratio* that was analyzed and rejected by USSC in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), the difference is that in United States, punitive damages are awarded to the plaintiff regardless of whether damages were caused to her or him. Conversely regarding Mexican environmental diffuse actions, the plaintiff could be the environment, which would be the harmed party, and the damages would be used and distributed by the already established national fund which would be administrated by the judiciary.

[66] *See* Técnica del "levantamiento del velo de la persona jurídica o velo corporativo". Su sustento doctrinal y la justificación de su aplicación en el procedimiento de investigación de prácticas monopólicas, Tribunales Colegiados de Circuito [T.C.C.], Semanario Judicial de la Federación y su Gaceta XXVIII, Novena Época, Noviembre de 2008, P. 1271 Tesis: I.4o.A. J/70, página 1271 (Méx.)

the misrepresentation, or ideological falsehood on credits such as promissory notes.[67]

It is essential to have the efficient legal institutions to deal with environmental damages. Although the ideal context in which punitive damages could have been instituted was through statutory reformation on the hands of federal legislators, the latent need for this legal institution may develop gradually by means of collective actions cases, and consequently through federal case law.

[67] *See* Títulos de crédito, falsedad ideológica o subjetiva en los, Tercera Sala de la Suprema Corte de Justicia [Third Chamber of the Supreme Court], Semanario Judicial de la Federación y su Gaceta, Volumen 163-168, Cuarta Parte, Séptima Época, página 117 (Mex).

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INTERNATIONAL SUPPORT FOR JUSTICE REFORM: IS IT WORTHWHILE?

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Abstract. *Over the last twenty-five years, a number of justice reform projects funded by international actors have been implemented in Latin America. No less than 2 billion US dollars were disbursed for this purpose. Several questions on this issue are addressed in this article: How does international aid work in the field of justice and what is the rationale used? What is the relationship between and the dynamics of the actors who participate in international aid? What are the results of the funded projects and what limits have been encountered? Has international support for justice reform been worthwhile? The author elaborates on the central argument that international actors underperform their role mainly for two reasons. One, the approach used in the recipient country seriously restricts the proper comprehension of the root causes of the problems country faces. Two, international actors lack serious interest in learning. In the predominant approach, bureaucratic criteria prevail: projects are designed and promoted according to the aid agency's blueprint, evaluation is usually poor and money is readily available. If in a given country there are no strong national actors, international agencies establish asymmetrical relationships with their counterparts, tend to import recipes that hardly suit the conditions in the country, and impose paths to reform that are difficult for local actors to appropriate. Cooperation agencies have disseminated an ideological construct based on a non-proven causal relationship between justice systems and economic growth as the driving force for reform. International actors could do better were they to develop a capacity for learning, but this goal seems difficult for them to reach.*

Key Words: *International cooperation, justice in Latin America, justice reform, development projects.*

Resumen. *En los últimos 25 años se han ejecutado en América Latina proyectos de reforma de la justicia auspiciados por la cooperación internacional que superan el monto de dos mil millones de dólares estadounidenses. Al respecto,*

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varias cuestiones se plantean en este artículo. ¿Cómo opera la ayuda internacional en el área de justicia y cuál es su lógica? ¿Cómo es la relación y la dinámica entre los actores participantes en la cooperación internacional? ¿Cuáles son los resultados de los proyectos así financiados y qué límites han encontrado? ¿Cuál es el valor del apoyo internacional para la reforma de la justicia? El argumento central que el autor elabora es que los actores internacionales alcanzan un desempeño insatisfactorio en su papel, debido a dos razones principales: una es que el enfoque usado en el país beneficiario les restringe seriamente una comprensión de las raíces de los problemas que enfrentan; otra es que los actores internacionales carecen de un interés serio en aprender. En el enfoque predominante prevalecen criterios burocráticos: los proyectos son diseñados y promovidos según el modelo de la agencia cooperante, la evaluación usualmente es pobre, y el dinero fácilmente disponible. Si no hay actores nacionales fuertes, las agencias internacionales establecen relaciones asimétricas con sus contrapartes, importan recetas inadaptables a las condiciones nacionales e imponen caminos de reforma que dificultan la apropiación por actores locales. Las agencias de cooperación han diseminado una ideología basada en una relación causal no demostrada entre sistema de justicia y crecimiento económico como fuerza conductora de la reforma. Los actores internacionales podrían desempeñarse mejor si desarrollaran una capacidad de aprendizaje, pero esta meta parece difícil de alcanzar.

Palabras clave: *Cooperación internacional, justicia en América Latina, reforma de la justicia, proyectos de desarrollo*.

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I. Introduction

In several Latin American countries, justice administration and its reform have entered the public agenda through actions taken by both international actors and those that could be termed "internationalized" actors, that is, citizens working in their own country, but using a conceptual and operational framework largely established by international aid agencies. This crucial contribution and the work carried out through reform projects make inter-

national support for justice reform a key element of the process, however insufficiently analyzed.

In the last two and a half decades, the expansion of international cooperation was accompanied by the rapid increase of a broader "internationalization" taking place in the field of justice. International observation of justice systems all over the Third World began by assessing the enforcement of human rights and later expanded under the umbrella terms of "governance" or "good government" —inadequately or ill-defined concepts. During this process, an increasing number of "indicators" for allegedly "measuring," "comparing" and "certifying" justice performance in each country were developed, which in turn opened the way for the indexes of justice that are now employed all over the world. Points and scores are assigned to courts despite the fact that in most cases the bases for these figures are very weak: opinions gathered from "experts," practitioners or "special" users of the system — mainly people who are well known in the business world. No real systematic analysis of the performance of justice systems has been carried out during the "internationalization" process.

International support for justice reform efforts in Latin America started in the 1980s. "In 1983, the State Department created an interagency working group on the administration of justice in Latin America and the Caribbean."[1] The following year, the Bipartisan Commission on Central America recommended that "the U.S. should encourage the Central American nations to develop and nurture democratic cultures, institutions, and practices, including strong judicial systems to enhance the capacity to redress grievances concerning personal security, property rights, and free speech."[2] Also in 1984, the U.S. Agency for International Development (USAID) launched its first judicial reform project in Latin America with active international support. El Salvador was the country in which institutional reforms were meant to replace —or at least counterbalance— military support for the government. In 1985, the U.S. Congress passed legislation authorizing justice reform programs for the region and "USAID created an administration of justice office in its Latin American and Caribbean bureau and started to provide assistance to other countries in the region."[3] From the beginning, emphasis was placed "on human rights and criminal justice issues" and in 1986 the program was extended to encompass South America. "By the early 1990s, the rule of law had been established as an important element of most USAID country strategies in the region."[4]

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[1] Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 American Journal of Comparative Law, 617, 648 (2007).

[2] Report of the National Bipartisan Commission on Central America 51 (1984).

[3] Langer, *supra* note 1, at 649.

[4] US Agency for International Development, Achievements in Building and Maintaining the Rule of Law. MSI's Studies in LAC, E&E, AFR and ANE 2-3 (2002).

Over the next 25 years, millions of dollars have been spent in a variety of justice reform projects. Many of them received international funding that mainly derived from three sources: the World Bank (WB), the Inter-American Development Bank (IDB) and USAID. While USAID donates resources, International Financial Institutions (IFIs) generally provide funds for this purpose in the form of loans. Thus, these contributions become part of the recipient country's public debt which must be repaid. Given the amount of funding provided, IFIs may be considered the principal actors behind international cooperation for justice reform.[5]

According to the figures available for the last two decades, the WB has earmarked more than 305 million dollars for projects related to justice reform in Latin America, while the IDB has been an even stronger supporter, providing more than 1.2 billion dollars to this sector (Table 1).

Table 1. Funding for Justice Reform Projects in Latin American Countries, Financed by the World Bank and the Inter-American Development Bank, in US dollars*

Country	*World Bank (1992-2011)*	*IDB (1993-2011)*	*Total*
Argentina	5,410,000	451,150,000	456,560,000
Bolivia	11,000,000	3,150,000	14,150,000
Chile	944,400	1,343,000	2,287,400
Colombia	47,379,000	113,785,000	161,164,000
Costa Rica	---	32,225,000	32,225,000
Dominican Republic	---	285,000	285,000
Ecuador	12,874,000	227,312	13,101,312
El Salvador	18,200,000	---	18,200,000
Guatemala	33,096,000	30,531,020	63,627,020
Honduras	15,000,000	41,350,000	56,350,000
Nicaragua	---	1,669,626	1,669,626
Panamá	---	57,470,000	57,470,000
México	30,000,000	---	30,000,000
Paraguay	440,000	42,918,000	43,358,000
Peru	96,210,000	251,554,638	347,764,638

[5] Alberto M. Binder & Jorge Obando, De las 'Repúblicas aéreas' al Estado de derecho. Debate sobre la marcha de la reforma judicial en América Latina 742 (Ad-Hoc, 2004).

Table 1. Funding for Justice Reform Projects in Latin American Countries, Financed by the World Bank and the Inter-American Development Bank, in US dollars*

Country	*World Bank (1992-2011)*	*IDB (1993-2011)*	*Total*
Uruguay	300,000	42,500,000	42,800,000
Venezuela	34,700,000	132,160,000	166,860,000
Regional Projects	---	2,581,400	2,581,400
Total	305,553,400	1,204,899,996	1,510,453,396

* Data compiled by the author from World Bank and Inter-American Development Bank sources.

Of 1.51 billion dollars committed by the WB and the IDB to justice reform programs during the last two decades, 96% of the amount consisted of loans and 4%, non-reimbursable funds (Table 2). In other words, over the last 20 years, Latin American countries added 1.45 billion dollars to their public debt from financing justice reform.

Table 2. Loans and Non-Reimbursable Funds for Justice Reform Provided by the World Bank (1992-2011) and the Inter-American Development Bank (1993-2011) in US dollars*

IFI	*Loans*	*Grants/Non-Reimbursable*	*Total*
WB	298,544,400 (97.7%)	7,009,000 (2.3%)	305,553,400
IDB	1,151,953,270 (95.6%)	52,946,726 (4.4%)	1,204,899,996
Total	1,450,497,670 (96%)	59,955,726 (4%)	1,510,453,396

* Data compiled by the author from World Bank and Inter-American Development Bank sources.

The contribution of USAID is more difficult to assess. At a public conference, a USAID officer estimated that, by the end of 1999, US$ 300 million had been disbursed by USAID and the State Department for programs promoting justice and police reform in Latin America.[6] An analysis of the statistics available in 2012 does not provide sufficient information to even estimate the magnitude of the funds the U.S. Government has allotted to justice reform in Latin America. The difficulty arises from the fact that US-

[6] Margaret Sarles, *USAID's Support of Justice Reform in Latina America*, *in* Rule of Law in Latin America: The International Promotion of Judicial Reform 44, 44 (Pilar Domingo & Rachel Sieder eds., Institute of Latin American Studies, University of London, 2001).

AID justice reform projects have been implemented under different areas (human rights, governance, democracy, etc.) at different times and in different countries. Moreover, USAID is not the only U.S. agency working in this field. For instance, the Department of Justice has been training public attorneys in Latin America over the last 15 years. Hence, determining the exact amount of U.S. support given to justice reform in the region would require devoting an entire research project to this aim.

Taking into account the fact that a number of developed countries — mainly Germany, Spain and the Nordic countries— have also contributed funds to justice reform programs, a fair estimate of the amount of financing for justice reform in Latin America would be that external funders have channeled more than US$ 2 billion over the last 25 years.

A key factor in justice reform for most countries in the region has not only been the amount of funding provided by international actors. In the absence of in-depth case studies on the role international actors have played, there is not enough knowledge to assess the way their presence has affected the justice reform process.[7]

This article explores the role of international support given to justice reform in Latin America while addressing several questions. How does international aid work in the field of justice and what is its rationale? Who are the actors involved? What is the relationship between and dynamics of those who participate in international aid? What are the results of the projects it funds and what limits have been encountered? Are these characteristics specific to the field of justice or do they simply reflect what international aid in fact is? And finally, what is the value of the international support for justice reform, or would Latin American justice systems be better or worse without it?

The central argument of this article is that international actors underperform their roles for two main reasons. One, the approach used in the recipient country seriously restricts an understanding of the root causes of the problems. Two, international actors lack a serious interest in learning. In the predominant approach, bureaucratic criteria prevail: projects are designed and promoted according to the aid agency's blueprint, evaluation is usually poor, and money is readily available, especially if it can be channeled towards building infrastructure and acquiring equipment. If there are no strong national actors in a given country, international agencies establish asymmetrical relationships with their counterparts, importing recipes that hardly suit national conditions and imposing paths to reform that are difficult for local actors to appropriate. Cooperation agencies have disseminated an ideological construct based on an unproven causal relationship between justice systems and economic growth as the driving force for reform. International actors could do it better were they to develop a capacity for learning, but this goal seems difficult for them to reach.

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[7] Binder & Obando, *supra* note 5, at 712.

II. How Does it Work?

A large number of initiatives for cooperation in justice reform come from international actors and organizations who offer to help local authorities —ministries of Justice, Supreme Courts, and the like. Such "offers" tend to include money —donated or loaned— and technical support to design and implement a program aimed at improving justice system efficiency. Both elements are very attractive to most governments. In some cases, simply the effect of the funding on the fiscal balance may be a decisive element —not necessarily for justice sector authorities, but for those in the government who are responsible for the economy. In the late 1960s, World Bank President Robert McNamara created "a bureaucratic environment in which development initiatives came not from the borrowing countries, but from Bank staff drive by organizational imperatives."[8]

Thus is established an asymmetrical relationship that entails all the consequences on which this article will further elaborate: "[d]eveloping countries may find themselves unable to resist the demands placed on them by foreign funding agencies and may adopt legal reforms implanted by developed countries with little public discussion or analysis."[9] In Central America, the region where international aid for justice reform started in the 1980s, even the government's political will to initiate justice reform was considered secondary, and not quite indispensable, component according to official U.S. documents:

> State Department officials believed that the availability of funds for judicial reform in Latin America in the 1980s pushed AID into initiating large projects prematurely in El Salvador, Honduras, Costa Rica and Guatemala. They noted that Congress, in an attempt to deal with the political instability in the region, earmarked funds for the region before host governments had demonstrated a willingness to implement significant reforms… the impact of these early efforts are [*sic*] largely uncertain.[10]

Since it did not take the initiative, the national counterpart agrees to the proposal for assistance "in the hope that participating will bring at least some benefits."[11] However, this sort of acceptance does not really assure very much.

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[8] Catherine Weaver, Hypocrisy Trap. The World Bank and the Poverty of Reform 85 (Princeton University Press, 2008).

[9] Luis Salas, *From Law and Development to Rule of Law: New and Old Issues in Justice Reform in Latin America*, *in* Rule of Law in Latin America: The International Promotion of Judicial Reform, *supra* note 6, at 44.

[10] U.S. General Accounting Office, Assistance for Justice Administration 14 (GAO/B-252458, 1993).

[11] Thomas Carothers, Aiding Democracy Abroad: The Learning Curve 260 (Carnegie Endowment for International Peace, 1999).

Some of the national authorities and officials may be aware of the importance of the reform project, but the result will not likely contribute to the appropriateness of the project, which is indispensable to achieve its objectives.

In some cases, a similar relationship is established with NGOs dedicated to analogous purposes, as Carothers noted regarding the relationship between donors and civil society entities:

> With donor dependence so high among NGOs in most transitional societies, donors invariably find an enthusiastic response to almost any line of activity they propose… NGOs in transitional societies everywhere are following the leads of donors in both area and project style and that local ownership of much civil society assistance is still very partial.[12]

The initial phase of any project is —or should be— an accurate diagnosis of the problem to be solved. However, a very common view among the critics of international assistance maintains that the diagnostic phase is frequently too short and its conclusions tend to be superficial —usually confined to the legal realm. To some extent, the diagnoses —also revealingly called "legal assessments"— only focus on the normative elements of the country being diagnosed, without giving further consideration to the way in which the system really works: "the emphasis appears to have been placed excessively on collecting information on legal institutions, but without an in-depth understanding of the way these institutions work… legal assessments tend to be somewhat formalistic exercises that compare legal institutions of a particular country with an ideal model of what a good legal system should look like." In consequence, the diagnosis is hardly "a device designed to provide pointers regarding which components of a particular legal system can realistically be expected to change or improve."[13]

As a result of this prevailing approach, reform projects often tend to focus on the symptoms rather than the causes of the realities to be transformed. As noted regarding U.S. cooperation programs' assessment of a judicial system, foreign experts may

> …conclude that it falls short because cases move too slowly, judges are poorly trained and lack up-to-date legal materials, the infrastructure is woefully inadequate, and so on. The aid providers then prescribe remedies on this basis: reform of court administration, training and legal material for judges, equipment for courtrooms, and the like. What they tend not to ask is *why* the judiciary is in a lamentable state, whose interests its weakness serves, and whose interests would be threatened or bolstered by reforms.[14]

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[12] *Id.* at 261.

[13] Julio Faundez, *The World Bank Justice Reform Portfolio. A Preliminary Stocktaking* 23 (31 July 2005, on file with author).

[14] Carothers, *supra* note 11, at 102

What is seldom found in most diagnoses is the relationship between the specific problem and the context within which said problem originated and developed. Therefore, the historical and cultural roots of the problem are often ignored or underestimated. A short-sighted diagnosis gives way to a poorly defined project that hardly anticipates the magnitude of the difficulties that will be faced.

According to Blair and Hansen, "[t]he decision process starts with the question… *Does the state meet the minimal criteria for even contemplating an ROL* [Rule of Law] *effort?* …attempting to improve such systems before basic minimal integrity is established would be senseless."[15] This basic question is rarely asked during the initial phase of project formulation and when it is explicit, it may be easily circumvented with the excuse that the project is actually designed to set conditions that allow the reform to be made. As an IFI official wrote, "[i]t might very well be counter-productive for the IDB to refuse to do any justice reform work in those countries that do not meet IDB-established standards for judicial independence of for consensus for reform."[16] According to this approach, the conditions for justice reform work in a given country are not applied as requisites in real terms. Accordingly, an independent judiciary is not a requisite for proposing a project because "[w]hen independence does not exist, the IDB has developed projects that address some of the obstacles to independence." In sum, implementing a project in a country can always be justified under any circumstances, including a lack of consensus regarding the need for reforms: "the IDB is working both in countries where there is a broad-based support for reform and admirable judicial independence, and in countries or contexts in which only partial independence and consensus for reform exists."[17]

If the country's actual situation does not really matter and/or the diagnosis of that situation is rather feeble, how is the content of the project defined? During the initial years of international cooperation in this area, simplistic responses to complex problems were the norm. In Central America, "AID projects focused on easier-to-manage technical assistance, such as judicial training seminars and computerized caseload management, rather than working on the institutional, political, and attitudinal changes necessary for fundamental, sustainable, reform."[18]

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[15] Harry Blair & Gary Hansen, *Weighing in on the Scales of Justice. Strategic Approaches for Donor-Supported Rule of Law Programs* 10 (U.S. Agency for International Development, Assessment Report No. 7, 1994).

[16] Christina Biebesheimer, *Justice Reform in Latin America and the Caribbean: the IDB Perspective*, *in* Rule of Law in Latin America: The International Promotion of Judicial Reform 99, 106 (Pilar Domingo & Rachel Sieder eds., Institute of Latin American Studies, University of London, 2001).

[17] *Id.*

[18] U.S. General Accounting Office, *supra* note 10, at 17.

As time showed that no effective change was taking place, the work on international support for justice reform produced a blueprint which though not particularly related to conditions prevailing in any country is in fact used throughout the region. In a candid presentation, a World Bank official explained this outline:

> The basic elements of judicial reform should include measures with respect to guaranteeing judicial independence through changes to judicial budgeting, judicial appointment, and disciplinary systems; improving court administration through the adoption of case management and court management reforms; providing alternative dispute resolution mechanisms; enhancing the public's access to justice, incorporating gender issues in the reform process; and redefining and/or expanding legal education and training programs for students, lawyers and judges.[19]
>
> Using the [general, one-size-fits-all] strategy, assistance providers can arrive in a country anywhere in the world and, no matter how thin their knowledge of the society or how opaque or unique the local circumstances, quickly settle on a set of recommended program areas.[20]

The resulting intermingling of available money from international agencies with the recommended prescriptions "facilitates" the adoption of certain standards for the reform projects:

> The IFIs pushed a "recipe" of policy prescriptions for the judicial sector, and loans were made available for specific types of judicial reforms. These included, for example, the adoption of national judicial councils, the creation of judicial academies, and the establishment of alternative dispute resolution mechanisms. Indeed, the IFIs' general formula for judicial reform has served as a template for most of the reforms initiated in the region.[21]

This blueprint was usually supplemented with operational tools like new buildings and computer systems. These costly components have in turn used up a significant portion of the money for justice reform projects. When the approach includes a bottom-up perspective, additional beneficiaries are "[n]ongovernmental organizations that work for public interest law reform...; ...that seek to help groups of citizens...; NGOs whose explicit goal is to stimulate and advance judicial reform, police reform, or other institutional reforms directly related to the rule of law; media training... legal aid clinics."[22]

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[19] Maria Dakolias, *The Judicial Sector in Latin America and the Caribbean. Elements of Reform* 7 (World Bank Technical Paper Number 319, 1996).

[20] Carothers, *supra* note 11, at 96.

[21] Jodi S. Finkel, Judicial Reform as Political Insurance. Argentina, Peru, and Mexico in the 1990s 26 (University of Notre Dame Press, 2008).

[22] Carothers, *supra* note 11, at 169.

In the blueprint, the specific content of a project is not usually based on the diagnosis made of the country, weak as it may be. Instead, it is based on practices routinely established by the donor or lending entity. For the WB, it has been noted that a "predilection to deductively design aid proposals around the prevailing organizational discourse and routines of the Bank rather than the specific context" is usually apparent on developing a project.[23] In the same vein, "[c]onsiderable weight is given to economic and technical factors that are easy to identify and measure, whereas complex political and social risk assessments that involve 'soft' qualitative indicators are usually distrusted as unscientific." A review of WB justice reform projects concludes that: "project components often appear as disconnected activities that are not clearly linked to objectives."[24]

Among the preferred activities included, project training is probably one of the most frequent. When projects for justice reform are reviewed, it is apparent the presumption that judges and public attorneys in Latin American countries need to be trained —and sometimes the sessions are even provided in English with simultaneous translation. Public defenders also need to be trained. Lawyers need to be trained, too. Even law professors require training. Every actor in the justice system needs to be trained or retrained, not once, but repeatedly. In the absence of a real diagnosis of these actors' actual weaknesses, training becomes a routine activity that fills— with diverse and sometimes humoristic content— any project. In some cases, "the training has covered such broad areas that it is difficult to draw any cause-and-effect relationship between the training and USAID/Mexico Rule of Law goals" and is not even known whether "the training programs are having the desired impact."[25]

Perhaps, the not-so-cognizant rationale for repeatedly introducing training in these projects rests on the idea that "if a society can reproduce the institutional components of established Western democracies, it will achieve democracy." If that is the goal, training is the means through which "individuals in key institutions can and should be taught to shape their actions and their institutions in line with the appropriate models."[26] It should be noted, however, that "[i]nvariably, …the performance of these components has been disappointing."[27]

It is possible to conclude that most internationally funded projects are not fully produced by personnel working in the institution "beneficiary" of the project. The designing phase of the project is mostly entrusted to officials from the international entity or consultants provided or proposed by said

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[23] Weaver, *supra* note 8, at 87.

[24] Faundez, *supra* note 13, at 7.

[25] U. S. Agency for International Development, Audit of USAID/Mexico's Rule of Law and Human Rights Program 8, 12 (Audit Report Nº 1-523-11-001-P, January 12, 2011).

[26] Carothers, *supra* note 11, at 90.

[27] Faundez, *supra* note 13, at 9.

entity: "the bulk of projects continue to be designed by foreign experts during brief visits, primarily consulting with government agencies and with little publicity."[28]

Projects are designed to operate within a given period of time —usually no less than six months, no more than three years— and are deemed as the right tools to tackle aspects of the justice *problematique* that are deeply rooted in traditional practices. In this way, the shorter the term employed in producing results, the better the project is considered at the time of its approval. The need to produce fast results has been officially recognized with respect to assistance provided by the United States: "[t]he State Department's policy stipulated that all assistance should be practical, start up quickly, have an immediate impact, serve as demonstration projects, and be directed toward existing institutions."[29] Hence, problems that would require attention for an extended period of time are not suitable for reform projects. Notwithstanding, projects tend to promise more than what can be realistically delivered. According to Faundez, WB "project expectations" become "wholly unrealistic" and he pondered the question: "[a]re there structural reasons related to the project approval process that create an incentive to exaggerate the outcomes and impact of project components?"[30]

The WB clearly explains how conditionality is handled through the lending instruments for legal and judicial reform: "[s]tructural and sector adjustments loans were the Bank's most common instrument to induce changes in legislation and reform in the administration of justice in borrowing countries. The 'conditionality' of these loans often includes the preparation and adoption of certain laws and regulations that reflect policies agreed upon with the Bank."[31]

In their observations, a number of authors[32] concur that the contents of reform projects are usually imported prescriptions that are transplanted without serious consideration of local conditions, in spite of the well-known lack of success in importing legal institutions because "law is a set of institutions deeply embedded in particular political, economic and social settings."[33] Notwithstanding, based on their knowledge of various countries, international aid entity officials —and especially experts serving as their consultants—, who base their work on the knowledge of various countries, regularly use the transplant as a preferred tool in justice reform projects.

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[28] Salas, *supra* note 9, at 45.

[29] U.S. General Accounting Office, *supra* note 10, at 21.

[30] Faundez, *supra* note 13, at 8.

[31] The World Bank, Initiatives in Legal and Judicial Reform 6-8 (2004).

[32] Julio Faundez & Alan Angell, *El rol del Banco Interamericano de Desarrollo*, 4-8 Sistemas judiciales 90, 102 (2005).

[33] S. Haggard, A. MacIntyre, & L. Tiede, *The Rule of Law and Economic Development*, 11 Annual Review of Political Science 205, 221 (2008).

It has been noted that some of the criminal procedure reforms recently introduced in the region were promoted by a "Southern activist expert network."[34] However, most of the transplanted elements that usually came with the internationally-funded reforms originated from the developed countries. By blending legal formalism and instrumentalism, transplants facilitate "a convenient methodological shortcut as it enables [consultants and experts] to offer legal advice without having to go through the tedious, difficult and often unrewarding task of understanding the societies they purport to help."[35] Among the various cases, one clear example of transplants can be found in the implementation of alternative dispute resolution mechanisms (ADRMs), originally introduced in the United States and then copied in Latin America under the auspices of the IDB, regardless of the specific nature and conditions of the conflicts to be solved,[36] without asking whether these mechanisms have safeguards to protect individuals' rights or perceiving the effects of their "marginalizing ordinary courts from involvement in important social and economic issues."[37]

The manner in which projects are designed —routinely based on the recipes that have supposedly worked well elsewhere— goes a long way in explaining why the diagnostic phase receives so little attention. As a procedural requirement for formulating a project, assessments in real terms become a formality rather than the foundation on which to understand the whole environment in which the project is to be implemented and hopefully succeed. One of the effects of this practice is that it underestimates the risks of the project. When it comes to the WB, in trying to get projects approved as quickly as possible, staff members pay little attention to the difficulties —political and institutional— that are found in the context and

> …are frequently overoptimistic (at least in writing) about how the project relates to broader development objectives, its expected output and the impact, and its sustainability… As a result, …staff members underestimate the risks during implementation that may undermine long-term outcomes. This often results in poor rating of a project's performance.[38]

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[34] Langer, *supra* note 1, at 663.

[35] Pilar Domingo & Rachel Sieder, *Conclusions: Promoting the Rule of Law in Latin America*, *in* Rule of Law in Latin America: The International Promotion of Judicial Reform, *supra* note 6, at 142, 145-146; Byrant G. Garth & Yves Dezalay, Introduction to Global Prescriptions. The Production, Exportation, and Importations of a New Legal Orthodoxy 1, 5 (Yves Dezalay & Bryant G. Garth eds., The University of Michigan Press 2002); Julio Faundez, *The Rule of Law Enterprise: Promoting a Dialogue between Practitioners and Academics*, 12-4 Democratization 568, 575 (2005).

[36] Faundez & Angell, *supra* note 32.

[37] Julio Faundez, *Introduction,* in 1 Legal technical assistance to Good Government and Law. Legal and Institutional Reform in Developing Countries 1, 18-19 (Julio Faundez ed., MacMillan Press/St. Martin's Press 1997).

[38] Weaver, *supra* note 8, at 87.

Another consequence of this approach is that it affects the relationship between the project and domestic actors. Riggirozzi has observed in the Argentinean case that WB "pre-conceived policy ideas and project intentions" may diminish "the capacity of domestic actors to influence the policy course… either because the Bank conditions the flow of capital to certain normative principles or ideological tenets or because it's a a-political stance is less conflictive to follow by the government than politically sensitive proposals presented by local experts that challenge the status quo."[39] The resulting alliance between the government's political interests and WB "principles" alienates a sector of local leaders, thereby frustrating their possible cooperation with the reform project.

In real life, the role reserved for national actors is not central. To begin with, various donors and lenders prefer a foreign entity to be in charge of the implementation phase of the project instead of the beneficiary institution or a local entity. "The projects are then awarded based on fairly closed bidding procedures with primary implementation responsibilities being awarded largely to foreign multinational consulting companies."[40] In the case of aid provided by the U.S. government, these general criteria corresponds to the "hope that giving aid dollars to American intermediary organizations rather than directly to groups or people in the recipient countries will allow them to keep close track of the funds." As a result, a new industry has prospered: "[a] whole community of American development consultants depends on U.S. aid funds."[41]

III. The Rationale to Work on Justice Reform

When international concern about justice systems in Latin America brought up the first external funded projects twenty-five years ago, two main strategic lines of work on justice reform were considered. One promoted changing laws, given that it was usual for international and local lawyers to blame "old statutes and codes" for backwardness and poor performance in the justice system. And as an official assessment of USAID's work in El Salvador suggests, legal changes in themselves seem to be a success: "progress in passing justice system reforms because most enabling legislations for the legal and structural reforms to the justice system has been enacted."[42] Many

[39] María Pía Riggirozzi, *Knowledge Producers, Knowledge Users and the World Bank: Research-Policy Dynamics in Argentina's Judicial Reform* 16 (The Global Development Network's 'Bridging Research and Policy' Project, 2005, on file with the author).

[40] Salas, *supra* note 9, at 45.

[41] Carothers, *supra* note 11, at 258.

[42] U.S. General Accounting Office, Foreign Assistance. U.S. Rule of Law Assistance to Five Latin American Countries 10 (GAO/NSIAD-99-195, 1999).

years later, a similar effort was launched to "modernize" Eastern Europe. In a couple of Latin American countries, even a full overhaul of legal norms was intended and funds were provided for that purpose. The other strategic line aimed at investing in infrastructure and training. In particular, a significant proportion of IDB projects on justice reform have included large sums for new buildings.

In spite of their very limited success, changing laws, new facilities and training for everyone are seldom omitted as project activities. Changing laws are in tune with a "purely technical" understanding of justice reform and they reflect views —especially in Latin America— by which a change in the law produces a change in reality. Since the 1990s, a reform of criminal judicial procedures has attempted to alter behavioral patterns in judicial processes by introducing new codes in most Latin American countries. First comes the new code; then, an intensive training program for the actors; and finally a new justice system should emerge. However, the facts tell a different story.

Buildings went up and the number of computers multiplied in judicial systems all over Latin America while these neutral —and uncontroversial— changes were able to generate consensus and experience only minor resistance. But considerable investment in infrastructure and training did not produce any notable results. While adding or improving infrastructure by itself is not a reform, results of training are very limited at best: "[t]raining for judges, technical consultancies, and other transfers of expert knowledge make sense on paper but often have only minor impact."[43]

In the evolution of the reform process, the fields of work for external funded projects later expanded and a variety of subjects have been included in what we called the valid blueprint for actions performed by international cooperation agencies. Issues such as access to justice —including the complex matter of indigenous justice—, judicial independence and the expeditious operation of the system are recognized as the three main areas of improvement to work in justice reform.

> Judicial reform aid seeks to make a court system work more efficiently, armed with better knowledge of the law, applying the law more consistently an appropriately, and with greater independence from political authorities or other powerful actors in society who would interfere. It may include programs for: rationalizing and strengthening overall management of the judiciary; increasing the judiciary's budget; renovating the physical infrastructure; reforming judicial selection and judicial career laws; training judges and other court personnel; increasing the availability of legal materials for judges; strengthening case management and other internal administrative tasks.[44]

[43] Thomas Carothers, *The Rule of Law Revival*, 77-2 Foreign Affairs 95, 104 (1998).

[44] Carothers, *supra* note 11, at 166.

This new approach may elicit a sort of "shopping-list" syndrome when in fact it is not part of any strategy, but rather just an extensive list of goals, objectives and activities that are neither interrelated nor logically sequenced. In 1993, an official U.S. report on the results admitted: "neither the Department of State, USIA, nor AID had assessed the region's needs or formulated long-term goals or objectives before targeting short-term technical requirements."[45] As IDB officials have conceded, "most projects are not defined as partial efforts to achieve a broader, longer-range goal," and that happens because "most [projects] developed so far have not been preceded by a country sector study which could help establish a long-range strategy… Formulation of project strategies will be helped by better diagnostics."[46] The strategy —based on a well-founded diagnosis— is mostly lacking as a framework to elaborate projects. The same authors recommend that the IDB "should develop justice sector studies that set medium-to long-term goals and provide organizing principles and priorities for project work," working with a strategy to "identify those projects that are priority in terms of their impact and catalytic potential for bringing about additional changes in the system."[47]

The WB sustains it has a strategy to work in this area, grounded on the so-called "three pillars on which the World Bank's legal and judicial reform (LJR) strategy is based." Those pillars are: "[f]irst and foremost, the judiciary must be independent, impartial, and effective… Second, an appropriate legal framework must provide enforceable rights to all. Third, there must be access to justice, without which all laws and legal institutions are meaningless"[48]. While nobody could possibly object to these three objectives, these principles are probably not substantial enough to form the basis of a strategy. However, there is another guiding idea permeating IFI documents that may exert direct influence on the project preparation phase: The judiciary must change to promote economic reform. This is a very important, frequently repeated, WB goal: "[e]conomic reform requires a well-functioning judiciary which can interpret and apply the laws and regulations in a predictable and efficient manner. With the emergence of an open market, there is an increased need for a judicial system."[49]

The conditions of justice administration have been increasingly linked to the reliability that any country supposedly needs to attract foreign investment and, consequently, improve growth and employment. According to this argument: "[i]f a country does not have the rule of law… it will not be able to at-

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[45] U.S. General Accounting Office, *supra* note 10, at 3.

[46] Christhina Biebesheimer & J. Mark Payne, IDB Experience in Justice Reform. Lessons Learned and Elements for Policy Formulation 31, 30 (Banco Interamericano de Desarrollo, 2001).

[47] *Id.* at 30, 31, 41.

[48] The World Bank, Initiatives in Legal and Judicial Reform 2 (2004).

[49] Dakolias, *supra* note 19, at 3.

tract substantial amounts of foreign investment and therefore will not be able to finance development."[50] The WB is mainly responsible for disseminating this argument, and it probably has won the battle in providing a foundation to justice reform since it offers a widely accepted rationale: economic success requires good governance; therefore, the rule of law and justice reform are crucial for achieving growth and development. Other international actors have also adopted this orientation. For instance, the Spanish international cooperation agency has formally stated that "an independent and professional judiciary… is a key for the development of economic activities," emphasizing that "carrying out of contracts depends on judges being independent and having a good technical preparation."[51]

Interestingly, a USAID report of what the agency achieved in the region in almost two decades —describing the agency's record in the field of justice reform as "impressive"— emphasized the time and meaning of that role:

> USAIDS's shift in the mid-1980s toward trade, investment, and indigenous private sector development brought attention to the enabling environment for private sector growth, and the Agency quickly recognized that the legal, regulatory, and institutional framework operating in target countries represented major barriers to foreign and domestic investment.[52]

The main goal for various international entities working with justice reform seems to be improving investment. Rigirrozzi perceives that the WB's actual approach to reform concerns solely to the creation of "conditions that enable a sound investment climate and reduce the costs of commercial transactions."[53] Some years before this assessment, Mendez arrived at a similar conclusion about international community actors working in the field of justice: "[i]ts priority has been the efficient delivery of services, particularly in fighting crimes of international interest and in expeditious resolution of investment disputes… there has been relatively little interest in emphasizing the overall fairness of processes and any decisions resulting from them."[54]

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[50] Thomas Carothers, *Promoting the Rule of Law Abroad. The Problem of Knowledge* 6 (Carnegie Endowment for International Peace, Rule of Law Series, Working paper N° 34, 2003).

[51] Estrategia de la Cooperación Española para la Promoción de la Democracia y el Estado de Derecho 35 (AECI, 2003).

[52] Gail Lecce, *Preface* to US Agency for International Development, Achievements in Building and Maintaining the Rule of Law. MSI's Studies in LAC, E&E, AFR and ANE (2002).

[53] María Pía Riggirozzi, *The World Bank as Conveyor and Broker of Knowledge and Funds in Argentina's Governance Reforms*, *in* The World Bank and Governance. A Decade of Reform and Reaction 207, 219 (Diane Stone & Christopher Wright eds., Routledge, 2007).

[54] Juan E. Méndez, *Institutional Reform, Including Access to Justice: Introduction*, *in* The (Un)Rule of Law & the Underprivileged in Latin America 221, 224 (Juan E. Méndez, Guillermo O'Donnell & Paulo Sérgio Pinheiro eds., University of Notre Dame Press, 1999).

The link between growth and justice was first established in the work of Douglass North as he emphasized the importance of functioning institutions for economic development. This line of thinking was later broadened by the Law & Economics school. While the concrete connection between economic growth and the administration of justice has not been subject to further elaboration, a number of studies have noted the lack of empirical evidence of a causal relationship between the two factors.[55] Moreover, during the last decade, the impressive economic growth of China has shown that the rule of law and an effective justice system are not needed for either attracting foreign investment or reaching a high rate of economic growth.

But whether a rigorous theory or just a crude ideological proposal, the WB's role in the widely accepted the criteria regarding development can hardly be overemphasized. "The financial leverage of the Bank… is perhaps surpassed by the normative power of its development theories… what it *says* about development, shapes other multilateral, bilateral, and national development strategies and defines the conventional wisdom on global development."[56] This preeminence is particularly clear in the field of justice reform.

The key aspect of WB's success in this field is its use of knowledge as a resource, closely and smartly combined with money, together with close collaboration with key decision-makers. As explained by Rigirrozzi for the case of Argentina:

> It is simply analytically misguided to assume that local actors simply agree or consent, or are coerced or co-opted by external development or financial agencies… the power of an international financial institution, such as the World Bank, to implement reforms is not linked to the leverage of conditional loans, but rather to its capacity to engage with key local actors to gain their consent to advance politically sensitive reforms. It emphasizes the implications of the configuration of social relations, funds and knowledge.[57]

The WB adopted and disseminated specific criteria that were widely accepted. Revolving around the link between growth and justice, these criteria did not have a scientific basis but were articulated in such a way that they came to shape the ideology of justice reform. This was followed up with a package of standard modules to be applied in any country. Finally, offers were made to some countries, providing them with funds and technical assistance.

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[55] Beatrice Weder, *Legal Systems and Economic Performance; the Empirical Evidence, in* Judicial Reform in Latin America and the Caribbean. Proceedings of a World Bank Conference 21-26 (Malcolm Rowat, Waleed H. Malik & Maria Dakolias eds., World Bank Technical Paper Number 280, 1995); Richard E. Messick, *Judicial Reform and Economic Development. A Survey of the Issues*, 14-1 Research Observer 117-136 (1999); Thomas Carothers, *Promoting the Rule of Law Abroad. The Problem of Knowledge* 6 (Carnegie Endowment for International Peace, Rule of Law Series, Working paper N° 34, 2003).

[56] Weaver, *supra* note 8, at 9-10.

[57] Riggirozzi, *supra* note 53, at 207, 212.

The process was not entirely up-down and several aspects of the "package" were probably learned through trial and error, but by its final presentation, the proposal appeared to be impeccable. Most countries accepted it for various reasons, one of them being the authority (and funds) of the WB. These countries most surely thought the WB knows the "right policies" and the "best practices" to build "sound institutions." As Riggirozzi pointed out, the WB created both the ideology of the reform and the demand for it.[58] This conclusion is shared by a participant of the process in Argentina: "[t]he Bank capacity for orienting funds towards reforms —via loans or technical assistance or training— has been a crucial element to boost the WB's policy ideas in the reform process. By the same token, this capacity has somehow sterilized efforts made by domestic actors."[59]

Regardless of the lack of evidence about a causal relationship between an effective justice system and economic success, presenting this guidance principle entails a clear advantage from the IFI's viewpoint: justice reform should not be conceived as a political process, but a technical one.[60] If the rationale for the reform is to be found in economics, its implementation should not be placed in the political realm. As the reform is depoliticized, some politically controversial components, such as the selection process of the judges, accountability and independence of courts, fall outside the scope of such projects, and —maybe more importantly— the judiciary's legal control over government actions is diminished.[61]

USAID has also chosen to define the limited scope of the reforms as "technical" instead of "political" by entering into the complex world of the contextual factors that deeply affect justice performance:

> AID officials in El Salvador and Guatemala favored technical projects because they (1) believed that such projects were easier to design, implement and manage; (2) assumed that technical changes could bring about substantive improvements; or (3) underestimated the extent that political considerations drove the host government's decision-making concerning the future of the judicial system.[62]

Perhaps this is why most international actors prefer to propose neutral justice reforms and not politically loaded ones when infrastructure projects become so important —and so expensive. While governance appears as the guiding concept of, for instance, IDB action in the field of justice reform, the depoliticized operational orientation is to bring in funds for buildings and computers.[63] The official way to ground this stress on the importance of

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[58] Riggirozzi, *supra* note 39, at 28.

[59] Personal communication with Horacio Lynch (Jan 2, 2006) (on file with author).

[60] Carothers, *supra* note 43, at 99.

[61] Riggirozzi, *supra* note 39, at 9.

[62] U.S. General Accounting Office, *supra* note 10, at 4.

[63] Faundez & Angell, *supra* note 32, at 99.

computers is as follows: "[t]hough upgrading technology does not, in itself, constitute reform or modernization, it can be an important tool to achieving transparency and more efficient functioning of institutions."[64]

As one WB official has admitted, "efficiency is a promising starting point… because of its relatively apolitical nature… Efficiency is a more neutral area in which changes can begin without major changes in the structure of government."[65] The argument is probably right. The problem is that, when adopted as a principle, it leads to a kind of reform that preserves the root causes of the traditional vices in justice systems intact.

The political aspects of judicial reform are important issues in the process of transforming this public service, the most important of which is to "enhance the principle of separation of powers: judicial independence of the courts; and the extent to judicial review powers vis-à-vis the other branches of the state." But international aid agencies find it difficult to confront these issues, and as a consequence "have generally been shy of pursuing reform initiatives that engage"[66]. There is no doubt that "[p]olitical benchmarks are the most difficult for the donor to establish or impose," but at the same time they are "the most important conditions for project success."[67]

A fundamental element of the game is money. But, when it comes to IFIs, or big donors like USAID, money is always readily available —and not always upon request. In the late 1990s, a WB task manager arrived in Guatemala City and with no further introduction he announced that the Bank had decided to lend the country US$ 30 million to overhaul its justice system. Years later, a representative of the European Union decided and proclaimed —more or less the same way— that the EU would donate 10 million euros to overhaul the Guatemalan prison system. According to a UNPD assessment, international sources made more than 185 million dollars available to Guatemala's justice institutions between 1996 and 2003.[68]

The case of IFIs is simple to understand. Banks *need* to lend money, as Weaver pointed out in the case of the WB: Robert McNamara (who took office in 1968)

> …initiated annual lending targets that over his thirteen-year tenure would increase lending from $1 billion to $12 billion. Internal promotions were granted on the basis of the ability of operational staff to meet targets. As a result, staff members have a strong incentive to find "bankable" projects (particularly those that would require large loans), convince borrowing governments of their ne-

[64] Biebesheimer & Payne, *supra* note 46, at 31.

[65] Maria Dakolias, *Court Performance around the World: A Comparative Perspective* 6 (World Bank Technical Paper Number 430, 1999).

[66] Domingo & Sieder, *supra* note 35, at 142, 154.

[67] Salas, *supra* note 9, at 41.

[68] Luis Pásara, Paz, ilusión y cambio en Guatemala. El proceso de paz, sus actores, logros y límites 211 (Universidad Rafael Landívar, 2003).

> cessity, and get the projects designed and approved as quickly as possible… The internal pressure to lend means that, in practice, projects are pushed through the organization very quickly.[69]

The IFIs' operational mode has been criticized by contesting "the loan structure itself" in which staff members aim at "making big loans, even when those loans are going to incompetent or corrupt debtor countries whose priorities —financial liquidity over institutional reform— vary considerably from those of the project." According to this argument, officials "seek out investments that can absorb huge amounts of capital with modest, if any, concern for the extent to which those investments support the larger judicial reform effort. And that is why project activities usually include the construction of courthouses and the purchase and installation of computers. Put simply: they cost more money." As a matter of fact, the view of traditional judges who demand large capital investments in infrastructure and facilities fits well into this approach.[70]

A bureaucratic mandate is probably shared by IFIs and donor agencies: money must go out there and, to some extent, regardless of the actual conditions to be found in the countries. Looking at the El Salvador experience, Popkin observed: "the availability of funding often does not coincide with a country's readiness to undertake major reform efforts… the dollars are available and must be allocated, but the counterparts may have a very limited ability to absorb the assistance and may actually be resistant to change."[71]

Disregarding obvious mistakes, if a bureaucratic procedure imposes its rules, the rationale of a justice reform may be lost along the way. IFI officials and donor agents are evaluated according to their capacity to assign funds. They will try to hand out funds in projects that at the beginning —and at the end— intend to be better than they really are. In the case of U.S. aid, Carothers noted: "[t]he imperative of getting millions of dollars out the door on a regular basis with a high degree of fiscal accountability produces inexorable pressure to create molds and formulas that stifle innovation."[72]

In fact, there is probably not much room for innovation in this routine. Nor is there much room to be thorough at the time of evaluating results and, especially, requiring national counterparts to fulfill their obligations in the project: "international agencies… have failed to require fundamentals change from

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[69] Weaver, *supra* note 8, at 84-85.

[70] Erik G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses, in* Beyond Common Knowledge: Empirical Approaches to the Rule of Law 336, 350, 353 (Thomas C. Heller & Erik G. Jensen eds., Stanford University Press, 2003).

[71] Margaret Popkin, Peace without Justice. Obstacles to Building the Rule of Law in El Salvador 254-255 (The Pennsylvania State University Press, 2000).

[72] Thomas Carothers, Aiding Democracy Abroad: The Learning Curve 343 (Carnegie Endowment for International Peace, 1999).

recipient governments in their Rule of Law projects."[73] At its worst, some international officials look for ways to justify national actors' non-compliance in order to keep the best possible relationship with them while looking forward to the next project.

Ultimately, what is the focus of a rationale that falls short of producing a strategy, has a working ideology to justify what it does, and always seems to have available, ready to go, money? Behind the operational blueprint, there are probably some implicit models —those of justice systems in the developed world—[74] and a very simple idea: "if the institutions can be changed to fit the models, the rule of law will emerge."[75] Rhetorically, worldwide accepted concepts —such as due process, judicial review and constitutionalism— are used while making no reference to the specific historical and social contexts in which said systems were produced, and converted into "moral and political imperatives that are used to measure and evaluate the quality of governance and the efficiency of legal systems."[76]

When this rationale is compared to internationally funded reform projects, a significant degree of coherence becomes apparent. The most enlightening example is that of criminal procedure reform, implemented by following a basic model —heavily influenced by the U.S. criminal system— slightly adapted to the cases of fourteen Latin American countries. A change in the actors' performance was expected as a result of the legal changes introduced by the imported model. A better administration of justice should emerge as the final result. The rule of law would be reached in the end. And, of course, huge amounts of money are needed —in both grants and loans— to implement these changes in the system.

IV. Actors in the Reform and the Dynamics of their Relationships

In times characterized by globalization, international actors are well accepted and old questions of "interventionism" tend to fade away. Nowadays, national actors tend to enhance their legitimacy by positioning their performance and proposals within frameworks provided by the discourse and actual behavior of international agencies working on a given project. For instance, human right groups frequently concentrate a significant amount of their efforts on achieving international impact instead of trying to work on growing better roots in local settings —always a more difficult and tedious task. In fact, they look for "rebound effects" in the country to which they belong, which are

[73] Salas, *supra* note 9, at 43.

[74] Rachel Sieder, *Renegociando 'la ley y el orden', Reforma judicial y respuesta ciudadana en la Guatemala de posguerra*, 35 América Latina Hoy 61, 62 (2003).

[75] Carothers, *supra* note 50, at 9.

[76] Faundez, *supra* note 35, at 575 .

in turn amplified by the media, hopefully in that way that will leave a more influential mark on public policies faster than by pursuing increased awareness in the citizenry.

When it comes to justice reform, international officials frequently have led the national authorities to consider the issue in order to create a starting point for the reform process. In that process, national actors have participated, but the extent to which each side —international vis-à-vis national actors— has an influence on the outcome varies a great deal from one country to another. In countries where a core of willing actors was in place —as seen in the cases of Costa Rica and Chile—, the contribution of international actors reinforced a basically endogenous process. Conversely, where just a few local and weak actors took part, international intervention would make use of several pressure mechanisms to impose that the issue be included on the public agenda. In these latter cases, which include most Central American countries, it is possible to argue that international cooperation has been "decisive, at least at the beginning."[77] Once the justice system reform is on the public agenda, countries are served irresistible proposals, made and funded by international agencies, with little domestic debate, not to mention consensus.[78] On the path these countries follow the "appropriateness" of the project becomes a recurrent problem that is difficult to solve.

The international experts brought to a given country as consultants for a justice reform project deserves attention. They may be specialists in justice reform or have some expertise in human resources, management or institutional reengineering, and proposed by the funding agency to do a diagnosis, draft a project or advice on its implementation. Previous experiences in other countries are highlighted in experts' resumes, no matter how deep the knowledge gained through these experiences. Working on an individual basis or as an associate to a consulting firm, the main attraction international experts offer relates to their international knowledge that, in turn, allows national officials, who frequently feel insecure when facing the reform challenge, to use the experiences of other nations to enlighten them.

A number of criticisms have been written on the work done in this field by international experts. On the diagnoses produced, it has been observed that most of them "focus almost only in the judicial sector pretending it is a separated entity from all the other national institutions" and offering, as a result, "assessments that put emphasis on formal aspects."[79] Accordingly, project designs are based in models built on legal norms without proper consideration of its actual functioning. Frequently, projects prepared by foreign experts, on the basis of short visits to the country, frequently fail to take into account national experts' opinions and rest basically on consultations and talks with gov-

[77] Binder & Obando, *supra* note 5, at 61, 89-90.

[78] Salas, *supra* note 9, at 44 .

[79] Faundez & Angell, *supra* note 32, at 103.

ernment officials.[80] A common outcome is that "reform projects are imported prescriptions rather than policy proposals which reflect specific local needs and power relations."[81] This trend entails "the risk than reform promoters assume that a one-size-fits-all model" is the right thing to work with.[82]

Since the importation of laws and legal institutions —via transplant or imposition— are prominent in the history of law,[83] the fact is that international actors exacerbate legal importation by taking advantage of the asymmetric relationship established between international and national actors. It is hard to establish any limits between the technical advice provided by an expert and the imposition of a policy based on the concurrent funding needed to implement the recommended policy.[84] The frontier is muddy also because the national actors feel legitimized their performance when using imported models. As it was observed for the Chilean criminal procedure reform, "importing ideas was a tool that legitimized the agents promoting the reforms, allowing them to gain a better position in the legal and political fields."[85]

For the case of the WB it has been remarked that consultants in some cases have a limited experience —or not experience at all— in the country where the projects are located, and therefore their goal is to replicate a WB standard format made for solving most usual problems in the judicial sector. In Argentina, in particular, the content of the program funded by the Bank was based on the work done by consultants who frequently worked on judicial reform projects being implemented in other Latin American countries. These consultants paid insufficient attention to the analysis, explanations and proposals made by national researchers, thus bringing about the risk that "[g]lobal knowledge carried by external consultants versus local knowledge supported by local ones can obstruct the prospects of join efforts to cooperate in analytical work."[86]

However, it should be noted that the ultimate influence of foreign consultants' intervention depends not only on their expertise and bearing, but also on the knowledge accumulated by local actors. The better the local knowledge and thinking on justice issues, the greater the quality of the demands made on external consultants.

After all, the other side of this asymmetric relationship is the national counterpart. On this side, "many of the recipients... have often failed to question the motives of donors and have primarily focused on the amount to be

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[80] Salas, *supra* note 9, at 45.

[81] Domingo & Sieder, *supra* note 35, at 142, 145-146.

[82] Faundez & Angell, *supra* note 32, at 96.

[83] Faundez, *supra* note 37, at 1.

[84] Riggirozzi, *supra* note 39.

[85] Daniel Palacios Muñoz, *Criminal Procedure Reform in Chile. New Agents and the Restructuring of a Field*, *in* Lawyers and the Rule of Law in an Era of Globalization 112, 123 (Ives Dezalay & Bryant G. Garth eds., Routledge, 2011).

[86] Riggirozzi, *supra* note 39, at 22.

received and less on the strings that were attached."[87] But it is a key part of the counterpart's attitude —when facing international actors— to not only be influenced by the funds to be received institutionally. Most often, individuals expect to receive some personal benefit, "whether computers, cash, a trip to the United States [or other donor country], or simply the association with a powerful foreign friend."[88]

Being a counterpart —both at an institutional or an individual level— confers a certain degree of legitimacy vis-á-vis other government agencies, the media and other international cooperation entities because: "[c]ountries outside the West rely on approaches developed in the key Western countries to provide credibility and legitimacy to their governments both locally and in global arenas."[89] Therefore, sharing the approach, concepts and proposals acquired from international actors is an extremely attractive option for would-be national counterparts. Besides, the national partner may personally receive small benefits handed out by the international entity.

The relationship with national partners needs to be cultivated by the officials of the international entity who need these partners to go forward in their plans. National partners are a sort of political or bureaucratic anchor for their work, especially when it comes to projects "that have no popular base of support [and] may find themselves tied to the coat tails of temporary political leaders."[90] The role of anchor is important when various international sources for cooperation operate in a given country, and competition among these entities, in generating projects and giving assistance, can be expected. In a situation like this, each agency usually counts on its *champion* —so labeled by an important international agency— who functions as the tactical ally to secure the relationship between the agency and its national counterpart. The alliance between the agency and its *champion* may be based on a real confluence on some goals and/or stimulated by incentives personally granted to the anchor. In Guatemala, whose Supreme Court launched a modernization plan with external support in 1998, the most important cooperation agencies had "his" or "her" justice in the Court, who was both the formal link with the agency and its informal representative before the Court.

In some cases, internal guidelines used by international entities strongly recommend that their officials fulfill the requests made by some key national actors even when they do not fit into the strategy formulated by the agency to reform justice in that particular country. It is advised to respond positively to requests guided by a traditional, non-useful way to reform justice —training, for example— in order to tactically reinforce the relationship with the counterpart and so facilitate the work done by the international agency in the country.

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[87] Salas, *supra* note 9, at 44.

[88] Carothers, *supra* note 72, at 260.

[89] Garth & Dezalay, *supra* note 35, at 1, 5.

[90] Salas, *supra* note 9, at 42.

The interests of foreign cooperation agencies and those of the authorities "need each other to survive" and that is why "they establish tacit pacts of procreation and custody of reforms lacking links with social needs and demands —as in fact it happened many times in the region."[91] It should be noted that the nature of the relationship established between international actors and their national counterparts to pave the way for the cooperation projects may either facilitate or harm reforms in the long term. For instance, that relationship may be favorable to clientele practices that should be eradicated if an in-depth justice reform project is to succeed. In given cases, it could make the position of an official who occasionally supports a reform project stronger because he or she is receiving some particular benefit, but in broader terms it goes against the transformation of the justice system. In the case of the WB, it has been noted that "[i]n an attempt to enhance support for policy change, World Bank staff endorses power relations that in some cases reinforce and in others limit the implementation of policy reform."[92]

Through these various practices, international officials' and experts' approach to their work seems to be solely guided by the need to accomplish the specific goals of the projects under their responsibility or in which they take part. The needs of a strategy aimed at transforming the justice system are deferred or plainly ignored. In some cases, the rationale by which a given project defines its accomplishments may be satisfied by making the implementation process easier, even if that may ultimately run counter to a more ambitious transformation of justice.

In the case of either loans or donations, the international actors' rationale tends to:

- Submit projects as outstanding initiatives and their actual outcomes as positive,
- Accept and endorse explanations provided by their national counterparts for any shortcomings and failures in the implementation process, and
- Evaluate the implementation process as relatively successful.

In other words, international actors' performance, mostly guided by the need to be successful in the project, may simply look for shortcuts to guarantee success for a particular project. In some individual cases, a dose of cynicism may be included but this does not seem to be a general characteristic of international officials' behavior. Many of them are people who firmly believe in what they are doing. However, beyond good faith, good intentions and clean consciences, the rationale introduced into international aid makes it that in many cases, the transformation of justice can hardly be reached.

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[91] Binder & Obando, *supra* note 5, at 61.

[92] Riggirozzi, *supra* note 53, at 207, 214.

At the core of the difficulties posed by such dynamics is the shortage of appropriateness of the national actors. True, the performance of international actors vis-á-vis their local allies does not usually lend itself to the constitution of a broad alliance so as to allow the project to attract all those in favor of a change in the justice system. Differences in the methods and tactics used by international actors resound in the forms and levels of national appropriation of the reform effort, and at the end of the day the appropriateness of the reform heavily depends on the existence and strength of national actors in favor of an in-depth transformation of the justice system.

International actors seem to be equipped to rightly answer questions regarding the strategy and process to be followed, what the starting points should be, which specific goals and what priorities are to be established. Undoubtedly, international experience is a source of learning and the accumulated knowledge is tremendously useful, but international actors, under no circumstances, are better authorized than national actors to respond those questions. Because national actors know the context and actual restrictions of the existing system better, they are better fitted to identifying the more viable options and courses of action during the project implementation process.

Attempts to replace national actors in that role are probably the most serious mistakes international actors make. After the El Salvador experience, it has been asked "whether excessive or inappropriate international involvement can actually inhibit progress in some areas. International donors can provide crucial assistance, but they cannot and should not replace societal processes."[93]

A distinction among national cases should be introduced. As Argentina is one of those countries in which national capacities are significant and actors in favor of justice reform are organized, international actors should fit better in their proper role: not trying to be a protagonist and play a complementary role in the process. As Riggirozzi recalled, the WB decided to play a different game and, using money as a lever, chose the easiest way politically speaking: to produce reform projects without consistency with the highest goals of justice reform. Mexico offers a different example: also a country with strong internal capacities, it has not accepted the imposition of externally funded projects. But in other countries, justice reform was forcibly introduced in the national authorities' agenda by international actors due to domestic actors' weakness. Later these actors found their initiative and proposal capacity further debilitated. Even actors who are in favor or justice reform but suffer from certain weakness tend to yield to the process driven by the international actor —and in his/her absence the change process gets paralyzed. When strong national actors are involved, many of the risks and problems examined thus far can be minimized, and the imposition of models unrelated to the specific social milieu can generally be avoided.

[93] Popkin, *supra* note 71, at 244.

V. Evaluation of Results and Knowledge Management

Reports by the cooperation agencies usually maintain that an important, if not deep, change in Latin American justice systems has taken place due to their active contribution to the reform process. A USAID publication (*Achievements in Building and Maintaining the Rule of Law*) invites the reader to recognize "USAID's role and the changes it helped to bring about in 15 countries: Argentina, Bolivia, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, and Uruguay." The agency's work is presented as crucial in "*Placing the Rule of Law on the Political Agenda*" because "USAID has been the catalyst for the justice reform movement in the LAC region" by "*Reforming Laws and Legal Procedures*" for a start —in particular, when "criminal code reform became an integral part of USAID justice programs."[94] However,

> USAID's support of code reform did not end with the enactment of new laws, but went on to include extensive institutional strengthening and training to develop skills needed by judges, prosecutors, defense counsel, and court administrators to carry out their new roles (p. 5) as the reform movement progressed, USAID continued to reinforce and supplement their efforts with considerable technical assistance and training to help shape new laws and foster public education and debate. USAID also furnished information about best practices, provided opportunities for local experts to observe other systems in operation, and otherwise supported and promoted the progress of legal reform throughout the region.[95]

Moreover, the agency work has focused on "*Strengthening and Reforming the Judiciary and Judicial Institutions*," "*Increasing Public Awareness, Access, and Advocacy*", and "*Supporting the Next Generation of Judicial Reformers*," including "the development of national and regional NGOs."[96] Overall,

> USAID has promoted changes that increase transparency and accountability, reduce political influence, and broaden participation in judicial selection processes… USAID programs introduced the concept of the professional court administrator, together with modern systems of case management, record keeping, and statistics, as well as the separation of judicial from administrative functions.[97]

Despite the modest caution that "[t]his ongoing process is far from complete, but is beginning to raise standards and expectations," it calls attention

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[94] US Agency for International Development, Achievements in Building and Maintaining the Rule of Law. MSI's Studies in LAC, E&E, AFR and ANE 1, 3 (2002).

[95] *Id.* at 4-5.

[96] *Id.* at 6-7.

[97] *Id.* at 6.

to something new in the region: "various LAC countries have now witnessed cases being brought against politicians, military officials, and others whose actions until recently had been considered above the law."[98]

A demanding reader would request hard evidence supporting such optimistic conclusions. However, the very first difficulty in endorsing any conclusion on the work performed by international cooperation in justice system reform in Latin America —and probably all over the world— is the lack of serious evaluation of the work that has been done. For this purpose, according to Carothers,[99] it would be necessary not only to establish certain criteria to define what exactly should be considered a *success*, but also to demonstrate the existence of "*causal links* between assistance programs and changes in the recipient societies." None of these developments have been produced and in fact most agencies "have tended to do few evaluations of their work."[100]

It has been noted above that weaknesses and insufficiencies affect the diagnosis. Something similar takes place in project evaluations. In some cases, there simply is no evaluation. In others, the evaluation is restricted to administrative aspects of the project, or merely list the activities completed, using figures "and indicators for components and activities (specifying that, for example, ten laws should be passed or 500 people trained),"[101] that is, focusing "on outputs rather than effects."[102] This approach entails a distortion: "when faced with strict, narrow criteria for success, aid officials begin to design projects that will produce quantifiable results rather than ones that are actually needed."[103]

It is rather exceptional to find a closer look taken of the outcomes that were effectively produced, not to mention the effects of the project on the justice system. International actors, seemingly concerned with introducing changes through the projects, do not show any interest in finding out "what effects those changes will have on the overall development of the rule of law in the country" when evaluation time comes.[104] A cynical interpretation of this disregard points out that agencies are not interested in getting real evaluations of the projects they manage: "weak independent evaluation is tied to the politics of donor assistance. After all, the goal of monitoring and evaluating these projects lies in obtaining a clean bill of health so that disbursements can go forward and new loans can be made."[105]

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[98] *Id.* at 6-7.

[99] Carothers, *supra* note 72, at 281.

[100] Linn Hammergren, Envisioning Reform: Improving Judicial Performance in Latin America 23 (The Pennsylvania State University Press, 2007).

[101] Biebesheimer, *supra* note 16, at 108.

[102] Carothers, *supra* note 72, at 286.

[103] *Id.* at 294.

[104] Carothers, *supra* note 50, at 10.

[105] Jensen, *supra* note 70, at 336, 351.

In any case, evaluation is in fact a circumvented —or considerably minimized— phase of internationally-funded projects. In 1993, the USGAO had already warned about: "AID funded continuation of projects without critically evaluating their impact. One major stumbling block has been AID's inability to agree upon indicators to evaluate the impact of its work."[106] The following year, an internal audit found that "USAID/Guatemala did not establish performance indicator baselines and intermediate targets to measure the progress of justice program activities."[107] Some years later, the same problem was found by an internal review of a program developed in Mexico: "the performance indicators and the respective targets are not appropriate for measuring progress toward accomplishing the subobjectives."[108]

The point missing in the exercises intended as project evaluations is whether the results really contributed to producing the desired reforms. In El Salvador and Guatemala, "[p]roject evaluations… did not indicate whether the projects resulted in reforms to the judicial system."[109] "In Honduras, AID cited the number of seminar and workshops given, observational trips taken, and public defenders employed as evidence of progress. However, none of these indicate whether the delivery of justice is actually improving."[110]

This underperformance has affected not only USAID projects. Most international agencies have tended to call evaluation to short-term situation analysis, which emphasizes certain actions and "not always the most important ones."[111] Two IDB officials identified the problem: "[c]onclusions of field studies and evaluations to date tend to be too general to be very useful."[112] Quoting the warning made in an IAB Task Force on Country Offices report, Faundez and Angell[113] underline the evaluators' emphasis on disbursements instead of paying attention to the project's impact on the justice system. These authors note that neither the WB nor USAID perform better in this area.

One of the difficulties with evaluation stems from who the evaluators are. Usually an agency has a "roster" to pick the consultant/s to be in charge of the evaluation. They are not officials, but experts in close, and frequently continuous, contact with agency officials. In plain language, "independent" evaluators depend on the agencies to make a living. As a consequence, when problems are found in a project evaluation, these evaluators are not prepared to produce an exacting document in which serious mistakes or severe short-

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[106] U.S. General Accounting Office, *supra* note 10, at 17.

[107] U.S. Agency for International Development, Audit of USAID/Guatemala's Justice Program 5 (Audit Report Nº 1-504-011-P, September 9, 2004).

[108] U. S. Agency for International Development, *supra* note 25, at 2.

[109] U.S. General Accounting Office, *supra* note 10, at 4.

[110] *Id.* at 18.

[111] Binder & Obando, *supra* note 5, at 74, note 54.

[112] Biebesheimer & Payne, *supra*, note 46, at 43.

[113] Faundez & Angell, *supra* note 32, at 112.

comings are highlighted because there is no "real detachment between those evaluating and those evaluated."[114] In the case of the WB, "[t]he fact that in some cases task managers are involved in writing the ICRs [Implementation Completion and Results Report] …further undermines their credibility."[115]

Usually, problems become prominent when the agency and its national counterpart expect a project extension, or are willing to prepare a new project to deal precisely with the very problems the evaluator will find. This practice has been reported in the case of USAID: when problem areas are "highlighted in project evaluations were often used to justify project extensions and additional project funding in the absence of any clear indication that the project would ever meet its intended goals."[116]

If *who* evaluates is a key factor, another important one is *what* is to be evaluated. Faundez's review of the WB project portfolio led him to observe that: "[t]he Bank... has placed excessive emphasis on quantitative indicators associated with the efficiency of courts, but has neglected the development of qualitative indicators to measure project activities that do not lend themselves to quantitative measurement."[117] This author wonders whether "the Bank has a mechanism to control the quality and relevance of the output of consultancy firms" and concludes that: "[s]ome ICRs [Implementation Completion and Results Report] …tend to be rather uncritical… Moreover, in the absence of a thorough evaluation in the field, it is not possible to state with any degree of certainty the main achievements of the projects."[118] Weaver concurred with the "neglect of monitoring and evaluation (M&E) throughout the project life cycle" at the WB, where she detects an "externalization of blame." This author also observes that: "[t]he result, broadly speaking, is an operational environment in which assessing the impact of a loan may be actively discouraged. Any focus on ensuring results is diminished and organizational learning is impaired."[119]

Indeed, one of the consequences of a derelict evaluation process is impaired learning. However, most agencies maintain that they pay special attention to what is widely called "lessons learned." The U.S.G.A.O. report *U.S. Assistance for Justice Administration*, issued in 1993, brought up "the lessons learned from 10 years of judicial reform experience in Latin America." In very clear words, the report indicated that:

> The most valuable lessons based on our work in Latin America were that: imposing judicial reform on a country that is not ready for or receptive to change is generally ineffective and wasteful, addressing technical problems without

[114] Carothers, *supra* note 72, at 302.

[115] Faundez, *supra* note 13, at 6.

[116] U.S. General Accounting Office, *supra* note 10, at 47.

[117] Faundez, *supra* note 13, at 8.

[118] *Id.* at 6-7.

[119] Weaver, *supra* note 8, at 87-90.

> confronting the political and institutional obstacles to reform is usually not productive… Projects Launched Without Commitment From Host Governments Face An Uncertain Future… Projects That Do Not Address Political and Systemic Obstacles Will Have Limited Impact.[120]

However, the report noted at the same time that those lessons seemingly learned had no effective application: "[t]he State Department has stated that it is U.S. policy to provide assistance only when a serious commitment to change exists… If this has been U.S. policy, AID has not always followed it."[121] In even broader terms, it was remarked that: "AID appeared to ignore the lessons learned from previous efforts" and specifically "failed to appreciate that the institutions AID was trying to change were at the cultural core of the societies they were seeking to alter. Yet, these same conditions remained at the root of many of AID's most problematic judicial reform programs in the region."[122]

"Lessons Learned" by the WB appears in a 2004 report entitled Initiatives in Legal and Judicial Reform and seems to show judicious comprehension of the subject:

> Legal and judicial reform is a long-term process… Legal and judicial reform should come from within the country and respond to its specific needs… Legal and judicial reform requires government commitment… Legal and judicial reform projects should be conducted through a participatory approach… Wholesale importation of legal systems may not be appropriate… Coherence of legal reform requires a comprehensive approach that ensures that the modernized legal system will not suffer from internal inconsistencies. Coordination among all concerned development institutions, multilateral and bilateral, is critical… Partnerships to share knowledge and experience can enhance legal and judicial programs.[123]

The question to be answered is whether comprehension of the complexities surrounding the areas where reform projects are to be developed is in fact guiding the action. It does not seem so if "[d]onors have continued to repeat similar mistakes in different countries, suggesting that important lessons learned are not always incorporated into planning and implementation of judicial reform projects."[124] Maybe there is a question that should be answered beforehand: beyond the trumpeted lessons learned, is there a policy for learning and managing knowledge in place for the international agencies working on Latin American justice reform?

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[120] U.S. General Accounting Office, *supra* note 10, at 2, 3, 6.

[121] *Id.* at 46.

[122] *Id*. at 41, 42.

[123] The World Bank, Initiatives in Legal and Judicial Reform 12-14 (2004).

[124] Popkin, *supra* note 71, at 259-260.

A look at the activities undertaken and products developed by these agencies clearly shows that knowledge does not play a pivotal role. Neither before the project is designed nor during its implementation, or later on, is there any sizable investment in producing knowledge about the issue being confronted. Only occasionally —mainly because somebody in the agency develops a personal interest in a specific subject— a solid reflection on a given topic arises. In fact, when the most important agencies' publications are reviewed, they show rather scant cumulative knowledge and, generally, the amount of knowledge is disproportionately low when compared with the amount of material resources invested in the area. In the area of justice reform it is also true that "[d]emocracy aid providers have accumulated almost no systematic knowledge about the long-term effects of their efforts."[125]

In examining the actual behavior of the international officials involved, one comes to the conclusion that deep knowledge of the operation of the justice system and its relationship with the social and cultural characteristics of a given country is not indispensable to them. Instead, short consultancies, focused on a specific subject and aimed at practical results, are deemed to provide the needed doses of specific knowledge to successfully carry out a project. In that way, there is not enough room for any in-depth study of the subject, an exercise that might shed light on the major complexities —that unavoidably will be encountered during the project implementation— which understanding makes it easier for the implementers to decide what is feasible and what the priorities should be. On the contrary, international actors' working practices correspond to the principle of learning-by-doing; in other words, action is first and by way of doing you will acquire knowledge. Although true to some extent, this is a longer and costlier way to learn, assuming that knowledge will be gained sometime along the road. When it comes to a project, its failure might possibly be also a way to learn something, but it is a very expensive way to do so —wasted resources and time– and unnecessary in the first place.

An international agency even fails to learn from its own experience by discarding "tough-minded reviews of their own performance."[126] The agencies' bureaucracies usually ignore previous efforts because "frequently do a poor job of collecting and disseminating the information they produce, even among their own employees, sponsor research that is not incorporated in their projects."[127] New incomers tend to think they are moving in a new direction and sometimes incur expenses in trying to discover what the agency should have already known.[128]

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[125] Carothers, *supra* note 72, at 286.

[126] *Id.* at 9.

[127] Hammergren, *supra* note 100.

[128] Binder & Obando, *supra* note 5, at 706.

It has been noted that "an agency like USAID… is challenged by a lack of institutional learning and memory."[129] In the case of the WB, it has been recommended that "the Bank should consider adopting a more structured approach to knowledge management."[130] The IDB has been asked to provide "[a] methodology that permits rapid learning from successes and failures [that] will aid in preventing problems and correcting them as they arise."[131] All the major actors in internationally funded projects on justice reform lack a policy for learning and handling knowledge.

But international agencies appear to share a consensus that disregards knowledge. To explain it, Hammergreen[132] and Carothers[133] point out that external assistance is a competitive business and suggest that the resulting relationship between foreign agencies discourage them from sharing knowledge and building on each other's work. Moreover, these entities do not seem very interested in their own past: "[t]hey are by nature forward-looking organizations, aimed at the next project or problem."[134]

There is a price to be paid for this approach. One of the first consequences is to neglect "the input of those with more in-depth knowledge of local institutions."[135] If the available knowledge on a subject in a given country is routinely ignored by foreign actors, the projects they sponsor will systematically underestimate any resistance and rest on misperceptions that will drive them to failure. A second consequence, partially related to the first one, is that "international actors tend to underestimate resistance to the profound changes needed to build the rule of law."[136] A third, broader and more decisive one, is that this approach entails a degree of disconnection —caused by ignorance— between the project and its context, which acutely harms the implementation of the former:

> Many U.S. programs treat judicial systems, for example, as though they were somehow separate from the messy political world around them. Such programs have been slow to incorporate any serious consideration of the profound interests at stake in judicial reform, the powerful ties between certain economic or political elites and the judicial hierarchy, and the relevant authorities' will to reform.[137]

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[129] Jensen, *supra* note 70, at 336, 351.

[130] Faundez, *supra* note 13, at 10.

[131] Biebesheimer & Payne, *supra* note 46, at 43.

[132] Linn A. Hammergren, The Politics of Justice and Justice Reform in Latin America. The Peruvian Case in Comparative Perspective 276 (Westview Press, 1998).

[133] Carothers, *supra* note 72, at 9.

[134] Carothers, supra note 50, at 12-13.

[135] Riggirozzi, *supra* note 39, at 28.

[136] Popkin, *supra* note 71, at 253.

[137] Carothers, *supra* note 72, at 101-102.

As a result of limits drawn by international agencies themselves, a substantial portion of their projects end in at least partial failure. At the beginning of the new century, it was observed that: "after more than a decade of aid and millions of dollars later, the justice systems of Latin America are facing their gravest crisis."[138] One of the factors intervening in this outcome is that of agencies having "encouraged over financing and redundancy in areas where everyone wants to work, and the funding of some activities that objectively represent fairly low priorities."[139]

Limitations also arise in promoting and supporting civil society groups concerned with justice, one of the most recent new developments in this field: "In general, civil society programs reach only a thin slice of the civil society of most transitional countries… Programs to aid civil society help many individuals and small organizations strengthen their civic participation but rarely have society-wide reverberations."[140]

One concurrent problem has been interagency competition: "the Justice Department's foreign rule-of-law work is too separate from that sponsored by USAID, due to institutional rivalries among all the U.S. actors involved in rule-of-law aid that dates from the 1980s." As a result, U.S. funded programs to support justice reform and other state institutions had "weak effects relative to their size."[141]

International agencies actually find it difficult to recognize shortcomings and failures. In the case of USAID, it has been said that it shows a "reluctance to terminate unsuccessful projects" (U.S.G.A.O. 1993: 6). Even on the rare occasions that the outcomes of a project are evaluated with a negative balance, nothing happens because "one lesson the agencies have had difficulty learning is how to terminate projects that, by their own assessments, consistently fail to achieve results commensurate with the money invested."[142] This point is illustrated by the approach adopted when the project failures in a country were undeniable: "[i]n Guatemala, AID officials said that discomfort with the judicial reform project led AID to concentrate on commodity purchases and high-priced seminars and technical assistance that did not effect any real changes in the justice system."[143] In other words, the project was not stopped because it failed and disbursements continued for irrelevant acquisitions and activities.

However, a tacit recognition of failure may be the decision made by the World Bank to quietly retreat from justice reform in Latin America. As shown in Table 3, between 2004 and 2010, the amount of money devoted to Rule

[138] Salas, *supra* note 9, at 41.

[139] Hammergren, *supra* note 132, at 276.

[140] Carothers, *supra* note 72, at 338, 341.

[141] *Id.* at 275, 336.

[142] U.S. General Accounting Office, *supra* note 10, at 9.

[143] *Id*. at 17.

of Law programs has been constantly decreasing and in 2010 was just about 1% of the amount lent to countries in the region.

Table 3. World Bank Lending in Latin America and the Caribbean on Rule of Law Programs in millions of US dollars (2004-2010)*

2004	2005	2006	2007	2008	2009	2010
270.9	147.9	108.8	97.5	50.1	1.0	22.9

* Data compiled by the author from World Bank sources

VI. How Worthwhile is International Aid?

Unfortunately there are no in-depth case studies from which general conclusions can be obtained, but available evidence shows a number of significant failed efforts among internationally funded justice reform programs. The cases of Guatemala and Argentina illustrate the kind of problems that usually affect these programs.

In a case study on the Guatemalan justice reform process[144] —where, as noted, between 1996 and 2003 international sources made more than 185 million dollars available to justice institutions—, it was possible to find many serious shortcomings, and explain why internationally-funded projects incur in them or fail. Most of the factors examined in this article were at hand in Guatemala. Attention was not paid to the particular characteristics of the country. Imported models were introduced in an attempt to strengthen justice institutions. The projects focused more on immediately measurable results, instead of long-term, more deeply-rooted achievements. International actors were not able to proceed in a coordinated manner; that is, sharing a chart of goals and tasks, clearly defined objectives and responsibilities, and time limits.

Each agency contributed to this common failure by focusing in their own policies and mandates —instead of prioritizing what the country required— and competing in their own performances prevailed while official discourses endlessly praised cooperation. A variety of agendas elaborated by international entities in Guatemala blocked the option to work on an integrated plan to help the country's justice system —when the 1996 peace accords opened up a rare window of opportunity to reform it. Each agency grasped at the leadership or the influence of a national personality to carry out its project, paying lip service to considerations of institutional and social conditions, which constrained not only the transformation of the justice system but even the success of specific reform projects.

[144] Luis Pásara Paz, Ilusión y cambio en Guatemala. El proceso de paz, sus actores, logros y límites (Universidad Rafael Landívar, 2003).

While justice reform in the country "constituted part of the conditionality for donor funds to support the peace process, yet the demand from local political elites and citizens for concerted reform… remained weak."[145] When it was apparent that there was not enough will or commitment on behalf of their national counterparts, external actors took shelter in the rationale that the projects would generate such will and commitment (although both are prerequisites), under the premise (or excuse) that "[t]he object of many projects is preparing the way for future reforms."[146] This stance was indeed conducive to ill-conceived, technically poor projects.

In regard to the justice system, one of the big failures was the newly created police force (PNC) —with U.S. and Spanish support— that sooner than later revealed itself as a pernicious actor.[147] At the end of the day, when the national authorities did not fulfill the commitments acquired through the peace accords, funding sources went on providing funds, despite the fact that fulfilling its commitments was a condition for disbursing aid.

In Argentina, international aid found strong resistance to the transformation of the justice system during Carlos Menem's government (1989-1999). The responses expounded by some international actors included promoting domestic efforts and contributing to build actors with enough capacity to demand and propose that changes be produced in justice administration. On the one hand, the International Monetary Fund (IMF) conditioned a loan —desperately needed by government authorities— to implement the Consejo de la Magistratura, aimed at providing the system with transparency and objectivity in the process for appointing judges. On the other hand, USAID conceded grants to NGOs —such as Poder Ciudadano, Conciencia, and FORES— to strengthen their roles as qualified voices of civil society on justice affairs.[148]

However, the WB persisted in working with the government —which is the only possible borrower that can be considered for a Bank loan— but renounced the power of conditionality, and tried to find national counterparts for reform their own way. After being more or less rejected by the Supreme Court, WB officials made entry through the Ministerio de Justicia that by the middle 1990s had prepared a comprehensive diagnostic study on the Argentinean justice system, funded by the Bank. Its conclusions traced a complex panorama in which political factors —such as decisions on judicial ap-

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[145] Rachel Sieder, *Legal Globalization and Human Rights, in* Human Rights in the Maya Region: Global Politics, Cultural Contention and Moral Engagements 67, 81 (Pedro Pitarch, Shannon Speed & Xochitl Leyva Solano eds., Duke, 2008).

[146] Biebesheimer & Payne, *supra* note 46, at 31.

[147] Rachel Sieder & Patrick Costello, *Judicial Reform in Central America: prospects for the rule of law, in* Central America. Fragile transition 169, 196 (Rachel Sieder ed., Institute of Latin American Studies-MacMillan Press, 1996).

[148] Rebeca Bill Chavez, The Rule of Law in Nascent Democracies. Judicial Politics in Argentina 143 (Stanford University Press, 2004).

pointments and the Supreme Court operations— were identified as critical. However, "despite the highly political issues raised by the assessment reports and the public discussions with local experts, the Bank's Legal Department designed a programme of reform that narrowly focused on technical managerial aspects of the system related to court administration," known by its acronym PROJUM and funded with 5 million dollars.[149] By taking this option, the WB domesticated the reform and made it acceptable to the government´s parameters.

According to Riggirozzi, the disregard of the study at the time of designing the project is explained by the WB inclination to choose a depoliticized approach to justice reform that makes it possible to reach an agreement with the government —any government— insofar as its content does not generate resistance among the authorities. The key factor rests on "the power of the Bank to frame policy paradigms that leave aside political questions that challenge the structure of authority… mainly because the Bank's interest in legal and judicial reform was not related to political aspects of the system but rather technical ones linked to" an investment friendly climate.[150] In the Argentinean case, the result was a justice reform project that brought out some ideas promoted by the WB and deemed acceptable to the depoliticized agenda shared by the Executive and the Supreme Court.[151]

Unfortunately, Guatemala and Argentina are no exceptions. "Between 1984 and 1990 AID provided some $13.7 million to the judicial reform programme in El Salvador. However, given that it focused on technical problems rather than addressing the lack of political will for reform, the project inevitably achieved little."[152] Accordingly, an official report admitted: "in 1990 that after 6 years of U.S. assistance, El Salvador's judicial system still lacked the ability to deliver fairs and impartial justice." Moreover, "AID documents show that most judicial reform efforts in Latin America experienced serious problems, resulting in a portfolio of marginally successful projects."[153]

WB projects in Venezuela "neither affected in any relevant way the changes nor reached their objectives."[154] In the case of U.S. work in the field of Latin American justice, the resulting balance was put forward after 15 years of cooperation:

> ...what stands out about U.S. rule-of-law assistance since the mid-1980s is how difficult and often disappointing such work is. In Latin America, …where the United States has made by far its largest effort to promote rule-of-law reform, the results to date have been sobering. Most of the projects launched with en-

[149] Riggirozzi, *supra* note 53, at 219.

[150] *Id.*

[151] Riggirozzi, *supra* note 39, at 28.

[152] Sieder & Costello, *supra* note 147, at 169, 185.

[153] U.S. General Accounting Office, *supra* note 10, at 3.

[154] Binder & Obando, *supra* note 5, at 776, note 38.

> thusiasm —and large budgets— in the late 1980s and early 1990s have fallen far short of their goals.[155]

Another analysis covering most of the international institutions working in the area of justice arrived at a similar conclusion some years later: "the design and approach were neither complete nor comprehensive. They did not correspond to an integral vision for defining an agenda and a methodology with the capacity to unblock and overcome the basic problems of justice sector in Latin America and the Caribbean."[156] In most cases of Rule of Law programs, as Salas noted,[157] international actors did not call for substantial changes from beneficiary governments.

In this article, emphasis has been put on the errors, vicious circles and negative causalities. But it is fair to recognize the real contribution some of the internationally-funded programs have made. An official U.S. report is probably right when it asserts that:

> U.S. rule of law assistance has helped these countries undertake legal and institutional judicial reforms, improve the capabilities of the police and other law enforcement institutions, and increase citizen access to the justice system… In each of these countries we visited [Colombia, El Salvador, Honduras, Guatemala y Panamá], host country government and civil society representatives noted that the presence of the international community —particularly the United States— was needed, not only for the resources it provides, but also to help encourage government officials to devote the necessary resources to enact, implement, and sustain needed reforms.[158]

It is only fair to recognize the real contributions made by some of the internationally-funded programs. The presence of international agents in the field of justice has initiated or stimulated —depending on the case of each country— work on justice. Probably, as Carothers put it for U.S. democracy aid, that presence "is rarely of decisive importance but usually more than a decorative add-on."[159]

But if the question is whether they could do better than they have, it is relatively easy to answer in the affirmative. There are many mistakes and structural limits in the way that most of the internationally-funded projects have operated. As has been reviewed in this article, there have been several negative facts: a superficial diagnosis, a separation between general —sometimes unrealistic— objectives and specific activities, the use of imported models regardless of local conditions, a lack of evaluation of the impact on the change in the system. Poor knowledge management contributes to fostering

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[155] Carothers,*supra* note 72, at 170.

[156] Binder & Obando, *supra* note 5, at 774.

[157] Salas, *supra* note 9, at 43.

[158] U.S. General Accounting Office, *supra* note 10, at 2, 8.

[159] Carothers, *supra* note 72, at 347.

conditions in which constructive criticism and innovation do not flourish and errors are repeated.

International agencies have not kept a stable interest in the area;[160] their role has been "neither linear nor always coherent."[161] At the same time, they have excessively available funds and have proposed too many objectives within an agenda that is too broad, impossible to implement,[162] and mainly guided by institutional policies "which frequently will not coincide with objective needs."[163]

USAID, the most important governmental agency working in the region, has been accused of "lacking an integral vision and a comprehensive strategy of the reform process."[164] A concurrent conclusion is found, as recently as 2011, in an Audit Report on a Rule of Law program implemented by the agency: "USAID/Mexico has not delivered technical advisory services in a strategic manner to reach maximum efficiency, effectiveness, and sustainability, mainly because it lacks a strategic focus... As a result, USAID/Mexico Rule of Law activities has had limited success in achieving their main goals."[165]

When looking to the variety of international actors working in a given process of justice reform, contradictory agendas, models and recipes come to light: "[t]ransitional countries are bombarded with fervent but contradictory advice on judicial and legal reform."[166] A not so silent competition is in progress as a result of "the tendency of different aid providers to try to import their own models and for those models to conflict with one another."[167] U.S. support for passing and implementing a new criminal procedure and Spanish agency's (AECI) insistence on introducing *Consejos* to govern judicial systems are clear examples of this trend.

From the point of view of governments, the use of aid as a tool available from the foreign policy toolbox seems unavoidable as long as it is used in domestic policy in the receiving country, as well. Being Scandinavian countries a notable exception, aid is a slot on a foreign policy matrix that is drawn thousands of miles away from the recipient country, a task for which not even the embassy's opinion is always taken into account. In numerous cases known in

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[160] Binder & Obando, *supra* note 5, at 90.

[161] Domingo & Sieder, *supra* note 35, at 142, 142.

[162] Linn Hammergren, *Quince años de reforma judicial en América Latina: dónde estamos y por qué no hemos progresado más*, in Reforma judicial en América Latina. Una tarea inconclusa 3, 4 (Alfredo Fuentes Hernández ed., Corporación Excelencia en la Justicia, 1999).

[163] Hammergren, *supra* note 132, at 316.

[164] Binder & Obando, *supra* note 5, at 756.

[165] U. S. Agency for International Development, *supra* note 25, at 2.

[166] Carothers, *supra* note 43, 104.

[167] Thomas Carothers, *The Many Agendas of Rule-of-Law Reform in Latin America*, *in* Rule of Law in Latin America: The International Promotion of Judicial Reform 4, 15 (Pilar Domingo & Rachel Sieder eds., Institute of Latin American Studies, University of London, 2001).

Latin America, aid projects have been granted or denied on purely political basis, regardless of the project's merits.

That is why in the receiving countries the question has arisen "as whether aid providing countries are not in fact mainly serving the interests of the aid-providing countries."[168] Beyond the donor countries' using the projects politically, the rules governing the procurement processes —including that of considering the nationality of the companies providing equipment or services, and the citizenship of the consultants to be hired— imply that a significant portion of the funds granted sometimes go back into the donor country's economy.

Both governmental cooperation agencies and those that are part of the United Nations system operate under formally established mandates and guidelines —which are not always public— that their officials must follow. Those internal rules prevail over any other consideration. Among them, keeping the institutional profile high becomes a problem when it conflicts with what is needed to accomplish the most important goals of a reform project. This is one of the reasons it is so difficult for cooperation agencies to join efforts for funding and developing a big and significant project; they prefer to fund a short-term, visible project that will reinforce their own institutional image.

Moreover, when it comes to multinational aid organizations, a key factor is the strategy each one develops to occupy spaces and positions, to expand functions, and to increase their own budgets. Explicit discrepancies between these organizations can be explained by the competition for expansion. "The current system of international organizations does not lend itself easily to cogent and integrated action. Each of the different agencies has its own charter, budget and governing body."[169] Besides, a pathology of international bureaucracies has been diagnosed as an important element to explain their actual behavior: "[w]hile I do not seek to generalize my explanation of hypocrisy beyond the critical case of the [World] Bank, I do see its hypocrisy as an exemplar of the bureaucratic 'pathologies', dysfunctions, and legitimacy crises that we observe in international organizations today."[170]

It is worth mentioning the case of the UNDP, as the United Nations' agency in charge of development programs. The UNDP frequently signs contracts to be the agency responsible for the administrative duties in cooperation projects funded by a donor country and executed by a recipient government. The UNDP in turn charges a fee that contributes to financing the agency. This mechanism is increasingly important in a world context with a growing difficulty in finding funds for development. But when the UNDP establishes

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[168] *Id.*

[169] Alvaro de Soto & Graciana del Castillo, *Obstacles to Peacebuilding*, 94 Foreign Policy 69, 74-75 (1994).

[170] Weaver, *supra* note 8, at 3.

such a partner relationship with the local government around some projects, a critical look of the national authorities' performance carried out by UNDP officials becomes rare.

Harsh criticism of the international cooperation is not lacking, as we have seen. Among the most vocal are Binder and Obando:

> ...cooperation... works through bureaucratic entities, inter-agencies power games and rules of the game shaping a distant reality... their tendency to achieve short-term results, multiple bureaucratic rationales, internal fights in which political criteria prevail over technical aspects... the structural difficulty for coordination between different cooperation actors... may block advancement or deepness of judicial reform.[171]

Certainly, not all the burden should be placed on international cooperation. Domestic conditions are crucial, not only in the implementation of the projects themselves, but also in framing of the role of the foreign actors. To some important extent, projects aimed at reforming State institutions depend on the wider process unfolding within the State apparatus. National counterparts share responsibilities with international officials and experts because both groups are connected by the implementation of a project.

The national responsibility is apparent when a reform project is put into effect and it is found that "[t]he primary obstacles to such reform are not technical or financial, but political and human," and also when even the generation of politicians arising out of the political transitions to democracy "are reluctant to support reforms that create competing centers of authority beyond their control."[172] If anything, international actors are responsible for denying or minimizing the importance of these factors that, as a matter of fact, explain a significant number of the failures.

International actors are also responsible for not paying enough attention to their own learning processes. As early as 1993, a USAID report on agency work in Honduras[173] explained the failures of the projects by attributing them to the conditions lacking in the country. Later, a new report was written[174] presenting a broader analysis of the specific conditions needed for Rule of Law projects to make sense. The authors noted that in the absence of those conditions —mostly related to the will and capacities of the national actors, projects in this area were condemned to failure and were therefore wasteful. The proposed criteria were mostly ignored by both USAID and other agen-

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[171] Binder & Obando, *supra* note 5, at 90-92.

[172] Carothers, *supra* note 43, at 96.

[173] Gary Hansen, William Millsap, Ralph Smith & Mary Staples Said, *A Strategic Assessment of Legal Systems Development in Honduras* (Center for Development Information and Evaluation, A.I.D. Technical Report No. 10, 1993).

[174] Blair & Hansen, *supra* note 15, at 10.

cies. Since the publication of that seminal paper, several other critical works have circulated, but they have had a very limited effect on the activities undertaken by international cooperation.

VII. Conclusions

International support for justice reform has played an important —and positive— role in some countries at certain times. In several countries, justice reform would not even be an item of the public agenda if international actors had not induced it. What has been gained through international support in the area of justice makes international actors key protagonists of the process. However, their role needs to be substantially improved and the area in which improvements are mostly likely needed is in the learning capacity of the international actors and their interest in critically reviewing their own work.

On a balance, a couple of introductory caveats should be offered. On the one hand, it is important to keep in mind that establishing the Rule of Law is a broader and more difficult task than reforming the justice system. Therefore, building a better justice system is not enough to establish the Rule of Law; the former is just a component of the latter. The quality of the laws, the legal culture, the actual social and economic inequalities, and the role played by the government —among other elements— are important and complex components of the process of building the Rule of Law.

On the other hand, internationally-funded programs of justice system reform are not able to produce deep changes, which are badly needed for both a better justice system and the establishment of the Rule of Law, in the receiving countries. Clearly, such programs are not able to "fundamentally reshape the balances of power, interests, historical legacies, and political traditions of the major political forces in recipient countries. They do not neutralize dug-in antidemocratic forces. They do not alter the political habits, mind-sets, and desires of entire populations" and "[o]ften aid cannot substantially modify an unfavorable configuration of interests or counteract a powerful contrary actor."[175] That is why international aid in the area of justice has not delivered a new justice system in receiving countries. It simply could not do it.

But there is some room for improvement. Taking into account the analysis made in this article, some concrete suggestions can be proposed for the many people, acting in good faith in the international agencies and who are willing to find ways to do a better job of improving justice systems in the region:

— *Knowledge is a must*. No decision about the area, content, size, timing or amount of a project should be made without detailed knowledge of the subject in the country where the work is to be done.

[175] Carothers, *supra* note 11, at 305, 107.

— *Learn what others produced*. To gain knowledge of the prevailing conditions mainly requires: collecting the information that already exists, paying attention to national actors' perceptions and analysis, taking advantage of the knowledge of international experts who have gained experience in that particular country, and evaluating other agencies' experience in the field.
— *National actors and a clear strategy are needed*. The conditions required to develop a project include: a core of national actors who are truly committed to the reform goals, and a strategy —to be designed jointly with national actors— with well-defined short, medium, and long-term goals within the project.
— *National actors have a crucial say*. The implementation phase of any project needs to have a partnership of national and international actors, but the last word should be said by national actors who know better and ultimately are responsible for the reform process in their country.
— *Monitoring and evaluation are indispensable*. Project implementation needs continuous monitoring and project evaluation presents opportunities to learn about both achievements and failures. External reviews of the projects —including work done by academic researchers— are powerful tools for a critical analysis on what works and what does not. Reticence to share information with capable peers is, in the long term, a way of wasting resources.

If these remedies —and other possible changes— are introduced to alter the performance of international actors and agencies, they may dramatically increase the level of quality of the outcomes of justice reform projects.

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TRUTH AND VICTIMS' RIGHTS: TOWARDS A LEGAL EPISTEMOLOGY OF INTERNATIONAL CRIMINAL JUSTICE

Edgar R. Aguilera*

Abstract. *The author advances the thesis that the now well established international crime victims' right to know the truth creates an opportunity for an applied epistemology reflection regarding international criminal justice. At the heart of the project lies the author's argument that this victims' right —if taken seriously— implies both the right that the international criminal justice system's normative structures or legal frameworks and practices feature a truth-promoting profile, or in other words, that they be designed, specified, and harmonized so as to enable the system as a whole to regularly lead to the formation of (fallible, though more likely) true beliefs about the world (both when it convicts and when it acquits); and a duty for the international community to implement the best epistemically-suited set of procedural and evidentiary rules and practices when it engages in the enterprise of engineering and setting in place international criminal tribunals, panels, chambers, or special courts. The author suggests that the research of the epistemologist Larry Laudan is quite relevant to the aims of the above project in that it outlines the general contours of a truth-promoting profile applicable to all instances of empirical systems of investigation. By contrasting Laudan's guidelines with the legal frameworks and practices of some international criminal tribunals, the author holds (though of course more research is needed) both that the victims' right to know the truth is being systematically transgressed at the international level in that these international institutions do not seem to possess an acceptable truth-promoting profile as one of their attributes; and that endowing them with such a profile is one of the ways in which the international community can pay its respects to victims' concerns*.

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KEY WORDS: *Applied epistemology, legal epistemology, victims' rights, truth and international criminal justice, epistemic principles and legal proceedings.*

RESUMEN. *El autor sostiene que el ahora bien establecido derecho a la verdad que tienen las víctimas de crímenes internacionales puede abrir la puerta para una reflexión epistemológica aplicada al terreno de la justicia penal internacional. En la base de dicha propuesta yace el argumento de que este derecho de las víctimas implica a su vez tanto el derecho a que los marcos jurídico-procesales y prácticas de los diversos tribunales penales internacionales exhiban un adecuado perfil veritativo-promotor o, en otras palabras, que dichos marcos y prácticas sean diseñados y armonizados de modo que confieran al sistema la habilidad de formar regularmente creencias (faliblemente) verdaderas acerca de los hechos que se alegan; como el deber de la comunidad internacional consistente en implementar el conjunto de reglas procesales más apto desde el punto de vista epistémico. Asimismo, el autor propone emplear las investigaciones del epistemólogo y filósofo de la ciencia Larry Laudan que delinean los componentes generales de un perfil veritativo-promotor óptimo, las cuales son, en principio, aplicables a todos los sistemas de investigación empírica. Habiendo contrastado los principios evaluativos sugeridos por Laudan con los marcos procesales y prácticas de algunos tribunales penales internacionales, el autor preliminarmente concluye que el derecho a la verdad de las víctimas está siendo violado a nivel internacional en virtud de que los tribunales respectivos no satisfacen los requerimientos de un perfil veritativo-promotor adecuado, y que conferir este perfil a los referidos tribunales constituye una forma en la que se respeta a las víctimas de atrocidades de carácter internacional.*

PALABRAS CLAVE: *Epistemología aplicada, epistemología jurídica, derechos de las víctimas, verdad y justicia penal internacional, principios epistémicos y procedimientos jurídicos.*

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I. Truth and International Criminal Law

1. *The International Criminal Justice System as a Wide-Scale Response to Mass Atrocities*

In "one of the more extensive waves of institutional-building in modern international relations,"[1] the international community has orchestrated a wide-scale response to what has become, mostly after the end of World War II, humankind's constant companion. By that I mean the abuse of public power.

In effect, throughout 250 post-WWII conflicts around the globe, State/Government-sponsored violence has metastasized leaving in its way a black trail of suffering and destruction for an estimated 70 to 170 million victims[2] who have been subjected to a host of "unimaginable atrocities that deeply shock the conscious of humanity,"[3] such as "genocide,"[4] "crimes against humanity,"[5] and "war crimes."[6]

Following decades of inaction since Nuremberg trials, an international wide-scale response helped create new legal institutions[7] that facilitated the rise of an international criminal justice system. In the coming years, this structure shall be likely improved, especially considering its relatively early stage of development.

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[1] *See* Mark A. Drumby, *Atrocity, Punishment, and International Law* 10 (2007) cited by Nancy Combs, *Fact-Finding Without Facts. The Uncertain Evidentiary Foundations of International Criminal Convictions*, 1 Cambridge, 2010.

[2] See Marcus Funk, Victim's Rights and Advocacy at the International Criminal Court 1 (Oxford University Press). The author adds that "experts estimate that during the twentieth century, warlords and military leaders subjected approximately four times more civilians to crimes against humanity and war crimes than the combined total of soldiers killed in all international wars during the same time."

[3] *See* Rome Statute of the International Criminal Court Preamble, Jul. 17, 1998.

[4] *See id.* Art. 6 (a) to (e); Statute of the International Criminal Court for the former Yugoslavia (ICTY) Art. 4; and the Statute of the International Criminal Court for Rwanda (ICTR) Art. 2.

[5] *See* Rome Statute of the ICC Art. 7; "Elements of Crimes", Art. 7 para. 1; Statute of the ICTY Art. 5; and Statute of the ICTR Art. 3.

[6] *See* Rome Statute of the ICC Art. 8; the "Elements of Crimes" Art. 8 para. 2; the Statute of the ICTY Art. 3; and the Statute of the ICTR Art. 4.

[7] Such as the *International Criminal Court for the former Yugoslavia* (ICTY), http://www.icty.org/; *International Criminal Tribunal for Rwanda* (ICTR), http://www.unictr.org/; *Special Court for Sierra Leone* (SCSL), http://www.sc-sl.org/, the *Special Panels in the Dili District Court In East Timor* (Special Panels), http://wn.com/Special_Panels_of_the_Dili_District_Court; *Extraordinary Chambers in the Courts of Cambodia* (ECCC), http://www.eccc.gov.kh/en; *Special Tribunal for Lebanon* (STL), http://www.un.org/apps/news/infocus/lebanon/tribunal/; and ultimately a permanent *International Criminal Court* (ICC), http://www.icc-cpi.int/Menus/ICC.

2. *The Key Features of a Multi-Purpose International Criminal Justice System*

Perhaps with more enthusiasm than realism, this international justice system is believed to warrant the realization of a wide range of different purposes, values or interests.[8] As Nancy Combs points out, some of those are:

> A) To affirm the rule of law in previously lawless societies;
> B) To promote peace building and transition to democracy in war-torn lands;
> C) To assist in reconciling former enemies;
> D) To deter future megalomaniacs from committing similar crimes;
> E) To create a historical record of the conflict; and
> F) To diminish the victims' propensity to blame collectively all those in the offenders' group.[9]

3. *Main Thesis: Fact-Finding Accuracy (or an Adequate Truth-Seeking Power) as the Core of the Criminal Justice System*

I submit that meeting the above ends depends crucially (though not exclusively) on the system's ability to make sufficiently accurate factual determinations. Accordingly, establishing (of course fallibly) the truth of what happened[10] (solving the main conundrum of who did what to whom) constitutes a necessary solid basis which we would have to secure if achieving those other goals in not just wishful thinking.

As Combs observes, the problem is that the ability of international criminal tribunals (*e.g.*, ICTY, ICTR, etc.) to accurately assess the facts of cases brought before them has been taken for granted with little suspicion by both legislators and academics.[11] It is as if this epistemic ability could simply just pop out to the surface regardless of whatever rules of procedure and evidence that have been laid down; or as if those rules had already reached the pinnacle of their epistemic evolution, hence leaving no room for their constant revision (and reform if needed).

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[8] *See* Combs, *supra* note 1, at 2-10, 186-188.

[9] *Id.* at 1.

[10] It has been a while since the empiricist philosophers made a powerful case that any human inquiry into the past, present or future characteristics of events that unfold in this world can aspire at best, to establish their findings to a "*moral certainty*" (propositions-conclusions that though subject to the eternal challenge of the sceptic may be considered as well-grounded beliefs supported by multiple lines of argumentation each one of them in deed very weak if considered in isolation, but providing sufficient evidentiary or probatory weight as a whole). Absolute certainty is the province, if any, of mathematics, and more broadly, of deductive logics where principles such as *non-monotonicity*, and the criteria of *soundness* coupled with *validity*, apply to deductive arguments. That is why I referred to the establishment of the truth as a *fallible or defeasible enterprise* (the shadow of error is permanent despite our best efforts to reduce it).

[11] See Combs, *supra* note 1.

But having an epistemically well-suited criminal justice system is not as free of charge as it is usually thought of. In order for criminal justice institutions and proceedings (both, at the international and at the national levels) to perform and deliver as the epistemic engines they purport to be, deliberate measures have to be put at place. This is the main idea driving this work.[12]

Before we discuss how we should endow criminal justice systems with an acceptable truth-seeking power, let us review the arguments in support of the objective of establishing the truth that portray it as a value in its own right, and as an essential feature of international crime victims' concerns and rights.

4. *Truth as a Legitimate Goal in its Own Right*

Establishing the truth of the matters brought before the courts has been regarded as a valuable goal of criminal justice in its own right (independently of the fact that if satisfied it may boost the probabilities that other ends are achieved). Thus, it is said that truth is an indispensable component of a just verdict. Furthermore, from a more general stance it has been also argued that establishing the truth contributes to legitimizing adjudication as an adequate means for dispute resolution, and to the justification of the assumption (and expectation) that law guides the citizenry's conduct; and to the citizenry's motivation to keep obeying the law.

5. *Truth as a Fundamental Right of the Victims of International Crimes*

Apart from being a necessary condition pursuant to the promotion of other ends, and a legitimate goal in itself to be achieved by a criminal justice system (whether national or international), truth plays a crucial role as a corollary of the progressive development that the international crime victims' doctrine has experienced throughout the 20th and 21st centuries in humanitarian law, international human rights law, and finally in international criminal law (particularly in the ECCC, and the ICC): Victims, it is now well-established, have a "right to know the truth."[13]

Marcus Funk (a leading commentator of the ICC's framework for victim participation) refers to the rationale behind this right as follows:

> ...survivors of atrocity crimes, as well as the families and loved ones of those who were injured or murdered, want to know first and foremost what hap-

[12] Which is inspired by the groundbreaking research of Larry Laudan. *See* Larry Laudan, Truth, Error, and the Criminal Law. An Essay in Legal Epistemology (Cambridge University Press, 2006).

[13] *See* William A. Schabas, An Introduction to the International Criminal Court 326, 327 (Cambridge University Press, 2010); *see also* Funk, *supra* note 2, at 29-41.

> pened, who committed the crimes, and why the crimes were committed... Victims seek the truth because the truth, to some extent at least, alleviates their anguish, vindicates their status, encourages individual accountability, and has the potential of removing the perpetrators and their allies from power... [Establishing the truth] makes it more difficult for those accused to create fictionalized, self-serving accounts of what occurred. A proper understanding of the historic events, and even public outrage over the conduct that often took place in the public's name, can replace the twin dangers of complacency and resentment towards victims.[14]

International criminal justice rulings also recognize the victims' right to truth. For example, the Pre-Trial Chamber of the ECCC has authoritatively opined that apart from generally supporting the prosecutor and making reparation claims, a main reason for victims to participate in the proceedings stems from two core rights —the right to the truth, and the right to justice.[15]

For its part, the Pre-Trial Chamber I of the ICC has acknowledged that in addition to security and privacy, other interests of victims may include the interest in the determination of the facts, the identification of those responsible and the declaration of their responsibility;[16] and that "the victims' central interest in the search for the truth can only be satisfied if (i) those responsible for perpetrating the crimes for which they suffered harm are declared guilty, and (ii) those not responsible for such crimes are acquitted, so that the search for those who are criminally liable can continue."[17]

The above reference to ECCC and ICC case-law may lead us to think that the only appropriate (and even necessary) instrument to establish the truth of what happened is by way of implementing criminal proceedings (whether inquisitorial, adversarial, or some sort of mixture of both modalities). But even if we assume that an accurate determination of what occurred is the most frequent outcome of adversarial, inquisitorial or mixed criminal proceedings this does not exclude the possibility that truth be also obtained by means other than (or in combination with) the implementation of the previously mentioned traditional criminal law structures. Amnesty-based truth commissions and State panels figure as some of the options, though of course, there is no definitive recipe.[18]

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[14] *See* Funk, *supra* note 2, at 127.

[15] See Karim A., Dixon, R., Archbold International Criminal Courts; Practice, Procedure, and Evidence 1142 (Sweet and Maxwell, 2009).

[16] *Id.* at 1141.

[17] *Id.*

[18] *See* Tricia D. Olsen et al., *When Truth Commissions Improve Human Rights*, 4 The International Journal of Transitional Justice 457-476, 2010; Gearoid Millar, *Assessing Local Experiences of Truth-Telling; Getting to 'Why? Trough a Qualitative Case Study Analysis*, 4 The International Journal of Transitional Justice 477-496, 2010; and Oskar N. T. Thoms et al., *State-Level Effects of Transitional Justice: What Do We Know?*, 4 The International Journal of Transitional Justice 329-354, 2010.

Accordingly, the victims' right to truth may have (at least) two readings: The first is a very abstract one in the sense of being independent of the particular combination of mechanisms and institutions set forth to advance this goal.[19]

For its part, the second less abstract reading of the victims' right to truth —specifically related to the implementation of criminal justice proceedings as a response to widespread violence— would imply the right that the system's structure, practices and cognitive processes carried out by its operators have a truth-promoting profile (whether the system concerned is the ICTY, ICTR, ECCC, ICC or any other), or in other words, that those legal normative structures, practices and cognitive processes be designed, specified, and harmonized in a manner that enables the system to regularly lead to the formation of (fallible, though more likely) true beliefs about the world (both when it convicts and when it acquits).

6. *The Victims' Right to Know the Truth and the International Community's Duty to Provide the Criminal Justice System with a Truth-Promoting Profile*

The flip side of this implied right —if it is to be effectively implemented— would be a very general duty or obligation for the international community on the one hand, to seriously include in the agenda the problem of conferring a truth-promoting profile (as opposed to just simply take it for granted) when it goes about engineering and setting in place international criminal tribunals, panels, chambers, or special courts; and on the other hand, to keep monitoring their performance due to the systems' arguably inherent tendency to take (a may be huge) distance from the originally established legal framework once they start operations (as will be shown below), and because no truth-promoting profile is definitive (there is no fixed formula —though some general principles may be established— as to the adequate and everlasting epistemic or truth-conducive particular content of the rules of evidence and procedure

[19] In this respect we may say that a second order truth-related right emerges for the victim which consists of the right to the determination of the *most effective and convenient steps* to be taken as a response to post-conflict situations. This second-order right would take into account not only the interest for the truth but also the implementation of suitable protective measures on behalf of the victims, how to better meet reparation and compensation claims, the previously mentioned overall interest of the community in reconciliation, and the like. The spirit of this overarching right (which implies that sometimes the triggering of criminal proceedings might not be the better option) runs through the ICC Rome Statute which in its article 53, 1, (c) entrusts the Prosecutor with the task of determining —once he has established that there are reasonable basis for believing that a crime within the jurisdiction of the Court has been or is being committed and that it is or would be admissible— whether to initiate an investigation "*would not serve the interests of justice*", considering the gravity of the alleged crimes and the interests of victims.

which jointly provide the core of the normative structure of a criminal justice system).

7. *An Outline of a Truth-Promoting Profile for the International Criminal Justice System (Based on Larry Laudan's Epistemic Principles)*

What would a truth-promoting profile be like? The research of the epistemologist and philosopher of science Larry Laudan is relevant to this point. He has proposed a theoretical framework to scrutinize the epistemic virtues and shortcomings of criminal justice systems, especially in relation to how the US criminal justice system ranks in terms of truth-conduciveness.[20]

The point of departure for what the author calls the "hardcore" part of his proposal is a thought experiment that captures the main features of an optimal truth-conducive criminal justice system (one which at this initial stage intentionally suppresses other factors) as a basic principles that help determine the content of rules of evidence[21] and rules of procedure[22] in all criminal justice systems.

One such principle (p1) that serves as a guideline for rules (and practices) of evidence-admission, states that:

(p1) "The triers of fact —whether jurors or judges in a bench trial— should see all (and only) the *reliable, non-redundant* evidence that is *relevant* to the events associated with the alleged crime."[23]

For its part, the following principle (p2) applies to rules of procedure:

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[20] *See* LAUDAN, *supra* note 12.

[21] Laudan stipulates that the rules of evidence establish what evidence the fact-finder —jury, judge or body of judges— will encounter. *See id.* at 141.

[22] For its part, the rules of procedure establish the details of when and how the fact-finder becomes aware of the evidence admitted. Nonetheless, they go much further than simply setting the agenda for a trial. As Laudan points out, "…they determine, for instance, how a jury is selected, what sorts of verdicts are subject to appeal, who can interrogate whom, what instructions the judge gives to jurors, what standards the judge must use for his various rulings, and sundry related matters. Obviously, such procedures can profoundly influence the outcome of a trial". *See id.*

[23] *See id*. at 121. A particular evidentiary item is *relevant* if it has the property of increasing or decreasing the likelihood that the hypothesis concerned is true. For its part, a particular evidentiary item is *reliable* if there are grounds for believing that its content (from which we infer other facts) is true. These grounds may be considered as particular conclusions which stand as outcomes of a scrutinizing process that takes into account factors such as distance, amount of time observing the event, visibility conditions, perceptual or cognitive deficiencies or abnormalities, time passed since the event concerned was witnessed, and the like (in the case for instance, of an eye-witness testimony). As the incidence of these factors may differ, reliability assessments constitute an activity that admits of degrees (contrary to relevance assessments), and thus, a particular evidentiary item may be more or less reliable —depending on the strength of its grounds— within a spectrum of values of reliability. The turn now is for redundancy: A particular evidentiary item is *redundant* if it can reasonably be established that it

(p2) "Rules of Procedure should be designed to optimize the likelihood that the triers of fact, typically jurors, receive their information in a way that enables them to draw valid inferences from the evidence about the guilt of the accused. That is, procedures should be chosen so as to reduce the likelihood of an invalid verdict."[24]

The notion of validity in (p2) aims to capture something important about the quality of evidence-assessments carried out by the trier of fact both at the local level (when some weight or probative value is assigned to a particular item of evidence), and at the global level (whether or not the holistic probative value of the evidence as a whole satisfies the standard of proof set in place). In this line, either when the trier of fact gives more or less weight or probative value to a particular evidentiary item than it genuinely merits, or when she misconceives the height of the standard of proof by interpreting it lower or higher than it actually is (assuming of course, that the sufficiency threshold is reasonably clear and objective), the verdict is inferentially flawed, and thus, invalid.[25]

Equipped with these general guidelines about truth-promoting profiles, we can move on to Part Two of this essay where we will identify and explore certain truth-thwarting patterns, which will emerge as norms and practices that are contrary to the general guidelines set out before, and hence constitute a systematic violation of the victims' right to truth in the sense previously stipulated.

We will focus on the international criminal law arena, and we will identify as an instance of a truth-thwarting pattern what Combs calls a Pro-Conviction Bias (PCB) —which transgresses the parameters set out by (p1) and (p2)—. This pattern has been arguably implemented progressively at the legislative and jurisprudential level of the ICTY, and perhaps more clearly, at the domain of actual practices at ICTR, the Special Court for Sierra Leone (SCSL), and the Special Panels for East Timor. In particular, the PCB transgresses the parameters set out by (p1) and (p2).

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would contribute with no significant impact in a pre-existing evidentiary profile supporting a proposition, in terms of boosting (or decreasing) such support.

[24] *See id.* at 121.

[25] *Id*. at 13, 195. Nonetheless, it is important to note that the property of being valid or invalid does not necessarily warrant either the *truth* or the *falsity* of the conclusion reached by means of the inference(s). The truth values of the proposition that states that John committed the crime concerned, or of the proposition that states the opposite, depend exclusively on an agreement —or on a lack of it— between the propositions' content and reality, thus creating the possibility for valid-false verdicts, and for invalid-true ones to exist. Of course, it is desirable that most of the time the verdicts' compliance with the rules of evidence and procedure could justifiably be considered as a *strong indicator* of their truth. Nonetheless, deliberative steps have to be taken to get as close as possible to this ideal epistemic scenario which imply the willingness to monitor the system and to put in place the best rules and practices available at a particular time (which may of course prove flawed as the monitoring operations continue as part of an on-going project of *legal epistemology*).

II. The Pro-Conviction Bias

1. *The International Criminal Tribunal for Yugoslavia (ICTY)*

Scholars and practitioners such as Circuit Judge Peter Murphy,[26] Eugene O'Sullivan, and Deirdre Montgomery[27] —all of whom have had extensive defence counselling experience at the ICTY— have recently raised their voices to denounce certain ICTY's practices, in particular those described as *truth-thwarting patterns* since their recurrence impairs (mostly in detriment of accused parties) the ability to make accurate factual determinations.

A. *Lack of Evidentiary Gate-Keeping*

Murphy's analysis highlights a pivotal judicial flaw in the Tribunal's evidence admission practices that may be characterized as the "everything goes bias," according to which judges have declined to exercise the broad discretionary powers conferred to them by the ICTY statute (which at least theoretically, allows them to exclude unreliable evidence), and thus, they have abdicated their general responsibility for the efficient management of the information that they come to learn about the alleged crime(s), in the sense of assuring that this information satisfies a minimum (epistemic) quality threshold at an early stage of the proceedings.

This bias manifests as the constant and systematic indiscriminate admission of whatever the parties regard as evidence without engaging in an (even rough and preliminary) enquiry into the particular evidentiary items' (indicia of) reliability, and into the possibility that the evidence concerned may have been manufactured or subjected to some sort of distortion by the parties (a risk that, as we will see below, increases at the international level as parties may be plausibly said to be motivated by a plethora of incentives that are not present, or not with such intensity, at the domestic level).

One of the main theses advanced by Murphy is that the indiscriminate admission of arguably relevant evidence without having it critically filtered at an early stage (where only the best evidence survives), for one part has the effect of making trials last longer than they need to, and for the other, increases the risk of incorrect adjudication as a frequent outcome of the legal proceedings.[28]

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[26] *See* Peter Murphy, *No Free Lunch, No Free Proof. The Indiscriminate Admission of Evidence is a Serious Flaw in International Criminal Courts*, 8 Journal of International Criminal Justice 539-573, 2010.

[27] See Eugene O'Sullivan et al., *The Erosion of the Right to Confrontation Under the Cloak of Fairness at the ICTY, 8* Journal of International Criminal Justice 511-538, 2010.

[28] *See* Murphy, *supra* note 26, at 540.

In this line, Murphy claims that the merely logical relevance of an evidentiary item does not necessarily contribute in a positive way to the flesh and bone judges' enterprise of accurately determining the facts of a case via evidence assessment. Thinking otherwise is, as Murphy identifies, a central feature of Civil Law lawyers' and judges' background, for whom the whole bulk of exclusionary rules of evidence developed by the Common Law constitute an obstacle for truth-seeking objectives (as they understand them).

Murphy's critique to this approach is that the mantra in which Civil Law judges are socialized, which states that they are able to fairly and impartially assign the genuine probative value that a piece of evidence merits —even if that value equals cero— at the end of the trial-drama (just before they are about to determine whether the defendant is guilty or not) without any preliminary and even rudimentary assessment of its quality as a prelude to the decisive evidence-evaluation task, simply does not hold in practice:[29]

Once unreliable and potentially fabricated evidence is admitted it becomes part of the record, increasing the overall volume of putative evidence (and thus increasing too the level of complexity of the evidence-evaluation task as judges become unnecessarily overburdened with more and more information to be assessed);[30] it is available for parties to be used and recursively referred to throughout the trial (which as the international experience has shown, may last years) as they call witnesses and address arguments to the Court (and thus, the putative evidence undergoes a process of progressive confirmation);[31] but the most important effect of the admission of this type of "evidence" takes place inside the mind of the judge, who has the amazing challenge of making sense of all the evidence available in a coherent framework, throughout and as the outcome of, a general process of integration of massive amounts of information.

As the evidence gets integrated in a coherent whole by sophisticated cognitive operations (such as the reduction of "cognitive dissonance"[32]), the particular evidentiary items are intertwined in an argument-narrative structure the elements of which provide complex reciprocate corroboration support to each other. In this line, an evidentiary item that would have deserved a low reliability value (enough to be reasonably discarded from consideration) if taken in isolation before its fusion with the overall evidentiary profile supporting a particular factual proposition, may be boosted at a later time by other

[29] *Id.* at 551.

[30] *Id.* at 552.

[31] *Id.*

[32] The theory of *Cognitive Dissonance* basically states that people experience an unpleasant feeling when they identify that they are holding contradictory cognitions, which motivates them to engage in a process of changing such cognitions, attitudes and behavior in order to dissolve contradictions and restore consonance. For a very preliminary introduction see the entry of Cognitive Dissonance of the *Skeptic's Dictionary*, http://www.skepdic.com/cognitive-dissonance.html.

evidentiary items that are consistent with its content, and vice versa as well, producing the metastasis effect that Murphy refers to in the sense of burying (or contaminating) genuinely probative evidence in a sort of evidential debris.[33]

Moreover, the content of a particular evidentiary item once it has become an input of the integration process, also performs the role of a sort of building block, an intermediate inferential step that guides the reasoning chain (may be in conjunction with other inferences) to some direction, which may have not been followed had the originally unreliable and potentially fabricated evidentiary item not been there in the first place.

To complicate matters further, for one part this integration process is triggered automatically as the trial develops, and usually takes place behind curtains in the sense of not being consciously monitored by judges; and for the other, this process plausibly suffers the influence of external factors such as the international community's and victims' pressures regarding the expedite completion of trials in a way that satisfies them (by issuing convictions, see below).

So, by adhering to this mantra ICTY's judges are caught in an illusion: They reach the final deliberation stage in a position where, even if we removed the external pressures from the picture, they are more likely not able even to recognize the initially questionable evidence, and much less able to assign the genuine probative value it originally deserved. But once the external pressures component is reintroduced, their declared willingness to dismiss unreliable information from their minds having suffered a constant exposure to it is all the more implausible (and remains at best as a theoretical aspiration) as they have developed a complex set of strategies with the overall purpose of giving the prosecutor's evidence a condescending treatment (which will become clearer when we recount Comb's research in the following section).

B. *Lack of Evidentiary Gate-Keeping and Hearsay Evidence*

In line with the general absence of evidentiary gate-keeping by its judges, the ICTY has been accepting hearsay evidence (mostly in a written format) and unauthenticated documents on an ordinary basis. This practice opens the door to the admission of vast (almost unmanageable) quantities of documentary evidence with no comparison to the amount of information normally received at domestic criminal proceedings due to the inherent large-scale nature of international crimes (which means that thousands of alleged victims and witnesses are potentially available), and because of the broad and vague statutory phrasing of some of the characteristic elements of these crimes (such as a "widespread policy" or a "systematic attack" that provide the general framework where acts of genocide and crimes against human-

[33] *See* Murphy, *supra* note 26, at 552, 543.

ity take place), that has the effect of exponentially expanding the universe of arguably relevant information that the parties may produce, including, as Murphy calls it, "the almost limitless galaxies of background and contextual evidence."[34] But as they systematically send the message that everything goes, judges are all the more likely to be bombarded with putative evidence by the parties, whose only limit is the amount of resources available to them.[35]

In order to give us an idea of the type of unreliable hearsay evidence that is routinely admitted by the ICTY's Trial Chambers, Murphy states that

> …It is common to hear a witness, in reply to a question about what happened to his friend in the detention camp, say something like: 'Well, I don't know myself. I never saw my friend again after he was arrested. But another friend told me that he heard from his brother that my friend was regularly beaten and was later shot by the guards.' Or consider the by no means unusual case, in which a trial chamber admits a report written by an officer of a respected NGO, which relies almost entirely on information supplied by B, C, and D, who in turn relied on informants E, F, and G, who say they had a sight of documents H, I, and J, which were written by K, L, and M, etc. etc. potentially ad infinitum…[36]

Murphy points to two basic dangers that make of routinely accepting hearsay evidence a risky business:[37] One of them is the inherent susceptibility of the message conveyed (the alleged fact) of being distorted in proportion to the amount of the message's repetitions that have occurred in the chain of meta-linguistic references that precede it (a phenomenon that is known as multi-level hearsay). The other and more important danger is that the original maker of the statement concerned (that is being recounted in-Court by the hearsay witness or in a document like a Report from an NGO) is not available for cross-examination by the defense.

As O'Sullivan et al comment,[38] cross-examination is the ultimate means of testing the witnesses' credibility; it allows for frailties of testimonies (given by even the most honest witnesses) to come to light; it is one of the ways the accused may follow in order to provide an answer and defence to the charges and allegations against her, or to elicit information regarding the facts at is-

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[34] As an example of the complexity of issues that are dealt with at the ICTY, Murphy points out that "…the prosecution set out to prove that the *motivation* for the *widespread 'ethnic cleansing'* committed by Bosnian Serb and Bosnian Croat perpetrators was the creation of a 'Greater Serbia'or 'Greater Croatia'. To prove these *alleged conspiracies*, the prosecution has adduced *extremely detailed evidence* about such matters as: the historical rivalry between the three constituent nations of the former Yugoslavia (the Serbs, Croats and Muslims); the historic borders of the constituent Republics of the former Yugoslavia; and political machinations over many years, not only in Bosnia and Herzegovina itself, but also in Belgrade and Zagreb…"; *id*. at 542.

[35] *Id.* at 542-543.

[36] *Id.* at 543.

[37] *Id.* at 559-560.

[38] *See* O'Sullivan, *supra* note 27, at 513.

sue, or regarding an issue favorable to her (in this sense it is a way to raise a reasonable doubt in the prosecutor's case); and it provides the trier of fact with the opportunity to directly observe the witnesses' performance as they take the stand, by which the trier of fact becomes aware not only of the content of the testimony but simultaneously of the non-verbal communication that witnesses engage in while the interrogation takes place.

Moreover, cross-examining a witness is a basic right of the accused and an essential feature of the fair trial doctrine. This right has been well established in the Common Law, in the Sixth Amendment to the US Constitution, in Article 6(3)(d) of the European Convention of Human Rights, and expressly guaranteed by Article 21(4)(e) of the ICTY Statute.[39] Nonetheless, these legal grounds that are protective of the right to cross-examination do not warrant a general blanket prohibition to admit hearsay evidence at the ICTY. Its admission becomes an issue of balance (or at least it is supposed to be like that). In this line, Rule 89(D) provides that evidence may be excluded if its probative value is substantially outweighed by the need to ensure a fair trial. The problem of course is that ICTY`s judges almost never seem to be sensitive to fair trial concerns that arise out of the general acceptance of hearsay evidence and thus, they do not consider that these concerns ever get to outweigh the relevance of an evidentiary item despite its questionable reliability status. As we have said earlier, Murphy holds that this is due to ICTY's judges' perception of exclusionary rules and practices as useless technicalities, and to their extreme confidence that they will be able to attach the proper probative value to any evidentiary item (provided that it is relevant) at a later point in time (which is why it is seen as having no point to exclude evidence at an early stage on the basis of its low level of reliability. It makes no difference, it is claimed, if this is done at the beginning or by simply dismissing the unreliable evidence from their minds at the final deliberations stage).

C. *The End-of-Orality Policy*

O'Sullivan et al point to the fact that during the period of 1994 to 2000, the ICTY had certain Rules and had produced case-law both of which established a preference for live in-Court testimony,[40] which for its part tempered to some extent the inherent reliability deficit of the hearsay evidence that was being (and continues to be) routinely accepted by the Tribunal, because at least that way judges would be able to hear and observe directly the witness concerned when she was recounting a statement made by somebody else outside the framework of the legal proceedings, and the defense would have had the chance to cross-examine her (which would be useful to determine her credibility and would ensure minimally the right to a fair trial, even when the

[39] *See* Murphy, *supra* note 26, at 560.

[40] *See* O'Sullivan, *supra* note 27, at 516-520.

witness was not the maker of the original statement that was being recounted as proof of its content).

In this line, Article 90(A) established the principle of orality by mandating that "witnesses shall, in principle, be heard by the Chamber;" and for its part, when analyzing the Rules that provided for exceptions to live in-Court testimony, the Appeals Chamber in *Kordic* found that in each instance of departure from this principle (depositions, video-conference links, expert reports, and affidavits) there were safeguards (which should be warranted) that ensured the reliability of the evidence, one of which amounted to the possibility to cross-examine the witnesses.[41] O'Sullivan et al highlight that during this period, the ICTY was well aware of the justified criticisms that were usually launched against the Nuremberg and Tokyo Tribunals, which are condensed in the characterization of their practices as "trials by affidavit," and thus wanted to avoid these criticisms by giving preference to oral in-Court debates.[42]

Nonetheless, by 2001 the principle of orality was deleted from Rule 90, and two new provisions were introduced: Rule 89(F) which states that evidence of a witness may be received orally or, where the interests of justice allow, in written form; and Rule 92 bis which provided for the admission of written statements and transcripts prepared for the purposes of the current legal proceedings (or for prior proceedings before the Tribunal, see below the section on judicial notice), and in lieu of oral testimony.[43] In other words, Rule 92 bis provided for the admission of a particular type of hearsay evidence in the sense that at some point the prosecutor would be recounting uncross-examined written statements made by somebody else.

In *Galic* and *Milosevic* the conditions and circumstances under which it would be appropriate for the Court to admit written statements in lieu of oral testimony were established: The content of the statement concerned could not refer to the "acts and conduct of the accused as charged in the indictment." In other words, the statement's content could not make reference to any critical element of the prosecution's case that was indispensable for a conviction (including aggravating circumstances), which should be supported with evidence that leaves no room for reasonable doubt: the statement —which if admitted would substitute the maker of the statement's appearance in Court— had to be prepared for the purposes of legal proceedings; because of the recognized risk that the document containing the statement may have been fabricated and/or that the information in it could have been favorably skewed by lawyers who may have carefully devised it, the Court had to approach the document concerned with caution; and if the Court found that there was a substantial degree of proximity between the accused and the person engaging in the acts and conduct described by the statement, and the evidence was

[41] *Id.*

[42] *Id.*

[43] *Id.*

pivotal to the prosecution's case, it could reject the evidence on the basis of impeding a fair trial.[44]

For its part, and taking distance from the above principles, the Appeals Chamber established in *Milosevic* that a witness written statement or a summary of it signed by the witness could be admitted as evidence if: (a) the witness is present in Court; (b) she is available for cross-examination and any questioning by the judges; and (c) she attests that the statement or summary accurately reflects her declaration and what she would say if examined.[45]

The core problem with this decision is that because the Appeals Chamber considered that in this type of cases the evidence concerned was governed by Rule 89(F) previously referred to, the admissibility restrictions of Rule 92 bis would not apply, and thus the statement or summary could refer to the acts and conduct of the accused as charged in the indictment, and the Court could approach it with plain confidence (as opposed to approach it with caution) or at least with no explicit warning, despite the fact that —as highlighted by judge Hunt in his dissenting opinion—[46] this evidence shares with the special kind of hearsay regulated by Rule 92 bis the common feature of having been prepared (with the assistance of lawyers) for the purposes of the legal proceedings, and thus, the risks of fabrication and misrepresentation are also present.

One might point to cross-examination as a still available option in this scenario to ensure the reliability of the evidence. The point is that cross-examination (if at all exercised) would stand on an uneven ground for the carefully devised and lawyer-assisted written version of the witness' testimony would substitute —against the reasoning laid down in *Kvocka*—[47] the oral examination in chief that should be conducted by the prosecutor, and would be assumed by the Court as the point of departure for the cross-examination to proceed, which in turn means loosing the opportunity to directly observe and hear how the testimony-giving dynamics develops naturally without any assistance, and simultaneously carries the distortion of the nature of oral debates.

D. *Judicial Notice of Adjudicated Facts*

Another practice that undermines the accused' right to hear and efficiently confront the evidence against him and that increases the risk of a final decision being made on the basis of potentially unreliable evidence is the judicial notice of adjudicated facts:

The doctrine of judicial notice considers common-knowledge facts as the only instance in which the general principle that all the relevant facts to a

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

dispute have to be supported by evidence, could reasonably not apply.[48] Nonetheless, the Statute of the ICTY has broadened this scope by incorporating a provision —Article 94(B)— to the effect that the Trial Chamber "may decide to take judicial notice of adjudicated facts or documentary evidence from other proceedings of the Tribunal relating to matters at issue in the current proceedings."[49]

In addition to the expansion of the universe of noticeable facts by the Chamber provided by Article 94(B), the ICTY has gone as far as to establish the possibility that the Trial Chamber may take judicial notice of facts that are susceptible to reasonable dispute in the current proceedings, thus departing from its own previous jurisprudence in *Simic* and *Kvocka* which reflected the common practice (before *Milosevic*) of not taking judicial notice over the objection of the accused, where there was not an agreement between the parties as to the facts proposed by the prosecutor to be noticed, and where the accused demonstrated that these facts were matters that needed independent determination.[50]

Lots of problems arise with the possibility previously referred to, but I will focus on one of them: Taking judicial notice of facts that are susceptible of reasonable dispute in the current proceedings faces the general fair trial-related objection that the parties (for instance, the accused) of the previous trial lack the appropriate incentive structure in order to litigate the alleged fact concerned in a manner that would be favorable to the defence strategy of the accused in the current proceedings. May be the accused of the previous trial was totally indifferent to the fact that becomes relevant in the current proceedings and thus, maybe she did not argue anything at all or argued insufficiently from the perspective of the interests of the current defendant.

In order to temper to some extent this general fair-trial concern regarding the practice of noticing adjudicated facts capable of reasonable dispute in the current proceedings, the ICTY allowed the accused of the current trial to refute the noticed fact concerned, thus creating an unnatural dynamics for debates and disputation that we will proceed to analyze:

According to the ICTY's Case-Law, the adjudicated fact noticed by the Trial Chamber has the status of a presumption in the sense of shifting the burden of proof to the accused, which in turn has the right to challenge the noticed fact by adducing evidence to that effect. The problem of course is one of defining the success criteria to be satisfied by the accused's refuting evidence in order to defeat the presumption; or in other words the issue is: what is the weight of the presumption that is established by noticing an adjudicated fact?

It seems that an agreement upon this question has not been reached; sometimes the presumption is regarded as a "well-founded" one (due to the

[48] O'Sullivan, *supra* note 27, at 520-526.

[49] *Id.*

[50] *Id.*

previous judicial scrutiny that the likely fact has been subjected to), which is arguably stronger than a plain an ordinary presumption; and sometimes the departure weight of the presumption seems even stronger.

In this line, in *Karemera* the Appeals Chamber considered that the burden placed on the shoulders of the accused was analogous to the onus that comes with the attempt to establish an affirmative defence (like self-defence), which consists usually of proving the elements of the defence concerned to the standard of the Preponderance of the Evidence (PoE).

If in deed the PoE standard applies, this is troublesome for the principle of the Presumption of Innocence (PoI), for the more general precept of granting the Benefit of the Doubt (BoD) to the accused, and for the error-distribution figure that the standard BARD is supposed to both imply and warrant (the Blackstone ratio that "it is better to acquit 10 guilty defendants than to convict one innocent"). By imposing a PoE standard to the accused in order to defeat the presumption created by certain previously adjudicated fact being noticed in the current proceedings, we are setting in place great obstacles to the accused which amount to imposing a burden of generating more than a reasonable doubt in order to stop the prosecution's case from being successful; and ultimately we are saying that it is not the case that convicting the innocent is as serious and costly as the Blackstone ratio conveys.

But more confusion surrounding this critical issue is generated due to the fact that while making the burden that is shifted to the accused when an adjudicated fact has been noticed analogous to that of a defence, the Appeals Chamber used the example of an alibi. As pointed by O'Sullivan et al, the problem is that the jurisprudence of the same Appeals Chamber has established that it is a mistake to characterize an alibi as a defence. In this sense, once the accused invokes an alibi there is no onus for him to establish it (as opposed to when a defence is invoked). Of course some evidence has to be produced to back up the alibi allegation, but it does not have to satisfy standards of proof like PoE or BARD. This situation requires the prosecutor to eliminate the reasonable possibility that the alibi is true by challenging the evidence adduced by the accused on this issue. So, it is not clear if the burden that the accused has to discharge when facing a presumption created by a noticed adjudicated fact is the standard PoE or the lower one that consists of only "producing" evidence in order to make the allegation that the noticed fact is not true a "reasonable" one.

E. *Admission of Co-Accused Statements in Multi-Defendant Trials*

The final practice that along with the previously described jointly provide the general picture of the ICTY's truth-thwarting patterns takes place in the contexts of multi-defendant trials. This practice consists of admitting a co-accused statement produced before, or an interview conducted by, the prosecutor, during the phase where the current co-accused (who makes the

statement or is interviewed) was only a suspect. These statements and/or interviews may be admitted even when they refer to the acts, conduct and mental states of the co-accused.[51]

The main problems with this practice are that judges cannot directly observe and hear the testimony of the co-accused in order to determine her credibility and that the co-accused (which is affected by the content of the statement or interview) may not be able to exercise his right to cross-examination due to the fundamental right to remain silent —established in Rule 21(4)(g)— that may be invoked by any co-accused.

Furthermore, there are reasons to remain skeptical about the reliability of this type of evidence given that it is produced in a context where the suspect (that later becomes the co-accused) has every opportunity —and plausibly takes it frequently— to minimize her role and to highlight or even exaggerate the role of others regarding the crimes investigated for which she and her co-accused are later charged with. It is a context where the prosecutor may also take advantage of her position in order to exert some sort of pressure to, and bargain with, the suspect, in order to procure "solid cases" to be tried before the Trial Chamber.

These reasons to remain skeptical have been acknowledged by the ICTY in *Blagojevic*.[52] Nonetheless, in *Prlic* and *Popovic* they were contested by the Appeals Chamber which stated that the suspect is not only and not necessarily prone to mislead or lie during the investigation phase; this stage, it is claimed, also poses the opportunity for her to tell the truth. Regarding the issue of cross-examination the Chamber reasoned that even if it the co-accused were treated as if they were being tried separately —which would give each of them the opportunity to call the current co-accused as witnesses— once called they could invoke their right regarding self-incrimination —Rule 90(E)— and thus, it would be useless for cross-examination purposes.[53]

Against this reasoning, O'Sullivan et al argue that despite the possibility that the co-accused may invoke her right not to testify regarding matters that might incriminate her, there is still ample room for questioning via cross-examination regarding matters affecting her credibility, regarding evidence relevant to the case of the cross-examining party, and regarding matters on which the Chamber permitted inquiry. But if the ICTY insists in the practice of not treating the co-accused separately, the fact that the right to hear and efficiently confront the evidence against her and the right to remain silent collide producing irreconcilable tensions, should be taken as an absolute reason not to admit statements or interviews from the co-accused in multi-defendant trials.[54]

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[51] O'Sullivan, *supra* note 27, at 526-528.

[52] *Id.*

[53] *Id.*

[54] *Id.*

F. *ICTY's Plausible Motivations for Implementing Truth-Thwarting Patterns*

We move now to analyze the issue of the motivations that the ICTY might plausibly have for its lack of evidentiary gate-keeping and for the progressive implementation of a policy in order to maintain orality to a minimum (hence privileging evidence in a written form), which as a consequence undermines the nature of debates, the accused' right to hear and efficiently confront her accuser and the evidence against her, and ultimately undermines the Tribunal's overall epistemic potential by increasing the risk of final decisions being based upon unreliable and un-cross-examined (or deficiently cross-examined) testimonies and unauthenticated (potentially fabricated) documents, despite the judges' belief and extreme confidence that they have attached the probative weight that this evidence genuinely merits and that the determination that the standard BARD has been properly made.

In Murphy's analysis the general lack of evidentiary gate-keeping at the ICTY is the result of the influence of Civil Law lawyers —like the President of the Tribunal, the Judge Antonio Cassese— and the implementation of a Free Proof system thereof.[55]

The basic tenet of this system is that all relevant evidence should be admitted regardless of its degree of reliability, which will be adequately —almost infallibly— established by professional judges (who also play the role of fact-finders) in their final deliberation. The judges' professional status is thought to be a sufficient guarantee in itself that they do not need any guidance as to how to conduct probative-value-attributions and that they are perfectly capable of critically filtering only the sufficiently reliable evidence at the final deliberation stage despite the fact that the unreliable evidence —that is supposedly erased from their minds once its deficient quality has been detected— had been part of the record and had been available for the parties to be continuously referred to throughout the whole trial.[56]

The Free-Proof system —a term which is considered by Murphy to be a euphemism for the systematic failure to inquire into the evidentiary items' indicia of reliability and into the possibility that they may have been fabricated— is plausibly based upon an aversive attitude from Civil Law lawyers toward the whole issue of applying exclusionary rules of evidence. For its part, according to Murphy, this aversive attitude makes the faulty assumptions that having exclusionary rules is a property that belongs exclusively to jury-systems (which is not the case), and that the bulk of these rules are obstacles for truth to emerge as a frequent outcome of the proceedings.

To contest the second assumption Murphy holds that rather than hindering triers of fact (whether judges or members of the jury) in their efforts to determine the facts of a case, some exclusionary rules actually facilitate

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[55] *See* Murphy, *supra* note 26, at 555-556.

[56] *Id.* at 545-551.

truth-seeking objectives by setting the best environment for correct adjudication to emerge frequently, because they allow for only the best available evidence to be considered, and because they represent efficient measures to shield the proceedings from the risk that parties may abuse their right to adduce evidence by bombarding the Court with potentially inaccurate information (nonetheless favorable to their case).

This risk of abuses by the parties pursuant to their own goals is inherent to the more general category —than jury trials— of adversarial systems where the proceedings are designed to be generally benefited in terms of evidence gathering, evidence presentation and argument devising, from the reasonable assumption that the parties have the intention to win their case. Nonetheless, the adversarial system also recognizes —and takes measures about it— that the parties' objective of winning and the arguable legal proceedings' objective to find out the truth may diverge, hence generating the risk that the information that the triers of fact receive may not be sufficiently reliable due to this conflict-of-interests-scenario.

As Murphy explains, there are reasons to be even more careful at the international level regarding the risk previously referred to due to the fact that in most cases where international criminal justice is activated the conflicts that provide the context for massive and widely spread violence have been nurtured through many years (may be decades or even centuries), they imply a complex set of ideological convictions underlying them, and they are deeply rooted in the collectivity's memory. In this sense, the different groups' versions of the facts are non-negotiable and sometimes even become part of their members' identity. It is naive to some extent to think that the conflict ends when the proceedings start; the hostilities may have stopped (hopefully for a long period), but the ideological battle may take over the Court. This battle of heart-convictions is plausibly not bound (or not sufficiently bound) to ethical self-constraints that would guarantee to some extent that only reliable evidence will be voluntarily submitted by the parties. But as the Tribunal sends the message that all "evidence" will be preliminary admitted (with the hope of dismissing the unreliable items at the final deliberation stage), the temptation to fabricate or distort evidence becomes all the more attractive (and even reasonable as means available for the parties), and as we have said before, the only limitations to this practice would stem from the amount of resources available to the parties.[57]

Now, turning to the motivations that the ICTY may have had to implement a progressive policy against orality —which is translated into a real affront to the accused' right to confront the evidence against her— O'Sullivan et al point to the Completion Strategy endorsed by the ICTY as a result of UN Security Council's resolutions. This Strategy mandated the ICTY (and the ICTR too) to take all possible measures to complete all the investigations by the end of 2004, to complete all trial activities in the first instance by the

[57] *Id.*

end of 2008, and to complete all the Tribunal's work by the end of 2010. This Strategy also requested from the Prosecutor and from the President of the Tribunal a report specifying their plan on how to implement the guidelines of the Strategy.[58]

G. *Sumary*

To recap, the practices described in this section constitute what we have called truth-thwarting patterns in that their constant occurrence impairs the ICTY's ability to make accurate factual determinations. As we have seen, the Tribunal's epistemic potential is undermined mainly in detriment of the accused.

More specifically the general lack of evidentiary gate-keeping (that we have also referred to as the "everything goes bias") violates (p1) in that it allows for unreliable evidence to get passed the admissibility bar (which is reduced to the determination that the evidentiary items concerned are relevant or not) and become an input of the information stream within the proceedings. But this practice also violates (p2) in that it constitutes a procedure that is more likely to generate more cognitive overload for judges and to create confusion regarding the probative value that an evidentiary item genuinely merits, which increases the risk of making erroneous assessments of evidence both at the local and the global levels.

2. *The International Criminal Tribunal for Rwanda (ICTR), Special Court for Sierra Leona (SCSL), and the Special Panels for East Timor (Nancy Comb's Findings)*

In her recent book "Fact-Finding without Facts; The Uncertain Evidentiary Foundations of International Criminal Convictions,"[59] Professor Nancy Combs reports the results of an illuminating research based on a thorough review of thousands of pages of transcripts from which she convincingly concludes that international criminal tribunals and courts such as the ICTR, the SCSL, and the Special Panels in East Timor (hereafter, the Special Panels) systematically face what she has called "severe fact-finding impediments" due mainly to the highly questionable eye-witness testimony on which their factual determinations are primarily based.

Comb's cconclusions raise serious doubts about the accuracy of these tribunals' findings regarding who did what to whom. The author even suggests that the pervasiveness of this major fact-finding flaw transforms international criminal proceedings to mere *show trials*.[60]

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[58] *See* O'Sullivan, *supra* note 27, at 535-538.

[59] *See* Combs, *supra* note 1.

[60] Combs states that: "By using the Western trial form, international criminal proceedings

A. *The Prevalence of Eye-Witness Testimony at these Tribunals*

In order to explain eye-witness testimony as prevalent, Combs points out that contrary to the Nuremberg trials —where the high-level Nazi officials that were prosecuted were convicted on the strength of their own documents— today's architects of wide-spread violence are not prone to keep meticulous records of their activities nor to leave documentary traces behind them; and even when they do leave some written records their availability for prosecutors is compromised due to the fact that international criminal justice still depends to a large extent on States' voluntary cooperation, which may not be politically convenient for particular States at a given time.

In addition to this general point, Combs urges us to keep in mind that the communities and societies living in what has become the territorial jurisdiction of the ICTR, the SCSL, and the Special Panels (and similarly in the current situations and cases at the ICC), view and understand their social world in very different terms than those associated to the western conceptual schemata.[61] In this line, basic expectations and implicit assumptions made by western-like criminal law institutions are not fulfilled, one of which is that the community concerned has implemented a well-functioning record-keeping habit as part of the ordinary interactions between its members and between them and the institutions set at place, which for its part would perform the role of an important documentary-evidence-supply for prosecutors, defence counsel, and for the tribunals' officials in general. When we take into account that these communities are primarily oral cultures and underdeveloped countries which live in conditions of massively spread poverty and even misery, these assumptions start to collapse.

For its part, forensic evidence is usually not obtained nor presented at international trials. With the exception of the Special Panels where the violence was short lived and the UN forces entered and controlled the territory immediately after the violence ended, exhumations and autopsies were not able to be performed in the cases of Rwanda and Sierra Leone because the magnitude of the atrocities as to the former, and the long length of the war in

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cloak themselves in the form's garb of fact-finding competence, but it is only a cloak, for many of the key expectations and assumptions that underlie the Western trial form do not exist in the international context. International tribunals hear evidence and make determinations about what a particular defendant did or did not do at a particular place and time on the basis of that evidence, as fact-finders in other Western trials do; but, given the quantity and nature of much of the testimony that the tribunals receive and their limited capacity to verify facts, these determinations in many cases constitute little more than guesses." *See id.* at 179; "…proceedings at the ICTR, SCSL, and the Special Panels are conducted in a way that creates the illusion that they are routinely capable of reaching reliable factual conclusions on the basis of evidence presented to them, when in fact, they are not. The Trial Chambers are adrift in a way that calls into question the very foundation of the international criminal justice project." *See id.* at 186.

[61] Combs, *supra* note 1, at 81.

the latter case, without the international community stepping in and with the absence of local political will to clarify the matter, made forensic investigations impractical.[62] As the author explains, the only forensic evidence that the ICTR has received has been introduced to prove the very general proposition that there occurred a genocide (that is, that a large-scale massacre took place, and that the vast majority of victims were Tutsi); and even in the case of the Special Panels, the forensic evidence introduced, though it was apt to determine with some certainty the existence and nature of the crimes referred to in the respective indictments, it was not prone to help the fact-finders in their determination of the role (if any) of the defendants in the alleged crime(s).[63]

B. *General and Contextual Caution Regarding Eye-Witness Testimony*

Before discussing the particular deficiencies of eye-witness testimony at the ICTR, the SCSL, and the Special Panels, Combs refers to the general inherent inaccuracy (which of course can manifest itself in various degrees) of this kind of evidence even in the best of circumstances:

To start with, the author recalls that according to recent studies, with the advent of DNA testing it has been shown that in the US for instance, nearly 80 percent of the wrongful convictions involved erroneous eye-witness identification.[64]

But certain features that are also at work in international criminal trials increase the likelihood of inaccurate testimony, such as the well established fact that memory of faces fades away over time;[65] the fact that individuals who witness (or are victims of) violent events are more likely to misperceive than individuals who witness non-violent events because the ability to perceive declines when an individual is experiencing stress;[66] and the fact that the introduction of post-event information may produce distortion of memories[67]

Regarding the first feature, we must take into account that it is not the rule that international trials start just after the violence ended. Several years usually go by before an actual international tribunal is set at place. Furthermore, trials individually tend to last for years too, and the overall tribunal's activities may still continue to this day (like in the case of the ICTR). So, we end up with witnesses testifying in relation to events that took place approximately 15 years ago.

Regarding the second feature, the author observes that international witnesses —mostly surviving victims or intended victims— are asked to give tes-

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[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

timony pertaining to events that are the most violent imaginable, and thus, the most stressing too. In this sense, Combs states that "it is frightening to consider the inaccuracies that are apt to be contained in international tribunal testimony, during which witnesses describe amputations, decapitations, gang-rapes, and large-scale massacres..."[68]

Finally regarding the third inaccuracy increasing feature, Combs points to research that has shown that the memory of an event may be substantially altered by the information that the witness concerned later learns about that event. One way in which new information may be introduced as part of the memory is the following: Studies show that new information (with the consequent risk of distortion by its incorporation to the memory) may be introduced —deliberately but mostly without that intention— by the post-crime police questioning itself, deeming this eliciting activity as potentially distortive of the memory that is being recollected. In this line, given that they are frequently interviewed numerous times before the international trial commences, it is likely that international witnesses' memories are being distorted to a certain extent in direct proportion to the number of pre-trial interviews, by the same efforts of the prosecutor's personnel to elicit from them the information needed to have solid basis for the indictment.

Another way in which new information may be incorporated in (and contribute to the modification of) the witnesses' original memories is due to the widely spread post-crime discussion that is likely to occur among the victims and intended victims of the atrocities that took place. In this line, contrary to what is usually the case in ordinary local crimes, where the victim of an assault for instance does not receive information and particular details about the crime concerned by her family or by any other source (in this sense, the assault constitutes an event that happened exclusively to her), the victims that survived a genocide or crimes against humanity have themselves to talk to and to constantly recount the events from their perspectives as victims.

Within this complex communicative process, the witnesses' memories are continuously subject to revision, during which different elements not "known" before are integrated in the broad mental narrative of the event that each victim is prone to create in order to make sense of the violent episode they experienced. So, in a sort of cascade effect the community collectively and progressively re-writes the story of what happened out of various potentially distorted versions of the facts produced by its members, of whom it may be plausibly said that they witnessed the events (if they in fact did witness them at all, see below) in a scary, vulnerable, and stressing mode (where survival was the primordial goal), surrounded by chaos all over the place.

Moreover, the distortive potential of collectively re-writing the story of the crimes increases when we take into account that the Rwandan, Sierra Leonean, and East Timorese witnesses —who live in an environment of an

[68] *Id.*

oral tradition— do not generally distinguish (or do not care) between having themselves seen the events and having been told aspects about them by someone else who is recounting those events. They have a tendency to endorse the recounted events as if they had been personally there to observe what happened. And even when they admit in court that they did not witnessed personally the event concerned —which they are supposedly recounting— they don't seem to understand why this worries the western enquirer so much. The event in question is part of the community's collective knowledge regardless of how their individual members came acquainted with it; either by personal direct observation or by indirect vicarious knowledge, it makes no difference to them.

C. *The Nature of Testimonial Deficiencies*

According to Combs, when questioned by the prosecutor, judges, or by the defence, international witnesses behave as follows:

a) They try to evade the question, which leads to no answer at all;
b) When they do answer, sometimes they do so unresponsively (either because the answer is incomprehensible to the court's personnel or because it amounts to information that is not pertinent);
c) Even when relevant, the answer is too vague;
d) Sometimes the answer is subsequently proven inaccurate;
e) And most worryingly, sometimes the answers are inconsistent either with prior pre-trial statements of the witness, or with other witnesses' testimony.

D. *Unconveyed Information*

The information unconveyed amounts to the following:

a) Basic personal facts (such as the age of the witness, the year that she was born, how long she had been married, how long he had been a mechanic);
b) Contextual information (*e.g.*, the number of Rwandan sectours; how the Sierra Leonean government gained power; the identity of the appointed East Timorese village head; the general context of the conflict which gave rise to genocides or crimes against humanity);
c) The dates on which the crimes allegedly witnessed occurred (sometimes the witnesses are able to say that the events took place during the "dry season" or the "rainy season," or even during a particular month, but that is as good as it gets. Sometimes they cannot tell even the year during which the crime allegedly occurred. On some occasions witnesses

are mistaken as to the dates they give despite of their conviction. They come to learn about their mistakes through corrections made by judges, prosecutors or defence council).

d) Relevant distances (witnesses often claim ignorance of Western units of measurement; when asked to estimate, for instance, how long it takes from one point to another either by foot or vehicle, they are often unable to answer. Sometimes witnesses give answers such as "a bit far," often seem to guess, like when Sierra Leonean witness TF1-024 was first asked if a particular kitchen was half the size of the courtroom, he answered that it was; but later when asked if the same kitchen was the size of a quarter of the courtroom, he also said yes);

e) Numerical estimates (witnesses are often unable to answer questions such as how many attackers were present at a massacre, or how many civilians were illegally detained. They often give answers like "they were as numerous as ants," or "there were many");

f) Specific details (such as vehicle models, or the type of gun used by attackers);

g) The identification of sites using maps, photographs, sketches or other two-dimensional representations (*e.g.*, when provided a sketch of the crime scene, Special Panels defendant Hilario da Silva responded "if we go to Lautem, I'll show you, but I don't understand this paper." Another Rwandan witness refused to even look at a photograph saying "please, don't drag me on photographs, I never studied photography or sketches, photos are for intellectuals").

E. *Problems Arising from Unconveyed Information*

The unconveyed information just recounted gives rise to the following problems: The absence or inaccuracy of this information makes it hard for the tribunal concerned to assess the credibility of the witnesses. This is relevant information that the tribunal should have access to in order to accurately determine the probative value of individual evidentiary items.

For its part, this environment of deficient, incomplete or even absent information is troublesome for the defendant in that she is not able to effectively exercise her right to defend herself by way of challenging the prosecutor's evidence or by presenting an alibi. As Combs puts it

> When a witness cannot name the make of the defendant's car, then the witness's account cannot be undermined by evidence showing that the defendant drove a car of a different make. When a witness is unable to say for how long the rebels occupied his village, then the witness's testimony cannot be inconsistent with that of another witness who might estimate a shorter or longer occupation. And when a witness professes not to understand maps or photographs, the witness renders the defence unable to prove that she was never even at the

> scene of the crime. In other words, all manner of innocent inaccuracies as well as deliberate lies can be concealed through a witness plausible claim that he is unable to answer a question.[69]

In this line, the possibility that the defendant may point to a reasonable doubt in the prosecutor's case as a holistic effect of diversified but jointly considered assertions in the direction that key witnesses are unreliable in various respects (due to factors such as that they were placed at a very far away position from the events they are recounting, that the visibility conditions were inadequate, that their testimony is plagued with inconsistencies, and the like) is undermined.

Finally, the testimonial deficiencies outlined previously stand in the way of the tribunal's broader and main task of determining the facts of the case. In this sense, judges are left with weak basis to accurately determine the nature of the crime(s), but more importantly, the nature of the defendant's involvement (if any) in the alleged crime(s) (recall that judges don't usually have any other means to corroborate testimonies or even to decide between competing accounts given by different witnesses).

Nonetheless, as we will see later, despite this weak basis to accurately determine the facts, the Trial Chambers of these international tribunals issue convictions in the vast majority of cases. But "how is this possible?" we might ask given the supposed strong built-in safeguard of a very exacting standard of proof such as beyond all reasonable doubt (BARD). We will get back to that in a moment; in the meantime let us analyze what could plausibly be causing the vast quantities of testimonial deficiencies previously outlined discarding for now an intentional or deliberate component on behalf of the witnesses (that is, giving them the benefit of the doubt).

F. *Innocent-Causes of Testimonial Deficiencies*

Following Combs, we can explain away these testimonial deficiencies by making them attributable to very convincing innocent-causes (which the author suggests to be taken seriously by empirical research specifically related to the witness population at these international tribunals), such as the following:

a) Vague, inaccurate, and inconsistent testimony could be the result of factors such as the general low levels of literacy and education of international witnesses in African conflicts: In this line, Sierra Leone has perhaps the lowest literacy rate in the world, at 35 percent. East Timor is not much better, at 43 percent, and in Rwanda, less than two thirds of the population can read and write.[70]

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[69] Combs, *supra* note 1, at 36.

[70] *Id.* at 63-66.

b) In addition to the lack of formal education, these international witnesses are likely to also lack the kinds of life experiences for which that sort of "school" knowledge would be useful.[71]

c) Lack of basic witness skills, such as the skill of conveying the firsthand experiences they witnessed in a reasonably articulated, clear, coherent, and detailed way, which for its part is indispensable for the fact-finder's efforts of evaluating the charges against the defendant, and for assessing the credibility of these witnesses. Nonetheless, due to the general low levels of literacy and education and to the lack of life experiences for which the "academic" knowledge would be useful, the possession of this skill is inherently doubtful. Another crucial skill that is assumed by the Western criminal proceedings is that witnesses will be able to understand and maintain a rational discussion —in a question and answer format— pertaining to a particular legally relevant issue. In this line, it is assumed for instance, that witnesses will be able to grasp the sometimes sophisticated questions that they are asked, such as compound or multipart questions. Witnesses have shown not to understand interrogation of this type, and thus, judges have had to become very active (and even overprotective) in the hearings instructing the lawyers to separate the respective questions. Some other times, these international witnesses do not explicitly state that they do not understand the question, but this becomes clear when the answer given is not responsive.[72]

d) Lack of familiarity with the Western criminal justice system: One of the aspects that is frequently misunderstood or not understood at all by international witnesses is that of its adversarial nature. In this sense, they often feel aggrieved and insulted when their testimony is challenged during cross-examination, which may lead to evasion and reluctance to answer, or to inaccurate, fast, and lacking in details responses just to prevent the questioning from continuing. Also international witnesses do not see to fully understand the different roles, goals and burdens of the main contenders of the Western-like criminal proceedings: The Prosecutor and the defendant.[73]

e) We also have cultural divergences to consider which certainly influence the methods by means of which people communicate and the subjects considered appropriate to discuss about: For instance, in many cultures, making eye-contact with another is considered a sign of disrespect, so immigrants from those cultures will avert their eyes while testifying, which for its part will typically be considered by Western fact-finders as a sign of being deceptive or shifty, because they depart from the assumption that making eye-contact usually indicates forthrightness and trustworthiness. Similarly, the demeanour shown by criminal defendants

[71] *Id.* at 66.

[72] *Id.* at 38-43.

[73] *Id.*

from certain cultures may be also misinterpreted as a lack of remorse when in fact it is only the reflection of adhering to a cultural norm that values stoicism and disdains public demonstrations of emotion. Moreover, while the inability or unwillingness to answer questions that imply the use of Western units of space and time is partially explained by the low levels of literacy and education, this phenomenon is complementary explained by the cultural fact that for instance, the Temme people (the largest tribe in Sierra Leone) do not view space as either arithmetically measured or geometrically analysed, as the anthropologist Littlejohn has determined. In this sense, the size of a farm for example is arrived at by estimating the bags of rice it ought to produce, and similarly, sometimes precise units of space measurement are established ad hoc for the context at hand, such as a stick of the desired size, which may stand as a model to be used in the construction of a house. For its part, international witnesses usually do not seem to understand the importance of providing sufficiently accurate and detailed time estimations that the Western court officials press them to; they tend to use time units in a more flexible and fuzzy way according to the nature of the events being recounted, to the role that the witness performed in that event, and the like.[74]

f) Interpretation errors: Besides the natural risk of committing translation and interpretation mistakes in general, the international tribunals and courts that Combs analyzed in her study face particular and serious problems. The Special Panels for instance, were severely understaffed in interpreters, which for its part caused hearings to be postponed, judgments to be issued in only one of the official languages (that sometimes couldn't even be read by judges of the same Panel), and the rights of the defendants to be constantly violated in that defendants frequently were not able to communicate with their lawyers during the trials, and in that defendants could not follow the proceedings because overworked interpreters systematically failed to translate exchanges between judges and counsel. In addition, questioning frequently proceeded through multiple translations because the interpreters sometimes lacked the skill to translate directly from the witnesses' language to one of the court's official languages. Some other times there were no official interpreters available to translate a particular tribal language and so the Panels had to just look around and see who they could find for the task.[75] Besides all this, the Special Panels faced deeper problems that impaired their translation activities, such as the fact that East Timorese people had never experienced a functional criminal justice system at least throughout the Indonesian occupation period. So, even if the words to convey a particular concept existed, there was still an understanding gap that should

[74] Combs, *supra* note 1, at 79-100.

[75] *Id.* at 66-79.

have been filled with personal or vicarious experience and learning.[76] For its part, the SCSL sometimes had to abandon verbatim translations in favour of the less accurate tools of summaries of testimonies. Some occasions the SCSL suffered from interpreters' embarrassment to translate obscenities such as in the RUF trial in which an interpreter translated a witness as stating that a rebel had said to a girl "let me have sex with you." A linguist in the translation booth immediately shouted "no" and insisted that the translator corrected his translation to reflect exactly what the witnessed had said, which was that the rebel uttered "I want to fuck you."[77]

g) Do Investigators' errors explain witnesses' inconsistencies? International witnesses of these tribunals are particularly keen to blame the investigators when their testimony fails to match their pre-trial statement. The most frequent allegation is that investigators omitted information; others claim that the investigators failed to ask the questions currently being answered in court which is why the pre-trial statement lacks this information; and some other times, the witnesses even accuse investigators of inserting fabricated accounts. It is unlikely though that the investigators err as often as witnesses claim they do, nonetheless it is certain that errors do occur and that investigators' work is uneven, and sometimes even incompetent. In some occasions, investigators seemed not to be willing to deep further into a line of inquiry which was simply out of their specified scope. Ideally, if a witness does mention another offender or points to another crime that is outside of the investigator's original scope for inquiry, the investigator would delve further into that matter or at least would send another team to follow up with the witness concerned, but often this does not happen.[78] On the top of this, it is common that people working as investigators lack an adequate understanding of the general contour of the conflict they are investigating, and of the habits and culture of the people they interview.[79]

G. *Non-Innocent Causes of Testimonial Deficiencies (Systematic Perjury)*

In addition to the above innocent-causes, the problematic testimony (particularly in relation to inconsistencies) that the ICTR, the SCSL, and the Special Panels constantly receive and work with may also be explained by alternative frameworks which portray it under the less favourable lights of non-innocent causes, that basically amount to the following possibility: The witnesses are constantly committing perjury, which if true makes of this phe-

[76] *Id.*

[77] *Id.*

[78] *Id.* at 122-129.

[79] *Id.*

nomenon a systemic problem to be dealt with. Some of perjury incentives are the following:

a) A cultural component: Scholars have produced evidence in support of the plausible claim that generally in Rwandan and Sierra Leonean societies lying, secrecy, and deception are not as socially condemned as (it is maintained that) it is in Western nations. A general lack of accuracy is accepted, presupposed and encouraged when establishing communication with a fellow member of the community, which even becomes a deeply rooted survival strategy (going back to pre-colonial times) when the communicative episode encompasses a foreigner or an authority as interlocutors. In paraphrasing Overdulve, Combs states that "although one can speak of 'hypocrisy' or 'deceit' in English, there are no equivalent Kinyarwandan words because the Kinyarwandan concepts have positive connotations. Concepts such as hypocrisy are positive values in Rwanda because they are necessary to survive, and a person using them shows his wisdom, prudence, and ability to support himself in that society."[80]
b) Financial incentives: The per capita income in Rwanda is about 250 dollars per year, which is not as different to the ordinary Sierra Linnean's whose average income is one dollar per day. Against this background, the stipends that international tribunals provide the witnesses with (particularly to those of the prosecution) become a very compelling reason to join the witness ride for a while (or as long as possible). SCSL stipends come to 16,000 leones per day (approximately 5.25 dollars per day), but that is not all, SCSL also reimburses witnesses for food, lodging, and transportation; in the case of ICTR the stipends come to 22 dollars per day for protected witnesses and 110 dollars per day for non-protected ones. For its part, Sierra Leone features 0.03 doctors per one thousand people and the life expectancy for Sierra Leoneans is between 37 and 40 years of age, while Rwanda features 0.05 doctors per one thousand people, and the life expectancy for Rwandans is between 44 and 47 years of age. Again, against this background the services, such as medical care, that the international tribunals usually provide the witnesses with become a powerful incentive for engaging in witness activities (accuracy of the testimony is another matter). The ICTR, for instance, has set up its own clinic that even provides HIV treatment. Armoury states that this clinic provides treatment to more than two hundred witnesses (some of whom are seen on a weakly basis), and some witnesses who testified as far back as 1997 are still receiving care.[81]
c) Lies are to a certain extent, relatively easy to pull off at these international tribunals because basic facts that would serve to reveal those lies

[80] *Id.* at 133.

[81] *Id.* at 135-148.

are difficult to be conclusively established: Regarding this issue, Combs points to a crucial expectation of an ordinary Western-style criminal procedure that is unfulfilled at the international level, which is that a thorough pre-trial independent investigation will be carried out both by the office of the prosecution and by defence counsel. We have alluded before to the problems surrounding investigations conducted by the office of the prosecution, so let us review Comb's observations regarding defence counsel investigations: The author refers to financial constraints, safety, and logistical concerns, and to political considerations, all of which impair primarily the defence counsel ability to undertake investigations.[82]

d) Virtual impunity for people engaged in perjury activities: Although Rule 91 of the ICTR Rules of Procedure grants the Trial Chambers the power to instruct the prosecutor to investigate allegations of witness perjury, the Trial Chambers have interpreted this rule in the sense of requiring from the one alleging an instance of perjury to prove the *mens rea* and *actus rea* regarding the witness concerned, as a previous condition to instruct the prosecution to start an investigation. This interpretation of Rule 91 renders the potential investigation useless because, what would be left to investigate if the movant has proven his perjury allegation already? In deed, ICTR Trial Chambers have only very recently ordered any investigations, and as Combs states, only when the witness confessed to perjury.[83]

H. *High Conviction Rates at these International Tribunals*

Now, given the quantity and nature of testimonial deficiencies (even when some of them could be explained by innocent-causes) we should expect a

[82] Regarding for instance, to financial constraints, the author refers to the Special Panels situation: The 6.3 million annual budget of the Panels was distributed among the prosecution and the salaries of the judges (6 million were allocated to the prosecution and the remaining 300 thousand to the judges). In this line, one of the *Los Palos* defence counsel said "we do not have witnesses, we wish we did," and complained that they lacked cars and time to travel to the districts, and that they also lacked resources to provide witnesses with transportation to Dili and to pay for their food and lodging while there. Regarding logistical difficulties, in some areas of Sierra Leone, roads are poor, impassable or nonexistent during the rainy season; and in some occasions in East Timor, given that vehicles were so scarce and travelling so hard, victims and perpetrators were transported to the court in the same car. Finally, regarding political considerations, in some cases defence counsel has maintained that the Rwandan government has harassed an intimidated defence witnesses in order to prevent them from testifying. But even if independent investigations were practical we have to keep in mind that Rwandan, Sierra Leonean, and East Timorese societies are non-documentary oral cultures, which means that the best these investigations can aspire to is to collect statements from more witnesses. *See id.*

[83] *Id.* at 201-203.

huge amount of acquittals from these international tribunals. We could reasonably expect convictions to be the exception in this scenario. Nonetheless, convictions are the rule.[84]

The question arising now is: How are Trial Chambers able to determine that the BARD standard has been met in this context of overwhelmingly problematic testimony (which is frequently the only kind of evidence available)? They do it, as Combs claims, by displaying a series of concealment tactics the overall purpose of which is to hide and burry the uncertain evidentiary foundations of their factual determinations in order to create the illusion of accurate fact-finding, and to convey a high level of certainty in their judgments (but being certain that p is not the same as being justified in believing that p).[85]

I. *Trial Chambers' Attitude Towards Testimonial Deficiencies*

We turn now to the Trial Chambers' treatment of testimonial deficiencies outlined previously, to which Combs refers to as a lackadaisical attitude:

While at hearings the treatment of testimonial deficiencies amounts to the following:

a) Judges are inclined to unquestionably accept that testimonial difficulties (witnesses' reluctance to answer, vague testimony, inaccurate time, distance, and numerical estimations, and so on) are the product of educational and experiential limitations. This assumption plays such an important role that judges interject counsel questioning when they sense that the witness will not be able to respond even when the witness concerned has not given any indication not to understand certain terms or the whole question that she has been asked to answer.[86]

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[84] Combs states that the SCSL is running a 100 percent conviction rate at present. Indeed, all eight defendants whose cases have been decided had received a conviction. The Special Panels are not that far away. They have acquitted only 3 of the 97 defendants whom they tried (97 conviction rate), but in 2 of the 3 acquittals the prosecutor recognized that he did not have sufficient basis for a conviction. Despite his attempt to withdraw the indictment before trial, the Trial Chamber did not accept it, nonetheless the Chamber did not have other option but to acquit in light of the fact that the prosecutor did not present the judges with any incriminatory evidence at all. For its part, the ICTR's conviction rate is at 85 percent, having acquitted six of its defendants. Armoury holds that three of these cases featured little or no credible evidence (so acquittals were assured), but in the remaining three, the acquittals seem to stem less from *real* differences in the quality and quantity of the testimony, than from the Trial Chamber's attitude (willingness to submit to a more rigorous scrutiny) towards the evidence. *See id.*

[85] *Id.* at 179.

[86] For instance, in the *RUF* case at SCSL, when defence counsel asked a witness in what year certain killings had taken place, before giving the witness a change to answer, the Trial Chamber interjected by saying "you expect her to know the year?;" In the CDF case, judge

b) At other times, judges tend to lose patience with defence counsel when they are pressing the respective witness to give information that would be particularly relevant to determine her credibility. Judges even seem not to understand the relevance pertaining to the witness's credibility of some questions that look to elicit information and details regarding for instance, to issues of time or to the witness's distance from a particular scene.[87]

In Trial Chambers' judgments, the lackadaisical attitude has the following manifestations:

c) In general, judges fail to mention testimonial deficiencies in their judgments;

d) When they allude to testimonial deficiencies they tend to reduce or ameliorate their impact by using condescending and diplomatic phrases or by mischaracterizing witnesses' answers.[88]

e) In their judgments, judges often recourse to certain rhetorical techniques in order to refer to witnesses' testimony as if it did not feature inconsistencies. Nonetheless, that the testimony concerned featured inconsistencies becomes clear while reviewing the transcripts.[89]

Boutet admonished counsel to stop using the term "office of the prosecutor" by saying that "may be the witness does not understand what you mean by that" (again the witness did not give and indication that she was having any trouble to understand). Similarly judge Thompson intervened immediately when he heard the counsel asking "do you recall modifying that statement?" by saying "what is "modify" for him? Can't we be a little clear; otherwise we invite a kind of argumentative response." *Id.* at 189-203.

[87] In this line, in the *Semanza* case at the ICTR, when defence counsel was trying to determine the distance between a witness and a particular scene he was describing, judge Williams asked "where does this take us? Whether some people were three meters from him, or some people were five meters from him, or some people were ten meters from him, or some people are right up to him, how does all this help us?... How do all these little distances here and little distance there, and who is at the side, and who is in the front, how does that help us? *See id.*

[88] For instance in the *AFRC* case, the Trial Chamber did acknowledge that witness TF1-209 "*had some difficulty in conveying what exactly she meant*," and that her testimony "*was at times unclear*," but as Armoury states, these phrases failed to convey just how difficult it was for the lawyers and the Trial Chamber itself to get clear answers from the witness; for its part, in the *Ndindabahizi* case, the Trial Chamber reported that witness CGV "*gave a clear indication* that the distance (between himself and the defendant) was about equal to the width of the courtroom," but again, while reviewing the respective transcripts Armoury was able to determine that it did not happen like that. As she explains, although initially witness CGV tried to estimate this distance by saying "from the wall on the other side" to "the other side of the room," his answer did not make it clear to lawyers and judges which walls he was precisely speaking of; and moreover, this witness eventually declined to estimate distance by either meters or courtroom references. *See id.*

[89] For instance, in the *CDF* case, when witness TF2-152 testified inconsistently from his statement about which organs (the heart or the liver) the Kamajors cut out of his friend, the Trial Chamber reported simply in its judgment that "*various organs* were removed from TF2-152's friend's torso;" Similarly, when witness TF2-154 testified inconsistently about how two

f) Other occasions, when inconsistencies between testimonies and pre-trial statements do make their way to the judgments, the ICTR for instance, following Akayesu has the preference to give more probative value to in-court testimony on the grounds that the Trial Chambers generally do not have access to transcripts of the interviews from which the statements were drafted, which in turn makes them unable to consider the nature and form of the questions put to the witnesses, or the accuracy of the interpretation at the time; other reasons are that the statements were not made under solemn declaration and were not taken by judicial officers.[90] Sometimes the Trial Chambers have acknowledged that even in-court testimony has grave contradictions, nonetheless they credit other aspects of the testimony as though the serious mistake or false testimony is relevant only to the particular issue about which the witness erred or lied. But as we will see later, given that judges recourse to a style that seems to be recounting historical facts in which reference to testimony makes at best the footnotes of the judgment, the only way to know which aspects of a particular witness's testimony were considered grave mistakes or lies, and which weren't is by going through the transcripts.[91]

g) As it happened with most Special Panels cases and with all of the ICTR and SCSL cases, judges tend to write their judgments in a certain style where they seem to be recounting unquestionable historical facts by using a "comprehensive narrative." In doing this i) they sometimes make reference to defendant's words as if they were being quoted verbatim, but they do not explicitly make it clear that these words were being paraphrased by a witness who may be testifying lots of years after the atrocities took place; ii) they decline to articulate the substance of witnesses' testimony; iii) they decline to present the reader with the results of their testimony-evaluation task and with the justification for having reached such results; iv) Reference to witness testimony generally only appears as footnotes to the judgment; v) the testimony that contradicted the Trial Chamber's factual findings is not discussed (at least in a way that would contest the respective finding); vi) sometimes testimony that contests the Chamber's findings is alluded to but in a way that purports to give the impression that it is supportive testimony (by using see also cites); vii) the Chambers force the reader's confidence trying to assure her that they considered fully all the relevant testimony available including that which is at odds with its factual findings. Nonetheless the lack of

men were killed, the Trial Chamber avoided the issue and simply reported that "two men were killed." In the Kamuhanda case, when witness GEI testified inconsistently about which family members where with him when he fled his home, the Trial Chamber just reported that the witness "fled with his family". *See id.*

[90] *Id.*

[91] *Id.*

reference to the latter is attempted to be justified by simply stating that it did not meet the threshold of reliability and credibility (who knows what that threshold is) to even make a factual conclusion upon it.[92]

h) Some other times, as in certain cases at the Special Panels, the Chambers decline to issue a conventional judgment and rather drafted a 3 or 4 page summary document that basically contains the crimes for which the defendant was convicted and the sentences that the Chamber imposed for those crimes.[93]

J. *Explaining the Pro-Conviction Bias*

Nancy Combs believes that international judges are, by and large, committed to the success of the international criminal law project and consequently they seek (may be even unconsciously) to take the necessary measures in order to ensure that the role and value of international tribunals will not get diminished.[94]

In this sense, they have to be (and they are) more open-minded and more sensitive to the opinions, perceptions, and potential actions that external actors —such as the usually large numbers of victims, the nation where the tribunals are established, or the international community as a whole (through the UN)— may engage in if they feel disappointed, which renders their activities, as they were described by Kingsley Moghalu, the former ICTR spokesperson, a kind of "political justice."[95]

In deed politics underlies decisions such as where to set ad hoc international tribunals (why in Rwanda and Bosnia, and not in Russia or China? Armoury asks), and which people to indict once having dug deeper into the conflict (higher or middle level officials, or even politicians may be?), but it influences —though more indirectly— less macro-level features such as the attitude of judges towards testimonial deficiencies.[96]

The author maintains that at some level, international judges recognize that if they were to severely scrutinize the problematic testimony that they ordinarily receive and honestly acknowledged that it has the capacity to gravely undermine the prosecution's case, obviously they would have to issue acquittals in a far greater proportion.[97]

The problem is that acquittals are much more politically costly at the international level because it is likely that they will produce large-scale victim

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[92] *Id.*

[93] *Id.*

[94] Combs, *supra* note 1, at 225-234.

[95] *Id.*

[96] *Id.*

[97] *Id.*

outrage which on its turn would impair the broader goal of reconciliation and peace-building in the land,[98] and could also lead to the withdrawal of enforcement and financial support of particular nations and of the international community as a whole (already long trials like ICTY's and ICTR's would be virtually impossible to justify if the money that could be spent in other post-atrocities measures, is used to set defendants free). In this line, Armoury believes that the "international community's continued support for international criminal trials is predicated on those trials resulting in convictions most of the time."[99]

K. *A Plausible Alternative Model for the Trial Chambers Action*

At this point of her research, Combs states the following: "I believe that most of the international criminal convictions are justified but on grounds different from those invoked in the Trial Chambers' judgments."[100]

But what are those other grounds that the above quotation indicates? To give us an answer the author presents us with a fact-finding model according to which judges only appear to be convicting solely for the charges in the indictments and basing their findings solely on the witness testimony that has been presented to them, but actually they supplement that problematic testimony with commonsense inferences from the defendant's official position or institutional affiliation in the context of the international crimes that have been committed; They overlook (or ameliorate the effect of) testimonial deficiencies based on the belief that any person who held the position that the defendant concerned held must have done "something" for which he should be held criminally responsible.

The problem of course is that these commonsense inferences are not expressly invoked by the Trial Chambers in their judgments; one can only make an educated conjecture (by thoroughly considering the information contained in the transcripts of the trials) that they are supplementing the reason-

[98] As Combs explains, the victims of international crimes, especially in African conflicts, will not see an acquittal in narrow legal terms as the unsuccessful attempt of the prosecutor to reach the BARD standard with the evidence presented at trial, but more broadly as a betrayal, as a denegation of their status as victims, and even as a negative to admit that massacres and atrocities took place. This outrage is exacerbated by the prosecutor's role itself within the proceedings. As a reflection of the notion that international tribunals are as accurate as public historical records of events, the prosecution has to establish the broader contours of the conflict by adducing background evidence regarding the existence of a wide-spread policy or a systematic attack against civilians or against particular groups. In this sense, victims are socialized little by little in the prosecution's theory of the case, which becomes even a heart-conviction. *See id.*

[99] *Id.* at 233.

[100] *Id.* at 220.

ing that leads them to make inculpatory factual findings with these kind of inferences.[101]

According to the fact-finding model previously outlined the specific acts that the defendants are charged with by the prosecutor in the respective indictments (such as that the defendant issued a particular set of orders in a particular time, that they planned the atrocities in particular meetings, that they encouraged violence by pronouncing a particular speech at a rally, that they distributed weapons to soldiers, or that they actually participated in the massacres being personally there and even having shot or wounded victims), become less important (not to the point of irrelevance as we will see later). The main focus of their fact-finding activities is on the defendants' broader (even unspecified) involvement in the violent episode for which judges sense that the defendants should ultimately be held criminally responsible.

They come to this general conclusion of the defendants' involvement in the atrocities by considering their official position or their institutional affiliation. The reasoning used is along the following lines:

The systematic, coordinated, wide-spread, and long-lasting nature of the violence that was unleashed gives us reasonable grounds to presume that the atrocities were carefully designed and planned in furtherance of (or pursuant to) a general policy or goal; The vast amount of resources deployed to execute the overall (criminal) purpose resembles to the kind of mobilization that a State, a State body or agency, or a State-like body is able to prepare, so it is reasonable to assume that a State or a State-like body or a collective entity was implicated; A State body or a State-like body usually works with an authoritative (or leadership) structure where different men hold different positions in order for the means to achieve the purpose to be coordinated from the top authoritative spheres to the bottom operative field-agents (or foot-soldiers); So, if the defendant held a high-ranking influential position (not necessarily a military one) within the authoritative structure of the particular group or body to which he belongs (and it has been proven that that body or group doubtlessly participated in the atrocities), it is reasonable to presume that the defendant –considering his influence and ostensive power within his group or body- engaged in activities (actions or omissions) capable of making the criminal purpose to come into fruition.

L. *Plausible Motivations for the Implementation of a Surreptitious Fact-Finding Model*

Addressing why the Trial Chambers may have implemented this dual fact-finding model in which formally they are basing their judgments solely on the consideration of problematic and deficient testimony (which nonetheless

[101] *Id.* at 215-236.

is given the treatment of "good quality" evidence in the judgments), but surreptitiously and unofficially they recourse to commonsense inferences from the defendants' official positions and institutional affiliations, Combs points to the international community's general repudiation since Nuremberg, of criminal-attribution techniques such as organizational liability and of everything that bears any resemblance to the spectre of guilt by association.[102]

Nonetheless, Trial Chambers are not considering the membership condition only, the defendant has to have a role within the collective entity or group such that it is reasonable to presume that he could have engaged in activities (the ones he is charged with or others) that contributed to the emergence of an atmosphere suitable to promote the commission of international crimes. In this sense, we are talking about high-ranked officers or very influential individuals within the group's particular authoritative structure, not about any regular and ordinary member (such as a foot-soldier). In addition, there must be sufficient evidence to establish that the collective entity or the group concerned, as a whole, participated in the atrocities, and also some evidence —regardless of its defects— directly linking the defendant with the atrocities (which points, even when weakly, in the direction that the defendant concerned engaged in some specified acts, such as the issuing of orders, the pronouncing of a speech, or in some other acts which may locate the defendant closer and closer to the role of a physical perpetrator of the crimes himself).

But despite the fact that Trial Chambers are going beyond merely considering the defendant's membership in an organization, they do not dare to make their reasoning explicit, because allegedly that would bring a plethora of criticisms that could jeopardize the international criminal justice project's viability by questioning its legitimacy.

In this line, judges are caught in a sort of political and legal trap of pressures: As we have said, some of those pressures are external such as the international community's and the victims' desire to, and expectation that the tribunals will convict most of the time; other pressures come from within the legal community itself which by generally repudiating the use of associational doctrines and techniques to impose criminal liability ties the judges' hands and to a certain extent forces them to recourse to the implementation of unnatural fact-finding models such as the two-faced model we have referred to previously.

III. Conclusion

It is now well established that victims in general and victims of international crimes in particular have a right to know the truth of what happened. As Funk says,

[102] *Id.* at 237-239.

> ...survivors of atrocity crimes, as well as the families and loved ones of those who were injured or murdered, want to know first and foremost who committed the crimes, and why the crimes were committed... Victims seek the truth because the truth, to some extent at least, alleviates their anguish, vindicates their status, encourages individual accountability, and has the potential of removing the perpetrators and their allies from power... [Establishing the truth] makes it more difficult for those accused to create fictionalized, self-serving accounts of what occurred. A proper understanding of the historic events, and even public outrage over the conduct that often took place in the public's name, can replace the twin dangers of complacency and resentment towards victims.[103]

Nonetheless, the truth-thwarting patterns outlined in this essay indicate that this right is plausibly being systematically violated as the International Community has implemented legal procedures, mechanisms, and practices that are much less reliable as truth-promoting or epistemic engines than what they purport to be.

Being aware of these patterns that undermine international criminal justice's ability to accurately determine the facts, and being willing to do something about them (by eradicating those patterns via making the legal frameworks and practices more susceptible to satisfy the epistemic principles outlined earlier) is our duty, one that will enable the International Community to pay its due respects and considerations to victims' concerns.

[103] *See* Funk, *supra* note 2, at 127.

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PRIVATIZATION WITHOUT REGULATION: THE HUMAN RIGHTS RISKS OF PRIVATE MILITARY AND SECURITY COMPANIES (PMSCS) IN MEXICO*

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ABSTRACT. *The use of private military or security companies is a growing phenomenon in Latin America. In recent years, increased violence and insecurity in Mexico has made the nation an attractive market for PMSCs. The privatization of security has changed how security is provided in ways that can be either positive or negative depending on how the industry is regulated. This note examines how the privatization of security has functioned in Mexico by examining the nation's two main private security categories —domestic and multinational PMSCs— who work for either private clients or the United States (US) and/or Mexican governments under the Merida Initiative. After discussing how Mexican law attempts to regulate the industry, this note analyzes whether or not existing regulation is sufficient to permit these organizations to act as a "force multiplier" to increase the overall sense of security. In light of evidence suggesting that domestic and multinational PMSCs do not respect Mexican law, it appears that most of the private security market in Mexico fails to be a "force multiplier". Moreover the presence of a non-state actor authorized to use force and not controlled adequately add greater complexity to an already complicated human rights situation. This note concludes by discussing how Mexico's failure to implement existing regulations on PMSCs amounts to a failure to respect its obligations under international law.*

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RESUMEN. *El uso de compañías militares y/o de seguridad privadas (CMSP) es un fenómeno creciente en América Latina. El aumento de la violencia y la inseguridad en México en los últimos años ha hecho que sea un mercado atractivo para las CMSP. La privatización de la seguridad cambia la forma de proveer seguridad, que puede ser positiva o negativa dependiendo de cómo los proveedores de seguridad están regulados. Esta nota examina cómo la privatización de la seguridad está funcionando en México, analizando los dos principales actores en el mercado de la seguridad privada en México —CMSP nacionales e internacionales— que trabajan para clientes privados y, en el caso de las CMSP internacionales, para los Estados Unidos o México bajo la Iniciativa Mérida. Después de discutir cómo la ley mexicana intenta regular estas CMSP, esta nota evalúa si la regulación existente es suficiente para permitir que las CMSP en México actúen como un multiplicador de fuerza que aumenta la seguridad. A la luz de la evidencia que sugiere que las CMSP nacionales e internacionales no respetan las leyes mexicanas, parece que la mayor parte del mercado de la seguridad privada en México sigue siendo no regulada ni controlada, lo que no sólo no le permite ser un "multiplicador de fuerzas". La presencia de un actor no estatal autorizado a usar la fuerza y no controlado de forma adecuada añade una mayor complejidad a la ya complicada situación de los derechos humanos. Esta nota concluye con una discusión sobre el fracaso de México para implementar la legislación existente sobre CMSP, incumpliendo sus obligaciones estatales en virtud del derecho internacional.*

PALABRAS CLAVE: *Derecho internacional, derechos humanos, seguridad privada, regulación, México, Estados Unidos*.

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I. INTRODUCTION

The use of private military or security companies (PMSCs) is a growing phenomenon in Latin America. Unlike in Iraq and Afghanistan, however, the rules are different in Latin America. In Iraq, PMSCs have been involved in massive violations of human rights as in Abu Ghraib, where contractors have

been implicated in both torture and civilian massacres. In Latin America and the Caribbean, PMSCs' activities are less visible and (perhaps for this reason) less controversial. Many PMSCs assist international organizations during humanitarian operations, such as in Haiti after the massive earthquake in 2010. Other companies, however, regularly participate in the so-called "war on drugs," providing intelligence, logistical support, and training to support the Colombian and Mexican armed forces. Contractors also work for private enterprises that provide security services in risky situations all over the region.

PMSCs can be defined as "private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel."[1]

The deterioration of the security situation in Mexico during the last decade has increased the nation's demand for security services, generating new business opportunities for PMSCs and resulting in greater demand by the private sector than by the government.[2] As we shall see, this privatization changes how security is provided in ways that can be either positive or negative.[3] For example, privatization often reduces the amount of control by the authorities over security services, thereby creating human rights concerns.[4] This said, the proliferation of security services and providers that occurs as a result of privatization —when well-regulated— can also act as a "force multiplier," by increasing the overall sense of security.[5]

The first part of this note focuses on the Mexican private security market and the law that currently regulates this market. Private security in Mexico is comprised of three main components. First, Mexico City's government[6]

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[1] Montreux Document, Art. 9, Sept. 17, 2008, I.L.M. *available at* http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/humlaw.Par.0057.File.tmp/Montreux%20Document%20%28e%29.pdf.

[2] *See* Alberto Cuenca, Ignacio Alvarado & Jorge Torres, *Seguridad privada, negocio sin control*, El Universal, May 24, 2010, *available at* http://www.eluniversal.com.mx/nacion/177912.html. *See also* Small Arms Survey, States of Security (2011), *available at* http://www.smallarmssurvey.org/publications/by-type/yearbook/small-arms-survey-2011.html.

[3] *See* Peter Warren Singer, Corporate Warriors, The Rise of the Privatized Military Industry (2003) (on PMSCs activities); s*ee also* Deborah Avant, The Market for Force: The Consequences of Privatizing Security (2005); Elke Krahmann, States, Citizens and the Privatization of Security (2010).

[4] *See* Simon Chesterman & Chia Lehnardt (eds.), From Mercenaries to Market: The Rise and Regulation of Private Military Companies, (2007) (on the effects of PMSCs' activities on international humanitarian law and human right law); *see also* Francesco Francioni & Natalino Ronzitti (eds.), War by Contract (2011).

[5] Rita Abrahamsen & Michael C. Williams, *Security Sector Reform: Bringing the Private In*, 6 Conflict, Security & Development, 1, 17 (2006).

[6] Mexico City refers here to Mexico, Federal District.

maintains a unique quasi-public security force called the "auxiliary police".[7] This police corps is composed of police officers whose official function is to work for private clients.[8] Even though the auxiliary police participate in the privatization of security, this paper does not focus on their activities as they are subject to the same regulations and controls as regular police. Instead, we shall focus on the remaining two players in the Mexican private security market —domestic and multinational PMSCs who work for private clients and, in some cases US and/or Mexican public agencies under the Merida Initiative.[9]

With regard to domestic and multinational PMSCs, Mexican law on private security requires, among other provisions, that security companies officially register both their entities and employees and that non-Mexican citizens are prohibited from bearing arms. In reality, however, neither domestic nor multinational companies respect this law. As a result, most private security functions remain unregulated, not only failing to be a "force multiplier" but also adding greater complexity to an already complicated human rights situation.

In light of this observation about the private security market in Mexico, the second part of this note will discuss how Mexico's failure to adequately regulate PMSCs runs counter to the nation's obligations under international law. Specifically, this note focuses on the Mexican government's obligations under the American Convention on Human Rights to prevent, prosecute, and remedy human rights violations, which obligations have been found relevant even in cases of violations of human rights committed by a private actor.[10]

II. Private Security in Mexico: The Limits of the Law

The wave of violence which has gripped Mexico in recent years, has for obvious reasons, increased demand for private security. In addition to the auxiliary police, the Mexican private security market is comprised of do-

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[7] *See* Cuerpo de Seguridad Auxiliar Urbano del Estado de México (Policía Auxiliar) [Urban Auxiliary Security Corps of Mexico City (Auxiliary Police)], Gobierno del Estado de Mexico *available at* http://www.region-6.com.mx/cvauem.htm (last visited feb. 8, 2013).

[8] *Id.*

[9] The U.S. Congress has appropriated $1.5 billion since the Merida Initiative began in fiscal year 2008. The US supports "comprehensive justice sector reforms" including training of federal police forces. The US used to outsource security cooperation. *See* U.S. Dept. of State, Bureau of Public Affairs, *The Merida Initiative: Expanding the U.S./Mexico Partnership* (2011), *available at www.state.gov/documents/organization/158009.pdf; see also* William Márquez, *¿Privatiza Estados Unidos la guerra contra las drogas?*, BBC Mundo (Washington), Jan. 16, 2012, *available at* http://www.bbc.co.uk/mundo/noticias/2012/01/111208_eeuu_pentagono_guerra_drogas_mercenarios_wbm.shtml.

[10] *See* Mapiripán Massacre v Colombia, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No. 134, ¶111 (Sept. 5, 2005).

mestic PMSCs and multinational PMSCs. Mexican state and/or federal law *should* regulate all domestic *and* multinational PMSCs that provide private security services in Mexico. As discussed in the two following sections, however, the reality is differs widely, since domestic PMSCs largely fail to comply with national laws and multinational PMSCs actively evading them. As a result, existing laws do not provide even a minimal amount of private market oversight.

1. *Domestic PMSCs*

The Mexican Constitution states in Article 21 that security is a state function,[11] and Article 122 gives the Legislative Assembly the power to regulate private security services.[12] As an illustration of the Assembly's discretionary power, several federal laws, including the General Law of the National Public Security System, explicitly contemplates the existence of private security.[13] Other federal laws however —most notably the Federal Law on Private Security— seek to regulate private security.[14] While other federal and state laws address private security, this paper mostly focuses on the Federal Law on Private Security —the hallmark piece of legislation on private security regulation in Mexico that serves as a reference point for all other regulation.[15]

The Federal Law on Private Security subjects private security to public oversight by making the states responsible for the regulation of PMSCs.[16] Although the law is clear and demanding[17] its implementation is a great failure.

The principal problem faced by the Mexican state is that 80% of PMSCs are not registered, despite both federal and state laws that require PMSCs to register with the Ministry of Public Security (Secretaría de Seguridad Pública).[18] The National Private Security Council (Consejo Nacional de Seguridad Privada) estimates that up to ten thousand unregulated private security

[11] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Art. 21, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.). Art. 21 states: "La seguridad pública es una función a cargo de la Federación, el Distrito Federal, los Estados y los Municipios".

[12] *Id*. Art. 122 c) base primera V (i).

[13] Ley General del Sistema Nacional de Seguridad Pública [L.G.S.N.S.P.] [General Law of the National System of Public Security], *as amended*, Arts. 150-152, Diario Oficial de la Federación [D.O.], 2 de Enero de 2009 (Mex.).

[14] *See* Ley Federal de Seguridad Privada [L.F.S.P.] [Federal Law on Private Security], *as amended*, Diario Oficial de la Federación [D.O.], 6 de Julio de 2006 (Mex.).

[15] *Id.*

[16] *Id.* Art. 2 §1.

[17] Markus-Michael Müller, *Private Security and the State in Latin America: The case of Mexico City*, 4 Brazilian Pol. Sci. Rev. 131, 148 (2010).

[18] Ignacio Alzaga, *Sin permisos, 87% de empresas de seguridad*, Milenio, April 29, 2012, *available at* http://www.milenio.com/cdb/doc/noticias2011/41b7fb1f83d1281726928ecb267920bc.

firms operate in the country, meaning that up to 600,000 guards fall outside the legal framework.[19] In fact, there are more PMSCs and PMSC employees working *outside* of the law than those working within its framework.[20]

Various factors contribute to the failed implementation of the Federal Law on Private Security including, for instance, differences between the laws in the different states or the lack of capacity of the state or federal governments. While these are genuine concerns and difficulties, there are two other factors that are more unique to Mexico that have also contributed to the failed implementation. The first one concerns the relatively casual relationships between PMSCs and their employees, and the second one concerns the training and the background of the employees of PMSCs working in Mexico.[21]

One of the reasons that the implementation of the Federal Law on Private Security has been unsuccessful has been the low level of commitment by employees to Mexico-based PMSCs. PMSCs in Mexico often do not provide steady work to their employees; instead, they provide short-term contracts lasting between several months and a week.[22] With such short-term employment contracts, PMSCs often find that it is not cost-effective to invest in their employees. The Federal Law on Private Security requires PMSCs to invest in human resources; all employees, for example, must be registered and properly trained. The way the private security market works, however —with short-term demand and high turnover— often undermines the objectives of the Federal Law on Private Security. Despite well-intentioned regulations, most PMSCs are unregistered, staffed by untrained employees with little job security and little commitment to the company for whom they work.

Other unique challenges in Mexico include the training and background checks of PMSC employees. Article 27 of the Federal Law on Private Security forbids PMSCs from hiring anyone who was fired from a public security institution (*e.g.*, police, military) for a serious offense, negligent endangerment, or working while intoxicated, among other violations.[23] Despite this prohibition, however, many ex-police officers with inadequate training or criminal histories seek employment at PMSCs; and evidence indicates that such individuals have been successful in obtaining work.[24] Again, the law itself is not necessarily a failure but rather its enforcement.

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[19] José Antonio Belmont, *Operan 10 mil firmas de seguridad privada fuera del marco legal*, Milenio, October 26, 2012, *available at* http://www.milenio.com/cdb/doc/noticias2011/96a40c0d7cdd67d4dae4f7a38e280a72.

[20] *Id.*

[21] Interview with Carlos Mendoza, Security consultant, in Mex. City (Sept. 6, 2012). *See also* Patricia Arias, Seguridad privada en América Latina: el lucro y los dilemas de una regulación deficitaria 54 (2009) (On relationships between PMSCs and their employees).

[22] Interview with an anonymous, in Mex. City (Sept. 16, 2012).

[23] Ley Federal de Seguridad Privada [L.F.S.P.] [Federal Law on Private Security], *as amended*, Art. 27, Diario Oficial de la Federación [D.O.], 6 de Julio de 2006 (Mex.).

[24] Jorge Medellín, *La seguridad privada*, *in* Atlas de la seguridad y la defensa de México,

Although Mexican laws such as the Federal Law on Private Security contemplate and seek to address several of the challenges posed by the privatization of security in Mexico, such regulations are only adequate on paper. In real life, implementation of the laws falls short, resulting in deficient regulation of private security. Ultimately, "formal laws do little to regulate private police in a country where the regulators —*i.e.* the public police— themselves are corrupt."[25] As a result, domestic PMSCs do not work as a force multiplier in Mexico —they are more a source of worries and corruption than a useful actor working to improve the security situation.

2. *Multinational PMSCs in Mexico*

Multinational PMSCs provide services to two categories of clients in Mexico: private and public. The private sector includes foreign, transnational, and Mexican companies, as well as wealthy individuals, who contract multinational PMSCs for "kidnapping resolution and ransom negotiation services, among others, often as part of broader 'risk management' contracts."[26]

The second main category of clients, states, is public. Multinational PMSCs operate in Mexico largely under the guise of the Merida Initiative —the 2007 agreement between the US and Mexico that concretized a plan for cooperation in fighting drug trafficking and increasing security in the region.[27] At the time the agreement was signed, the Mexican Foreign Affairs Minister explained to the public that the Initiative did not provide for the presence of US troops and military consultants.[28] "The [US] Congress has appropriated $1.5 billion since the Merida Initiative began in fiscal year 2008" to support "comprehensive justice sector reforms" including training of federal police forces.[29] These monies have funded maintenance, logistics, equipment, training and support, among other items,[30] services provided mostly by PMSCs based in the US.[31]

146, 148 (Raúl Benítez Manaut, Abelardo Rodríguez Sumano & Armando Rodríguez Luna eds., 2009).

[25] Diane E. Davis, Law Enforcement in Mexico: Not Yet under Control 22 (NACLA Report on the Americas, 2003).

[26] Nick Miroff, *As Kidnappings for Ransom Surge in Mexico, Victims' Families and Employers Turn to Private U.S. Firms Instead of Law Enforcement*, Wash. Post, Feb. 26, 2011, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2011/02/26/AR2011022603384.html.

[27] *See* Raúl Benítez Manaut (ed.), Crimen organizado e Iniciativa Mérida en las relaciones México-Estados Unidos (2010) (on the Merida Initiative).

[28] Armando Luna, *La iniciativa Mérida y la guerra contra las drogas. Pasado y presente*, *in* Crimen organizado e Iniciativa Mérida en las relaciones México-Estados Unidos, 31, 44 (Raúl Benítez Manaut ed. 2010).

[29] U.S. Dept. of State, Bureau of Public Affairs, *The Merida Initiative: Expanding the U.S./Mexico Partnership* (2011), *available at www.state.gov/documents/organization/158009.pdf.*

[30] Telephone interview with an employee of PMSC (June 12, 2012).

[31] William Márquez, *¿Privatiza Estados Unidos la guerra contra las drogas?*, BBC Mundo, Jan.

PMSCs contracted under provisions of the Merida Initiative work directly either for the Mexican or US government. Employees of PMSCs that work directly for the US government are considered part of the US mission in Mexico and benefit from the same treatment as other US government employees —*e.g.*, they benefit from immunity from prosecution by the Mexican government.[32] The other PMSCs contracted under the Merida Initiative usually work for the Ministry of Public Security; their job consists mostly of training the federal police.

Regardless of whether they serve private or public clients, multinational PMSCs face two legal hurdles: first, under Mexican law, solely Mexican citizens may establish and own a PMSC; secondly, there are severe restrictions for keeping and bearing weapons.[3334] Rather than complying with these limitations, however, Mexico-based PMSCs found a way to sidestep the law: they establish bases in neighboring countries and work remotely or travel for short periods of time.[35] This is possible because the "Mexican private security market, unlike in Iraq or Afghanistan, does not require the show of force or high-caliber weapons. Work in Mexico is based more on contacts, prevention and intelligence."[36]

By managing operations from abroad, these PMSCs have been successful in evading Mexican law. Even if PMSCs' activities within Mexico make them subject to Mexican law, it is not clear that there would be capacity or will on the part of the Mexican government to implement or enforce the law; the latter —will to enforce the law— is of particular concern given that PMSCs working under the Merida Initiative are among those who use these tactics to evade Mexican law.

This reality of PMSCs operating outside the law raises concerns about accountability and respect for human rights. In fact, despite working with mul-

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16, 2012, *available at* http://www.bbc.co.uk/mundo/noticias/2012/01/111208_eeuu_pentagono_guerra_drogas_mercenarios_wbm.shtml.

[32] Diplomatic and consular protection are regulated by the Vienna Convention on Diplomatic Relations, Apr. 18, 1961; Vienna Convention on Consular Relations, Apr. 24 1963, and the Convención Consular entre los Estados Unidos Mexicanos y los Estados Unidos de América, U.S.-Mex., Jul. 17, 1943.

[33] Ley Federal de Seguridad Privada [L.F.S.P.] [Federal Law on Private Security], *as amended*, Art. 25 § I, Diario Oficial de la Federación [D.O.], 6 de Julio de 2006 (Mex.). The nationality limitation has been under discussion, but remains unchanged to the date of writing this note (December 2012). *See* Enrique Méndez, *Extranjeros podrán participar en las empresas de seguridad privada*, La Jornada, Apr. 11, 2012, *available at* http://www.jornada.unam.mx/2012/04/11/politica/003n2pol.

[34] *See* Ley Federal de Armas de Fuego y Explosivos [L.F.A.F.E.] [Federal Firearms and Explosives] *as amended*, Diario Oficial de la Federación [D.O.], 11 de Enero de 1972 (Mex.).

[35] Telephone interview with an employee of PMSC, (June 12, 2012); Interview with Armando Luna, member of Colectivo de Análisis de la Seguridad con Democracia, in Mex. City (September 13, 2012).

[36] Interview with Manager of PMSC, in Wash. DC (October 18, 2012).

tinational PMSCs only a short time, Mexico has already witnessed negative effects stemming from PMSC operations under the Merida Initiative. PMSCs that provide training to Mexican police, for example, have been accused by the media of training Mexican police in torture techniques.[37]

As noted by Human Rights Watch[38] and Amnesty International,[39] the human rights situation in Mexico is really complicated, including several cases of torture and disappearance[40] by public forces have been reported. Moreover,

> [s]upervision and accountability mechanisms for police officers, military personnel, prosecutors, forensic scientists, medical examiners or judges as well as defence lawyers and representatives of the national and state human rights commissions remain inadequate and judicial reforms have largely failed to address the impunity that results from this lack of accountability.[41]

The result is that in Mexico, PMSCs, not only do not work as a force multiplier, helping the overall sensation of security, but also raise concerns about respect for human rights. These concerns raise questions about the Mexican state's obligations, which will be discussed in the next part.

III. States' Responsibility for PMSCs' Activities

In Mexico, PMSCs, both domestic and multinational, operate largely unconstrained by existing federal and state laws because companies purposefully disobey or evade application of these laws. This part focuses on the Mexican state's obligations under the Inter-American System of Human Rights con-

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[37] "One of the videos, obtained two weeks ago by the newspaper El Heraldo de León, shows police appearing to squirt water up a man's nose, a torture technique once notorious among Mexican police. They then dunk his head in a hole that an unidentified voice on the video says is full of excrement and rats. In another video, an unidentified English-speaking trainer asks a police agent to roll in his own vomit. The English-speaking man belonged to a private U.S. security company hired to help train the agents." In Fox News, *Report Mexico cop in torture case fired*, July 19, 2008, *available at* http://www.foxnews.com/printer_friendly_wires/2008Jul19/0,4675,MexicoPoliceTorture,00.html. *See also* Deborah Bonello, *Mexican police in 'torture' class?*, L.A. Blogtimes (July 1, 2008, 12:57 PM), http://latimesblogs.latimes.com/laplaza/2008/07/mexican-police.html.

[38] Human Rights Watch, Mexico: Neither Rights Nor Security Killings, Torture, and Disappearances in Mexico's "War on Drugs," (2011) *available at* http://www.hrw.org/reports/2011/11/09/neither-rights-nor-security-0.

[39] Amnesty International, Known Abusers, but Victims Ignored: Torture and Ill-Treatment in Mexico (2012), *available at* http://www.amnestyusa.org/research/reports/known-abusers-but-victims-ignored-torture-and-ill-treatment-in-mexico.

[40] Human Rights Watch, Mexico's Disappeared, The Enduring Cost of a Crisis Ignored (2013), *available at* http://www.hrw.org/sites/default/files/reports/mexico0213webwcover.pdf.

[41] Amnesty International, *supra note* 39, at 25.

cerning human rights violations; as the Inter-American jurisprudence clarifies, a complex internal situation does not limit these obligations, and finally, these obligations are also binding when the human rights violation is committed by a private actor.

The American Convention on Human Rights (AC), adopted in 1969, is the pillar of the Inter-American System of Human Rights, ratified already by Mexico which has also accepted the jurisdiction of the Inter-American Court of Human Rights (IACtHR). For this reason, the legal framework established by the AC and IACtHR are useful reference points in analyzing Mexico's obligations.

The legal framework of the AC, IACtHR and Inter-American Commission of Human Rights (IAComHR) require that parties to the convention "ensure" the enjoyment of human rights by preventing, investigating, prosecuting, and remedying all human rights violations, and adopting internal measures, as modify domestic law if necessary.

In its first influential case, Velásquez-Rodríguez vs. Honduras, the IACtHR interpreted the first article of the AC, which imposes on each state a "legal duty to take reasonable steps to prevent human rights violations."[42] The Court defined "prevention" to include "all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts."[43]

The same case further held that each state party has a "legal duty… to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[44]

The next state obligations is to give citizens the access to "an effective remedy" and to investigate and prosecute the perpetrators of human rights violations. In the case Fenelon vs. Haiti, the IAComHR ordered a "complete and impartial investigation to determine accountability where lies the responsibility for the actions denounced; [as well as] sanction[s for] those responsible for the denounced actions."[45]

The Court has been forced to rule extensively on these matters, as governments have frequently ignored their obligation to prosecute human rights violations.[46]

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[42] Velásquez Rodríguez v Honduras, Merits, Judgement, Inter-Am. Ct. H.R. (Ser. C) No.4, ¶ 174 (Jul. 29, 1988).

[43] *Id.* ¶ 175.

[44] *Id.* ¶ 174.

[45] Fenelon v Haiti, case 6586, Inter-Am. Comm'n H.R., Report No 48/82, OAS/Ser.L/V/II.61, doc. 22, rev.1, ¶3 (1982). This formulation is repeated in several further cases, *see for instance* Pierre et al. v Haiti case 2646, Inter-Am. Comm'n H.R., Report No 38/82, OAS/Ser.L/V/II.61; Doc. 22, rev.1 (1983).

[46] Hélène Tigroudja & Ioannis K. Panoussis, La Cour interaméricaine des droits de l'Homme: Analyse de la jurisprudence consultative et contentieuse 165 (2003).

In the case of Paniagua Morales et al. vs. Guatemala, the Court noted that impunity is common in Guatemala and that

> …the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected by the American Convention, in view of the fact that the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives.[47]

Human rights law permits certain rights to be suspended under certain circumstances, such as war or even situations of internal tensions.[48] However, Article 27 of the AC lists several rights that are protected even in "time of war, public danger, or other emergency that threatens the nation's independence or security;"[49] the Court has expanded on this list in subsequent rulings.[50]

In the case of Castillo Páez vs. Peru, the Court states that domestic situation cannot serve as limitations to the state obligation to prosecute. In this case, Peru tried to argue that its obligations were limited because of the situation of internal tension produced by the activities of the armed group *Sendero Luminoso* (Shining Path); however, the Court responded that

> …the Peruvian state is obliged to investigate the events that produced [the violations]. Moreover, on the assumption that internal difficulties might prevent identification of the individuals responsible for crimes of this kind, the victim's family still have the right to know what happened… It is therefore incumbent on the state to use all the means at its disposal to satisfy these reasonable expec-

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[47] Paniagua Morales et al. v Guatemala, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No. 37, ¶ 173 (Mar. 8, 1998).

[48] *See* Art. 27 of the American Convention, Art. 15 of the European Convention of Human Rights, and Art. 4 of the International Covenant on Civil and Political Rights.

[49] Organization of American States, American Convention of Human Rights, Art. 27, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 12.

[50] In several cases the Court extends the list of non-derogable rights: for example, the prohibition of torture is considered by the Court as *jus cogens,* the right to mental and physical integrity (related with article 5) as an absolute right that cannot be suspended under any circumstance and the right to access to justice as a norm *jus cogens*. *See* Maritza Urrutia v Guatemala, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No.103, ¶ 92 (November 27, 2003) (on torture); *see also* Tibi v Ecuador, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No.114, ¶ 143 &145 (Sept. 7, 2004); Massacre de la Rochela v Colombia, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No.163, ¶ 132 (May 11, 2007); Bueno Alves v Argentine, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No.164, ¶ 76 (May 11, 2007). *See* Case of Ximenes Lopes v Brazil, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No.149, ¶ 126 (Jul. 4, 2006), (on physical integrity). *See* Case of Goiburú & al. v Paraguay, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No.153, ¶ 131 (Sept. 22, 2006) (on the right to access to justice).

> tations. In addition to this duty to investigate, there is also the duty to prevent… and to sanction those responsible for them. These Obligations on Peru shall remain in force until such time as they have been fully performed.[51]

Mexico's situation may be considered internal tension. Since President Felipe Calderón declared "war" on organized crime in 2006, security has deteriorated, resulting in significantly more fatalities and increased violence.[52] Even under these circumstances, however, IACtHR case law, particularly Castillo Páez vs. Peru, suggests that this situation would not exempt Mexico from its obligations under AC provisions.

The last relevant state obligation concerning possible violations of human rights by PMSCs is the obligation to adopt internal measures in order to guarantee the rights included in the AC. In other words, states have the obligation to implement or modify domestic legislation in case of legal vacuum or insufficient legislation.[53] The Court explained this obligation in the case of Castillo Petruzzi vs. Peru:

> …[t]he general duty under Article 2 of the American Convention implies the adoption of measures of two kinds: on the one hand, elimination of any norms and practices that in any way violate the guarantees provided under the Convention; on the other hand, the promulgation of norms and the development of practices conducive to effective observance of those guarantees.[54]

As discussed above, Mexico does not lack domestic legislation —it lacks implementation of the legislation. Although the result of the current situation in Mexico —the non-control of PMSCs— is ultimately the same than a non-regulation, but the solution is different. Given the current situation, regulations must be promulgated to prevent practices such as operating businesses from abroad; practices should be developed that require the registration of both businesses and employees.

Finally, the states' obligations to prevent, investigate, prosecute, and remedy any violations of human rights are also valid if the violation has been committed not by the state but by a private actor. Although the Court "recognized that a State cannot be responsible for every human rights violation committed by individuals subject to its jurisdiction,"[55] it affirmed, in the case of the Mapiripán Massacre, that: "…the attribution of responsibility to the

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[51] Castillo Páez v Peru, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No. 34, ¶ 90 (Nov. 3, 1997).

[52] *See* Human Rights Watch, *supra* note 39.

[53] Tigroudja and Panoussis, *supra* note 46, at 172.

[54] Castillo Petruzzi v Peru, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No.52, ¶ 207 (May 30, 1999).

[55] Valle Jaramillo et al. v Colombia, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No 192, ¶ 78 (Nov. 27, 2008). *See also* the Pueblo Bello Massacre v Colombia,

State for the acts of individuals may occur in cases in which the state fails to comply with the obligations *erga omnes* contained in Articles 1 and 2 of the Convention, owing to the acts or omissions of its agents when they are in the position of guarantor."[56]

In the case of PMSCs in Mexico, this would mean that Mexico is responsible for human rights violation committed by PMSCs in its territory. For instance, the Mexican state is responsible for the contents of the training provided to Mexican police by multinational PMSCs.

In the Inter-American System, Mexico has the obligation to prevent, investigate (effectively), prosecute, and punish any party responsible for human rights violations under its jurisdiction. Despite the ongoing "war" against narco-trafficking in Mexico, this internal situation cannot limit these obligations —Mexico must ensure that human rights are respected in its territory. Considering the current violence and tension, an appropriate use of PMSCs could act as a force multiplier and increase safety and security; however, in order to achieve this objective, effective regulation —beginning with implementation of the existing laws— is an absolute necessity.

IV. Conclusion

The recent proliferation of security services and providers in Mexico raise many issues concerning their role in both security and human rights violations. Some authors argue that PMSCs have the potential to increase the sense of security in areas where they operate.

This note discussed the failure of the Mexican authorities to implement existing law to regulate the activities of domestic and multinational PMSCs operating in Mexico. Moreover, PMSCs add greater complexity to an already complicated human rights situation.

In light of this conclusion, this note discussed in its last section how Mexico's failure to adequately regulate PMSCs operating in its territory constitutes a failure on the part of the Mexican state to respect its state obligations under international law. As a party to the American Convention on Human Rights, Mexico has to ensure all persons subject to its jurisdiction full enjoyment of their rights according to the Convention. These obligations are to prevent, investigate, prosecute, and remedy any violation of human rights and they are binding even in cases of violations of human rights committed by a private actor. Considering these state obligations and the current situation of regulation and control of PMSCs in Mexico, there is a need for an improvement of the implementation of the Mexican laws on private security.

Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No. 140, ¶ 123 (Jan. 31, 2006).

[56] Mapiripán Massacre v Colombia, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (Ser. C) No. 134, ¶ 111 (Sept. 5, 2005).

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THE POLITICAL RIGHTS OF MEXICAN MIGRANTS: NATIONALITY AND CITIZENSHIP IN MEXICO

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Abstract. *This note explores the state of political rights of Mexicans living abroad. After multiple reforms to Mexican legislation, the political rights of Mexican migrants are still not fully protected. Absentee voting is the only political right Mexican migrants can exercise. The first reforms that granted Mexicans the possibility of retaining their nationality were the cornerstone for the following reforms on the implementation of absentee voting. It is important to understand explains the difference between citizenship and nationality in Mexican laws. The note gives a general overview of the lack of uniformity in the use of these two concepts in international practice. The note also invites us to reflect on the political rights mentioned in international instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the American Convention of Human Rights. The issue of the full implementation of active and passive political rights of Mexicans living abroad remains unsolved despite the reforms made to Mexican legislation.*

Key Words: *Citizenship, nationality, political rights, absentee voting.*

Resumen. Esta contribución trata de explicar los derechos políticos de los mexicanos residentes en el extranjero. Después de múltiples reformas a la legislación mexicana, los derechos políticos de los migrantes mexicanos aún no están completamente protegidos. El voto a distancia es el único derecho político que puede ser ejercido por los migrantes mexicanos. Al inicio este artículo trata el fenómeno migratorio mexicano, así como las razones y consecuencias de la reticencia de los migrantes mexicanos para adquirir una nacionalidad extranjera. Las primeras reformas que permitieron a los mexicanos conservar su nacionalidad mexicana fueron el pilar para las siguientes reformas que concluyeron con la implementación del voto a distancia. Posteriormente se explica la diferencia entre la

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ciudadanía y la nacionalidad en las leyes mexicanas. Es necesario aclarar que el estatus de ser ciudadano en México confiere los derechos políticos. La autora proporciona una aproximación general a la falta de uniformidad en el uso de estos dos conceptos en la práctica internacional. Asimismo, nos invita a reflexionar haciendo referencia a los derechos políticos contemplados en los instrumentos internacionales como la Declaración Universal de los Derechos Humanos, la Convención Internacional de Derechos Civiles y Políticos, la Convención Internacional para la Protección de los Derechos de los Trabajadores Migrantes y sus Familias, así como la Convención Americana sobre Derechos Humanos. Posterior a esta aproximación, la pregunta sobre la implementación completa de derechos políticos activos y pasivos de los mexicanos residentes en el extranjero continúa aún abierta después de varias reformas a la legislación mexicana.

Palabras clave: *Ciudadanía, nacionalidad, derechos políticos, voto a distancia*.

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I. Introduction

Mexico is the third largest emigration country in the world, after China and India.[1] With millions of migrants around the world[2] and the more than 22.8 Billion U.S. dollars in remittances[3] they send back to Mexico, the phenom-

[1] See Facts and Figures, International Organization for Migrations, *http://www.iom.int/cms/en/sites/iom/home/about-migration/facts--figures-1.html* (Last visited March 25, 2011).

[2] At least in United States there were more than 30 million people, according to the U.S. Census Bureau. "Population growth between 2000 and 2010 varied by Hispanic group. The Mexican origin population increased by 54 percent and had the largest numeric change (11.2 million), growing from 20.6 million in 2000 to 31.8 million in 2010". Information taken from the Sharon R. Ennis, Merarys Ríos-Vargas & Nora G. Albert, *The Hispanic Population: 2010*, 2010 U.S. Census Bureau 2 (May 2011). Available at: *http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf* (Last consulted March 25, 2011).

[3] *http://www.banxico.org.mx/SieInternet/consultarDirectorioInternetAction.do?accion=consultarCuadroAnalitico&idCuadro=CA11&sector=1&locale=es/*.

enon of migration is important economically, as well as politically and culturally.

Mexicans living in the United States roughly represent the same population as those living in Mexico City. Today the U.S. state of California has the largest Mexican population after Mexico City.[4] Of that population at least 10 million Mexicans citizens were identified as potential electors for the 2006 Mexican presidential elections.[5] With this number of Mexicans voters, the Federal Electoral Institute (Instituto Federal Electoral, IFE) in charge of implementing absentee voting,[6] had a huge target audience to reach for the 2006 presidential elections and later for the 2012 presidential election.

To understand the political rights of Mexicans living abroad (most of them in the United States), it is important to consider the history of migration from Mexico to United States. In the first part of this article, I will briefly present the history of the Mexican migration.

In the second part, I will tackle two different terms that are used in Mexican legal discourse to refer to specific groups of population: nationals and citizens. These legal terms are linked to certain rights and obligations of specific groups of people. Most importantly, citizenship allows Mexicans to obtain and exercise their political rights. Nevertheless, to get Mexican citizenship it is necessary to be a Mexican national.

In the third part, I will present the political rights of migrants in an international context, as in the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights (ICCPR), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the American Convention on Human Rights. Political rights belong to the group of so-called first generation human rights, but Mexican legislation has yet to fully implement them.

In the fourth part, I explain Mexicans' political rights, in particular the right to absentee voting. Even though absentee voting in the 2006 presidential elections was granted, voter participation was low, as it was in the 2012 presidential elections. Mexican immigrants are included in Mexico's political affairs, but only to the extent of their right to vote.

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[4] In the western region of the United States, Mexicans number 16,464,100 according The Hispanic Population: 2010 issued May 2011, p. 7, available at *http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf* (Last consulted on March 25, 2011).

[5] Leticia Calderón Chelius & Nayamín Martínez Cossío, *La democracia incompleta: La lucha de los mexicanos por el voto en el exterior*, in Leticia Calderón Chelius (coord.), Votar a la distancia. La extensión de los derechos políticos a migrantes, experiencias comparadas 219 (Instituto Mora, 2nd. ed., 2004).

[6] *See* Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Art. 41, base III, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.). "The organization of federal elections is a public funded activity performed by a public autonomous agency named Federal Electoral Institute…"

In the fifth part, I share some reflections on the implementation of the political rights of Mexicans living abroad.

II. A Brief History of Mexican Migration

The first time a large number of Mexicans went to live in the United States was due to extraordinary political circumstances. Under the Treaty of Guadalupe-Hidalgo (1848), Mexico ceded the territory that now forms the states of Texas, California, Arizona, New Mexico, Nevada, Utah and parts of Colorado to the United States.[7] Consequently, significant numbers of Mexicans suddenly found themselves living in the United States of America. They then had to decide if they wanted to stay in their ancestral lands or if they wanted to "return" to Mexico.

The first wave of Mexican "immigration" to the United States therefore happened without people having to move from one country to another. If people actually moved, they were Mexicans moving from their ancestral lands south, back to their country: "…Mexican nationals that were left in the middle of lost Mexican territory unburied their dead and migrated south."[8] These political and legal events did not take into account the desire of the Mexican population to remain on their ancestral land.

The second and most important wave of Mexican migration to the United States was in 1917 and again in 1942 when U.S. farm workers left their fields to fight in the war. The U.S. and Mexican governments created the "Bracero"[9] program that brought Mexican farmers to the U.S. countryside on a seasonal basis.

"The program between 1942 and 1964 was the largest, admitting almost five million Mexicans (some individuals returned year-after-year, but one to two million Mexicans participated). However, there were more apprehensions of Mexicans illegally in the US than of legal Bracero admissions during this period."[10] Field owners encouraged irregular migrants to come to the United States because these migrants were not subject to the sanitary, health,

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[7] See Patricia Morales, Indocumentados mexicanos 13 (Grijalbo, 1982).

[8] The original reads: "…los connacionales que quedaron en la mitad del México perdido desenterraban a sus muertos y se trasladaban al sur", in Patricia Galeana (ed.), La migración México- Estados Unidos y su feminización, Cuadernos de América del Norte II 7(CESAN-UNAM, 2008), *see also* Patricia Galeana (coord.), Nuestra frontera norte 40 (Patricia Galeana coord., Segob-AGN, 2008).

[9] The Bracero program was established in 1942 by both governments as a solution to the lack of farmers in the United States. Under this program, the War Manpower Commission hired Mexican farmerswho were called *braceros* (strong arms). This program remained in effect for 22 years. See Morales, *supra* note 7, at 99-113.

[10] Agustin Escobar et al., Migration and Development: Mexico and Turkey 6 (University of Konstanz, 2006).

safety and payment conditions that the Mexican government had negotiated early on in the program to protect migrants from possible abuse. "Meanwhile, many rural Mexicans became dependent on seasonal US farm jobs to support their families, and faced a fall in their usually rural areas of origin did not develop during the Bracero years."[11]

In the 1960s, some *maquiladoras* (*i.e.* assembly plants) were set up within Mexican borders. Their main goal was first to assemble products with imported duty-free components using cheap Mexican labor force, and then to export the final products.[12]

From 1980s to today, migration flows have changed. In the past, immigrants were mainly male farmers who abandoned their fields in northern Mexico. Later, female migration[13] started and now entire families are migrating. People with different educational backgrounds and even university degrees are now working in the service and construction sectors in the United States, which represents a brain drain for Mexico.[14]

Mexicans immigrants find it difficult to adapt in foreign societies due to, among other factors, to not knowing the language and cultural differences. But perhaps the most important factor is the lack of integration to the host society.[15]

Many Mexicans living abroad before 1998 did not seek to acquire foreign citizenship because that implied renouncing their Mexican nationality. Some of the consequences of losing their Mexican nationality included losing their rights as Mexican citizens, as well as the impossibility to retain ownership of their lands in Mexico[16] since adopting a new citizenship or nationality makes them foreigners under Mexican law. According to the Mexican Constitution:

> Article 27
>
> The Nation has an original right of property over the lands and waters within the boundaries of the national territory. The Nation has and will have

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[11] *Id.*

[12] *See* Oscar J. Aranda & Margarita Escalante de Aranda: *Las empresas maquiladoras en México. Implicaciones económicas y jurídicas*, *in* Víctor Carlos García Moreno (comp.), Análisis de algunos problemas fronterizos y bilaterales entre México y Estados Unidos, 29-40 (UNAM, 1982).

[13] Levine, Eliane, *Empleos para mujeres mexicanas migrantes en Estados Unidos*, *in* Galeana, *supra* note 8, at 69.

[14] *See* Juan Artola V., *Migración internacional: escenarios y desafíos*, *in* Cecilia Imaz Bayona, ¿Invisibles? Migrantes internacionales en la escena política 20 (UNAM, 2007).

[15] *See* Alarcón, Norma, *…Pero no pareces mexicana*, in Martisa Belausteguigoitia (coord.), Güeras y prietas. Género y raza en construcción de nuevos mundos 35-46 (UNAM, Programa Universitario de Estudios de Género, 2009); see also Lucía Melgar, *Sin ton ni son: los vericuetos de las fronteras invisibles*, *id.*, at 59-69.

[16] *See* Jorge A. Bustamante: Migración internacional y derechos humanos, 89 (UNAM, 2002).

> the right to transfer its property's domain to private individuals in order to crate private property rights.
>
> …*Only those persons recognized as Mexicans by birth or by naturalization* as well as Mexicans corporations shall have a right to acquire legal domain over lands, waters and their accessories. They shall also be entitled to acquire lands, waters and their accessories… *within an extension of one hundred kilometers from the national borders inland and of fifty kilometers from the seashore inland*, *foreigners shall never be allowed to acquire direct domain over lands and waters*[17] (emphasis added.)

Until 1998, Mexico had endorsed single nationality. This meant that Mexican nationals could not keep their Mexican nationality once a foreign country conferred them nationality or citizenship.[18]

By losing their nationality and citizenship, Mexicans were excluded from participating in any kind of political affairs. Moreover, to a large extent, Mexicans living abroad were not integrated into the new society. Hence, even in the host society, they could not exercise political rights. To recover their rights in Mexico, Mexicans must renounce the new acquired nationality and regain the Mexican one through a long and complicated process. Aware of this, Mexican authorities reformed the Article 37 of the Mexican Constitution[19] to allow Mexicans abroad to preserve their Mexican nationality even if they adopt a foreign nationality or citizenship. One consequence of this reform was regaining their political rights, which will be fully explained in the following section.

III. Nationality and Citizenship: Are These Concepts Synonyms?

Unlike other countries, Mexican legislation makes a distinction between the concepts of nationals and citizens. Preserving Mexican nationality was a step toward the possibility of retaining Mexican citizenship and with it, the ability to exercise political rights in Mexico.[20]

The concepts of "national," "citizen," "resident" and "foreigner" are commonly used terms to justify the different treatment between individuals

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[17] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Art. 41, base III, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.).

[18] See Federal Official Gazette dated January 18 1934, stating that Mexican nationality cam be lost by the acquisition of a foreign nationality. The original reads:

"Artículo 37

A. La nacionalidad mexicana se pierde:

I. Por adquisición voluntaria de una nacionalidad extranjera;"

Available at *http://www.juridicas.unam.mx/infjur/leg/constmex/pdf/rc016.pdf* (Last consulted March 25, 2011).

[19] Article 37 states that: "A) The Mexican nationality by birth shall never be revoked". *Id.*

[20] *See* Jorge Carpizo & Diego Valadés, El voto de los mexicanos en el extranjero, 24-24 (UNAM-Porrúa, 2002).

living in the same territory. What are the circumstances of nationality and citizenship, and the subsequent duties and rights for the 214 million migrants around the world[21] today?

Sometimes, nationality and citizenship are treated indistinctly. It appears that there is a very thin line between these two concepts. The term nationality designates:

> …a political-legal term, or a sociological term, although on most occasions it is difficult to distinguish between them because one concept does not exclude the other… nationality is a twofold relationship, between single individuals, on the one side, and formal States on the other. Moreover there has to be a formally recognized *vinculum* (link between them).[22]

Nationality is "a union of masses of men of… hereditary society, of common spirit, feeling and race bound together especially by language and customs in a common civilization which gives them a sense of unity and distinction from all foreigners quite apart from the bond of the state."[23]

Nationality is understood as the bond that links people with common descendants, culture, language, territory, customs, traditions, identity and religion seeking common purposes that express this sense of belonging through activities organized by the State. This bond then establishes double duty-right conditions between nationals and the State.

> Nationality can be acquired at birth or thereafter. Nationality acquired at birth is called original nationality, and it is normally acquired on the basis of *ius soli*, that is, the individual acquires the nationality of the country in which he or she was born, or *ius sanguinis*, when the individual acquires the nationality of the country of his or her parents no matter the place of birth. When the nationality is acquired later, it is normally acquired through the procedure of naturalization, by which the individual, after fulfilling certain requirements, acquires the nationality of a given State.[24]

Today the concept of nationality presents difficulties in the face of a complex globalized society in which dual or multiple nationality[25] is possible.

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[21] International Organization for Migration, Fact and Figures, information can be consulted at *ttp://www.iom.int/jahia/Jahia/about-migration/facts-and-figures/lang/en* (Last consulted March 25, 2011).

[22] Carmen Tiburcio: The Human Rights of Aliens under International and Comparative Law, 3-4 (Kluwer Law International and Marinus Nijhoff Publishers, 2001).

[23] S. Herbert, *Nationality and its Problems*, cited by Joseph Bernard, Nationality its Nature and Problems, 21 (Allen and Unwin LTD, 1929).

[24] Tiburcio, *supra* note 22, at 8.

[25] "Multiple nationality is the condition in which individuals hold the nationality of more than one State." Peter J. Sapiro, in the Max Planck Encyclopedia of Public International Law, at *www.mpepil.com* (Last consulted March 25, 2011).

Sometimes States confer nationality to individuals even if links of common spirit, common language or cultural bonds are not well proven. In some cases, nationality is given by means of an administrative process, thus losing the true meaning of belonging.

The International Court of Justice referred to the term nationality[26] in the case of *Liechtenstein v. Guatemala*, (also known as the Nottebohm case). The Court defined "…nationality as a 'legal bound having at its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties…'"[27] In this case, the International Court of Justice coined the concept *real and effective nationality* based on the "factual ties between the person concerned and one of the States whose nationality is involved."[28] Mr. Friedrich Nottebohm was born in Germany, was living and had his business in Guatemala, and adopted the nationality of Liechtenstein. When he demanded protection from Liechtenstein as a Liechtenstein national, his *real and effective nationality* could not be proven and the claim was dismissed.[29]

States are free to legislate on the matters of nationality and there are international standards that guide and limit certain related aspects. For example, Article 15 of the Universal Declaration of Human Rights states that "(1) Everyone has the right to a nationality, (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Nothing in the Declaration makes any mention of citizenship.

Article 20 of the American Convention on Human Rights on the right to nationality indicates: "1. Every person has the right to a nationality. 2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality. 3. No one shall be

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[26] "The term 'nationality' appeared, denoting the quality of that which was national. Soon after it also acquired a third sense, indicative of citizenship". Joseph, *supra* note 23, at 21.

[27] Kay Hailbronner, *Nationality in Public International Law and European Law*, *in* E. Bauböck et al., Public International Law and European Law, in acquisition and Loss of nationality, 36 (Amsterdam University, 2006).

[28] "Different factors are taken into consideration, and their importance will vary from one case to the next: there is the habitual residence of the individual concerned but also the center of his interests, his family ties his participation in public life, attachment shown by him for a given country and inculcates in his children, etc.". The information was consulted on the International Court of Justice web-page at *http://www.icj-cij.org/docket/index.php?p1=3&k=26&case=18&code=lg&p3=4* (last visited March 25, 2011).

[29] See the Nottebhom Case (Liech. v. Guat.), 1955 I.C.J. 4, 18 (April 6). This judgment states: "The Government of Liechtenstein claimed restitution and compensation on the ground that the Government of Guatemala had acted Towards Mr. Friedrich Nottebohm, a *citizen* of Liechtenstein, in manner contrary to international law. Guatemala, for its part, contended that the claim was inadmissible on a number of grounds, one of which related to the *nationality* of Nottebohm, for whose protection Liechtenstein had seised the Court.

In its Judgment the Court accepted this plea in bar and in consequence held Liechtenstein's claim to be inadmissible". The emphasis is added.

arbitrarily deprived of his nationality or of the right to change it."[30] Again, citizenship is not mentioned in this regional instrument.

According to Article 24 of the International Covenant on Civil and Political Rights (ICCPR) "3. [e]very child has the right to acquire a nationality."[31] In this case, citizenship is also not mentioned.

Why do the above mentioned instruments not deal with the concept of citizenship? Is it because citizenship is used as synonym of nationality? Is it just a confusion despite the fact that nationality and citizenship have been recognized as being two different terms albeit closely related?

Although citizenship is sometimes used to refer to nationality, the two concepts are quite different. The term citizenship can be traced back to Ancient Rome to describe the membership in the political community.

> In international law citizenship is generally called nationality. This is somewhat [an] ambiguous term, since in many languages it is also used for membership of a [an] ethno-national group that need to be [re]established as independent state. In a related sense, the concept is also used for distinguishing states composed of several "nationalities" from nation states… Nationality refers to the international and external aspects of the relation between an individual and a sovereign state, whereas citizenship pertains to the internal aspects of this relation that are regulated by domestic law.[32]

It is the right of States to determine who their citizens are in their domestic laws. Some examples of the different uses of the terms nationality and citizenship in national legal systems can be observed. One example is China, which considers itself a multinational State.[33] Chinese nationality is acquired only by those whose parents (or at least one of them) are (is a) Chinese nationals or if the person was born in China. India, on the other hand only refers to citizenship[34] via *ius soli* and *ius sanguini*. In the U.S. Code, nationals are citizens or non-citizens with a permanent allegiance to the United States.[35]

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[30] The American Convention on Human Rights is available at the Inter-American Commission on Human Rights web page available at: *http://www.cidh.oas.org/Basicos/English/Basic1.%20Intro.htm* (Last consulted March 25, 2011).

[31] The International Covenant on Civil and Political Rights is available at the web page of the Office of the United Nations High Commission for Human Rights at: *http://www.cidh.oas.org/Basicos/English/Basic1.%20Intro.htm* (Last consulted March 25, 2011).

[32] Rainer Bauböck (ed.), Migration and Citizenship. Legal Status, Rights and Political Participation 16 (Amsterdam University Press, 2006).

[33] China Nationality Law of the People's Republic of China, September 10, 1980. Article 2: The People's Republic of China is a unitary multinational state; persons belonging to any of the nationalities in China shall have Chinese nationality. Information available at: http://www.novexcn.com/nationality.html (Last consulted March 25, 2011).

[34] Constitution of India, as modified to December 1, 2007, Part II Citizenship, English version of the Indian Constitution is available at: http://indiacode.nic.in/coiweb/welcome.html (Last consulted March 25, 2011).

[35] U.S. Code Title 8, Chapter 12, Subchapter § 1101, 2006, (22) The term "national of

> We must consider the term "citizenship" and distinguish it from "nationality", with which, as has already been observed, it is frequently confuses. Etymologically the term citizen means the inhabitant of a city in the original use of the world as equivalent of the state. Citizenship properly used describes the status of a person as a constituent member of a state who possesses full national rights of that state and owes it his allegiance.
>
> The fundamental difference between nationality and citizenship is that nationality is subjective whilst citizenship is objective. Nationality relates to a condition of the mind or feelings or mode of life; whilst citizenship is a political status.[36]

In some Latin American countries, it is common to distinguish between nationals and citizens.[37] Article 30 of the Mexican Constitution states that:

> The Mexican nationality shall be acquired either by birth or by naturalization.
>
> A. The Mexicans by birth shall be:
>
> I. The individuals born within the Republic's territory whatever their parent's nationality might be;
>
> II. The individuals born abroad from Mexican parents who were born within national territory,[38] from a Mexican father who was born within national territory or from a Mexican mother who was born within national territory;
>
> III. The individuals born abroad from naturalized Mexican parents, from a naturalized Mexican father or from a naturalized Mexican mother, and
>
> IV. The individuals born aboard Mexicans ships or airplanes whether military or commercial.
>
> B. The Mexicans by naturalization shall be:
>
> I. The foreigners who have obtained a naturalization Declaration from the Foreign Affairs Secretary;
>
> II. The foreigners married to Mexicans who live within national territory and fulfill all legal requirements.[39]

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the United States" means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.

[36] Bernard, *supra* note 23, at 27.

[37] Just to mention some examples see (a) Argentina: Law 345 Citizenship and naturalization Articles 1 Argentineans and Article 2 citizens by naturalization. (b) Bolivian Constitution Chapter I Nationality, Articles 36 and 37 and Chapter II Citizenship, Articles 40 and 41. (c) Chilean Constitution, Chapter II Nationality and Citizenship, Article 10 on Chilean nationals, Article 13 Chilean citizens. (d) Colombian Constitution Title III on the inhabitants of Colombia Chapter I on Colombian Nationals Article 96, Chapter II on the Colombian citizens Article 98. (e) Costa Rican Constitution Article 13 on Costa Rican nationals and Article 90 on Costa Rican citizens. (f) The Constitution of El Salvador states who is a national of El Salvador in Article 90 and who is a citizen in Article 71.

[38] This fragment was reformed in 1998 to avoid granting individuals born from parents in the United States Mexican nationality without any limits.

[39] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Art. 41, base III, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.).

In the other hand, the concept of citizenship[40] is used to describe the bond between individuals and the State mainly through political participation. In Mexico, one cannot be a citizen without being a national first, but one can be national even if one is not a citizen (as the case of children or the mentally ill). For the ancient Greeks, citizenship was a concept that was used as a positive quality of individuals and understood as active membership in society.[41]

"Citizenship has three aspects, namely, that citizens have a say in political decision-making; access to courts of law that are manned by cocitizens; and guarantee of minimum socioeconomic conditions of existence."[42]

Article 34 of the Mexican Constitution specifies who is considered a Mexican citizen: "The citizens of the Republic shall be those individuals who are considered as *Mexicans* and fulfill conditions as follows: I. To be at least 18 years old, and II. To have an honest way of life."[43]

In the Mexican scenario, millions of migrants stood to lose their Mexican nationality, Mexican citizenship and the rights derived from these categories when adopting foreign citizenship before the reform made to the above-mentioned Article 37.

The membership status that represents being a citizen also includes the possibility to exert individual will. Today when one out of every 33 people is a migrant[44] and every sovereign State controls its own borders, the right of free exit is considered a human right. Unfortunately, there is not a corresponding right to the rest of the states to admit migrants to enter their territories neither to recognize them as nationals or citizens.

The relevance of the reform to Article 37 of the Mexican Constitution, which declares that Mexican nationality by origin shall never be revoked, opened up the possibility for all Mexicans abroad (who were at least 18 years old) to regain Mexican citizenship and with it, their political rights.

In trying to distinguish Mexican nationals' duties and rights from those of Mexican citizens, the Constitution states that:

> Article 31. Mexicans shall have duties as follows:

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[40] According to Herman R. Van Gunstern, "The term citizenship is used in a strict sense to refer to the status of political equality and participation." Herman R. Van Gunstern, A Theory of Citizenship, Organizing Plurality in Contemporary Democracies 12 (Westview Press, 1998).

[41] "The word 'citizen', derived from *civitas*, is distinctively Latin in origin. However, the idea of citizenship, understood as active membership of and participation in a body politic, is generally regarded as emerging first in Greece at about 600-700 BC." Paul Berry Clarke, Citizenship 4 (Pluto Press, 1994).

[42] Van Gunsteren *supra* note 40, at 13-14.

[43] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Art. 41, base III, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.).

[44] International Organization for Migration, Fact and Figures, information can be consulted at ttp://www.iom.int/jahia/Jahia/about-migration/facts-and-figures/lang/en (Last consulted 25 March 2011).

> I. Mexicans shall send their sons, daughters or pupils to either public or private schools in order to provide them not only with preschool education but also with primary and secondary education and even military instruction according to the law.
>
> II. Mexicans shall attend civic and military instruction within the timetables established by the city in which they live in order to be prepared to claim their rights as well as to get acquainted with the use of weapons and with the military discipline;
>
> III. Mexicans shall enroll themselves and serve in the National Guard under the law in order to defend the Nation's independence, territory, honor, rights and interests as well as the interior peace and order, and;
>
> IV. Mexicans shall contribute to finance the federal spending as well as to finance the spending of the state or municipality which they live at. Likewise, they shall contribute to finance the Federal District's public spending.[45]

As stated in Article 31, the duties of Mexicans tend to promote cultural bonds, the connections of co-existence, common interests and sentiments through education (subjective elements). Mexican immigrants find it difficult to fulfill these duties, first because the education they have received, as well as that of their children or wards, in foreign countries are related to the host country. Of course, consulates help by distributing materials on Mexican facts, but this will never replace the education provided by educational authorities in Mexico.

The duty to attend civic and military instruction or enrolling in the National Guard is impossible to fulfill since migrants live abroad. While the remittances Mexican migrants send to Mexico represents a very important source of income for Mexico after oil an before tourism and exportations, but they are not taxes that contribute directly to financing federal spending.

Article 35 of the Mexican Constitution states that citizens are entitled to:

> I. *Vote at popular elections*;
>
> II. *Be elected* to any public office or appointed to any employment or commission which requires certain legal qualities to be fulfilled;
>
> III. *Associate* freely and individually with others in order to participate in the country's political affairs;
>
> …[46]

It is clear that political rights are derived from being citizens. This article of the Mexican Constitution refers to the prerogative to vote, to be elected, and to associate freely, as well as to participate in political affairs. However these entitlements are diminished in the case of Mexican immigrants as will be seen in Part V.

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[45] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Art. 41, base III, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.). Emphasis is added.

[46] *Id*.

Article 36 of the Mexican Constitution states the duties of Mexican citizens:

> I. To register himself at the respective council tax office, declaring his property as well as his industry, profession or work; he also shall register himself in the National Register of Citizens under the law. The National Register of Citizens as well as the Mexican Citizen Identity Card's issuing procedures shall be considered as public interest services and the State shall be therefore in charge of them.
>
> The citizens' participation shall be authorized under the law;
>
> II. To enroll in the National Guard;
>
> III. *To vote in the popular elections* under the law;
>
> IV. To *perform the duties of officers elected by popular vote which shall never be unpaid ones, and*
>
> V. To *perform the municipal official duties, the electoral ones* and those reserved to juries[47] (emphasis is added).

Mexican immigrants have encountered difficulties to fulfill their duties as Mexican citizens because: paying taxes in Mexico when working and living abroad would be double taxation. In order to avoid that, double taxation agreements must be signed between Mexico and the host country.

Enrolling in the National Register of Citizens to obtain a Mexican Citizen Identity Card is impossible outside Mexico as it not allowed to be done outside the territory of the Mexican Republic: consulates and embassies are not authorized to do so. Without a Mexican Citizen Identity Card, it is not possible to take part in popular elections or absentee voting. This means that Mexicans need to return to Mexican territory to get this identity card if they did not travel with it at the time of emigration. If the card was lost or stolen, they need to return to Mexico to get a new one. The process in getting the new identity card can take from two weeks to one month.

Article 36, parts III, IV and V, deal with the political rights to elect and be elected in popular elections. As stated above, the first step to allow Mexican immigrants to take part in Mexican political affairs required conceding that Mexicans still uphold the bonds of culture, language, interests and sentiments with the Mexican nation recognized by its nationality. This was the argument used to allow migrants to regain Mexican citizenship and with it, the possibility of regaining the rights and duties enshrined in Articles 35 and 36 of the Mexican Constitution.

In Mexico, nationals and citizens are dealt with separately in the Constitution. Rights, entitlements and duties derived from these statuses have different purposes. Nationality indicates the bind that Mexicans abroad still have with the Mexican nation and the concept of citizen serves the purpose of linking migrants to Mexican political affairs.

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[47] *Id.*

Each national system handles the concepts of nationality and citizenship differently. Then, it can be concluded that the term nationality refers to a legal-political and sociological term that links individuals through common feelings, ways of thinking, life, cultural bonds and interests; while citizenship confers political rights.

In some national systems, there is no distinction made between nationals and citizens. "Each country will define, according to its laws, who are its nationals. As there is no uniformity in the laws of nationality of the various countries…"[48]

In the following section, the political rights derived from citizenship status internationally, as well as the political rights that correspond to migrants, will be discussed.

IV. The Political Rights of Migrants in an International Context

Political rights are the rights that empower citizens to participate in the administration or establishment of the government within the State to which they are members. "Political rights, as rule, are granted only to citizens. Therefore citizenship is a specific concept in international law, applying to the individual national of a certain State, who is in full enjoyment of political rights. Citizen is not a synonym for national. It means the person who has enjoyment of political rights, and, as seen, not necessarily all nationals are citizens."[49]

Political rights are derived from citizenship status. In ancient Rome, those rights were exercised only by Roman citizens excluding foreigners, non-citizens and women. Eventually some foreigners could participate in the politics, at least in Greece where "several early legislators were foreigners, called when the situation among the ruling class became so bad that no impartial citizen could be found to accomplish the task."[50]

It was not until the French Declaration of the Rights of Men and Citizens in 1789 that a distinction was made between fundamental rights and political rights. The distinction between men and citizens was not well established, but it was inferred that political rights were conferred to citizens.

The unequal situation between citizens with political rights and citizens without them moved people to fight against the restrictions placed on exercising these political rights, such as that of poll tax:

> [b]y October 1789, in a move reminiscent of an earlier Rome, citizens were divided into two types: those who could vote and those who could not, active citizens and passive citizens… Under the terms of the 1789 law the assembly

[48] Tiburcio, *supra* note 22, at 1.

[49] *Id.* at 178.

[50] *Id.* at 179.

> decreed payment of a poll tax as a voting qualifications. Deputies to the assembly were to be chosen by those who had paid the basic poll tax.[51]

Restrictions on women voters also had to be abolished before political rights became accessible to every citizen and today, universal suffrage is possible in some countries.

Political rights are understood as: the right to vote and to be elected, the right to exercise public service in general, the right to perform specific functions in the Executive and participation in within the State in which one is citizen. Some authors consider freedom of assembly and freedom of thought part of political rights, but others such as Carmen Tiburcio and Manfred Nowak disagree with that.[52]

Political rights are protected by international documents like the Universal Declaration of Human Rights and international law instruments like the International Covenant on Civil and Political Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the American Convention of Human Rights. With respect to migrants, one has to inquire about their political rights both in the country they emigrated from and in the country to which they immigrated.

Article 21 of the 1948 Universal Declaration of Human Rights indicates that "1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives…"[53]

The Declaration refers to "everyone" instead of citizens or nationals. The previous section discussed the lack of uniformity in the use of these concepts in national legal systems. Each legal system decides the requirements individuals must fulfill to exercise political rights, such as being a specific age or registering on an electoral list.

The Universal Declaration is too broad to refer to political rights when it mentions the "right to take part in the government." Notwithstanding, it is very careful to draw attention to the point that everyone can do so in "his country."

Political rights cannot be restricted without justification. The distinction between aliens and citizens and the difference in the rights they can enjoy as

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[51] Clarke, *supra* note 41, at 16.

[52] See the opinion of Tiburcio, *supra* note 22, at 177. "Liberty of thought and opinion are not dealt with under this category, for they cannot be understood as political right. Thinking is an activity inherent to human nature and consequently, expressing thoughts is also something which should be consider as basic to the individual and which therefore cannot be classified under the same heading as voting, being elected, or other similar activity and consequently suffer the same restriction." See also Manfred Nowak, U.N. Covenant on Civil and Political Rights. CCPR Commentary 265 (N. P. Engel, Publisher, 2nd revised edition, 2005).

[53] Universal Declaration of Human Rights. Available on-line at the United Nations webpage at: http://www.un.org/en/documents/udhr/index.shtml (Last consulted March 25, 2011).

citizens is not considered discriminatory or arbitrary; on the contrary, it is a situation accepted worldwide.

As stated in the above-mentioned Article 21 of the Universal Declaration of Human Rights, migrants included in the broad concept of "everyone" can take part in the government of the countries of which they are citizens. However, this does not mean that migrants can exercise the political rights of the country to where they immigrated, but there are cases in which it is possible to do so.[54]

Article 25 of the 1966 International Covenant on Civil and Political Rights (ICCPR) stipulates that:

> [e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2[55] and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

---

[54] See references to New Zealand in VOTO EN EL EXTRANJERO: EL MANUAL DE IDEA INTERNACIONAL (IFE, 2009). Available at: http://www.idea.int/publications/voting_from_abroad/sp.cfm.

See also TIBURCIO, *supra* note 22, at 181, where she mentions some example of countries that allow foreigners to vote: "…This is the case with Denmark, which in its ordinary legislation, since 1981, grants aliens who reside in the country for more than three years, without regard to their nationality, the right to participate in local elections. Spain, in its Constitution, admits that, on condition of reciprocity, aliens may participate in elections at local level. Hungary also grants resident aliens the right to participate in local elections. Ireland grants aliens who reside in the country for more than 6 months the right to vote in local elections. The Netherlands Constitution admits that aliens who have been living in the Netherlands for more than 5 years can vote at local level. The Portuguese Constitution provides for the participation of aliens in local elections on condition of reciprocity. Paraguayan Constitution allows foreigners to vote in municipal elections…"

[55] International Covenant on Civil and Political Rights, Article 2.

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c) To have access, on general terms of equality, to public service in his country.[56]

The Covenant thus limits the right to vote to citizens, but it does not clarify what is to be understood by this concept. States therefore seem to be free to choose between the socio-cultural concept of nationality and the more neutral concept of citizenship.

The rights mentioned in this legal instrument are: the right to take part and conduct of public affairs, the right to vote and be elected (universal and equal suffrage, secret ballot and periodic and free elections), and the right to equal access to public service. Migrants can exercise these rights if the national legal systems of the States of which they are citizens provide access to these rights. For example, more than 100 countries allow their migrants to vote from abroad.[57] It is evident that the political rights of migrants are limited due to national legal restrictions and administrative or operational barriers, as well as the significant financial expense it represents.

Article 41 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW), adopted by General Assembly resolution 45/158 of 18 December 1990, ratified by Mexico in 1999, and entered into force in 2003 sets forth that:

> 1. Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.
>
> 2. The States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.

The ICMW establishes the right to participate in public affairs, as well as to vote and to be elected at elections (although it does not specify the kind of elections). These are the political rights migrant workers and members of their families may exercise. This Covenant does not refer the terms citizen or national, but it clearly states that political rights must be exercised according to the legislation of each State.

Article 23 of the 1969 American Convention on Human Rights (ACHR) indicates that:

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[56] Johann Bair, The International Covenant on Civil and Political Rights and its (First) Optional Protocol. A Short Commentary Based on Views, General Comments and Concluding Observations by the Human Rights Committee 119-115 (Peter Lang, 2005).

[57] Jean-Michel Lafleur, *Why Do States Enfranchise Citizens Abroad? Comparative Insights from Mexico, Italy and Belgium*, 11 (4) Global Networks (forthcoming 2011) (manuscript at 2, on file with authors).

> 1. Every citizen shall enjoy the following rights and opportunities:
> a. to take part in the conduct of public affairs, directly or through freely chosen representatives;
> b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
> c. to have access, under general conditions of equality, to the public service of his country.
> 2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

Both the ACHR and the ICCPR refer to citizenship status as being able to exercise political rights. Like the ICCPR, the ACHR also recognizes: the right to take part and conduct of public affairs, the right to vote and be elected (universal and equal suffrage, secret ballot and periodic and free elections) to be exercised in the State of which one is a citizen. Again, migrant participation needs to be regulated separately by each national legal system.

Since migration flows are a constant feature in the globalized world, the participation of aliens in the public life of the place where they live has started to be questioned:

> In 1992, the Treaty on the European Union established the participation of aliens —nationals of other European countries— in the public life of the community. This convention grants resident aliens, nationals of other EU countries, the right to freedom of expression, the right to reunion and the right to associate. Additionally, the Convention stimulates the States which are party to this Convention to create organizations to represent the alien at local level. Finally the Convention also allows aliens, residing for more than 5 years in a specific European member country, the right to vote and be elected at local level.[58]

From the international instruments analyzed above, it can be noted that the political rights of migrants may be granted in the countries they are considered citizens and that every national legal system can stipulated restrictions on these rights. Until now, only a few States give migrants the right to vote in local elections, but the right to take part in and conduct public affairs and the right to be elected is restricted to citizens of the States that confer that status.

In the following section, the political rights of Mexican migrants will be presented. Even though Mexico is not the first State to allow its citizens abroad to participate in national political affairs, it is the volume of potential voters (10 million people) that makes this case stand out. Absentee voting for Mexicans was made possible for first time in the 2006 presidential elections, but low voter participation was seen again in the 2012 presidential elections. This can

[58] Tiburcio, *supra* note 22, at 180.

have two different interpretations, namely: was it the lack of voter interest or the lack of proper means to effectively implement absentee voting?

V. Is Absentee Voting: The Only Political Right of Mexican Migrants?

As mentioned above, Mexico is not the first State to implement absentee voting. "Today there are 115 countries that allow some form of external voting."[59] In Mexico, the first attempt to promote absentee voting was in 1929 when

> …a leader of Mexican Revolution, Jose Vasconcelos, conducted a vigorous campaign among Mexicans abroad for his candidature for the presidency. After this early episode, both the Mexican authorities and Mexicans abroad largely ignored the issue. The failure to actively to promote such legislation for decades was primarily due to the fear of the *Partido Revolucionario Institucional* (PRI), the party in power for 71 years, to grant political rights to citizens who would not support it.[60]

After that first attempt, the timeline for the legal process that allowed absentee voting can be described as follows:

1) The reform of Article 36 of the Mexican Constitution in 1996, allowed Mexicans outside their electoral circumscription to vote in a different circumscription.
2) On February 22, 2005, the Chamber of Deputies approved the initiative on granting suffrage to Mexicans living abroad.
3) On April 27, 2005, the Senate approved the draft decree that would add the chapter on the vote of Mexicans living abroad to the Federal Code of Federal Institutions and Procedures (In Spanish *Codigo federal de Institutiones y Procedimientos Electorales*).
4) On June 30, 2005, the reform was signed and published by presidential decree.[61]

We can see that the only political right Mexican migrants have gained after the reforms introduced in the national legal system is the right to vote. In 2006, absentee voting in presidential elections was possible. Even today, Mexican migrants are excluded from participating in other popular elections, such as voting for senators, deputies or local authorities. The right to take part

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[59] Lafleur, *supra* note 58.

[60] *Id.* at 5.

[61] See Electoral Gazette 89. Acuerdo del Consejo General del Instituto Federal Electoral Relativo a las Asignaciones Presupuestarias Necesarias Durante el Ejercicio Fiscal 2005. Available at www.ife.org.mx/documentos/DIR-SECRE/gaceta.../gaceta89/4-G89-04.pdf.

and conduct of public affairs, the right to be elected by universal and equal suffrage or the right to equal access to public service have not been granted.

Mexicans with a second nationality cannot: "Be elected to any public office or appointed to any employment or commission which requires certain legal qualities to be fulfilled"[62] as indicated in the Mexican Constitution as a political right of Mexican citizens.

Mexican migrants need to return to Mexican territory to participate as candidates in public offices, and they need to comply with specific periods of time residing in Mexico. But the most important point is that certain public offices are restricted to Mexicans by origin[63] that have not acquired a second nationality. This constitutes a clear distinction between the political rights of Mexicans in national territory and Mexicans abroad.

On the other hand, Mexico does not recognize political rights for aliens living in its national territory; in fact, it is forbidden by Article 33 of the Mexican Constitution. Even though this is closely linked to the subject of this article, this specific point is not covered in the present work. However, it is worth nothing that according to Eliseo Aja and Laura Díez Bueso, some of the reasons considered for denying aliens political rights are, in general: 1. Foreigners must be naturalized under the laws of the host country if they want to exercise political rights and this is a slow and expensive solution. 2. Foreigner participation in politics represents an attempt to infringe national sovereignty. 3. The participation of foreigners in politics is understood as going against national identity and patriotism because national needs and aspirations are unknown to them.[64]

Mexicans abroad want to participate in elections because they feel they are still part of the Mexican community even if they live abroad. They send remittances to their families back home and hence, want to participate in the political decisions that will directly affect the future course of the country.

The electoral authorities published that 81% of the Mexicans abroad participated in the last presidential elections. However, it has to be pointed out that the percentage only referred to the list of Mexicans that registered on a nominal list that was created in order to send the corresponding ballots. This list was made a few months before the elections and many Mexicans were unable to complete the registration process. Therefore, millions of potential

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[62] Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, Art. 41, base III, Diario Oficial de la Federación [D.O.], 5 de febrero de 1917 (Mex.).

[63] Nuria González Martín, "Régimen jurídico de la nacionalidad en México", in Cuadernos Constitucionales México-Centroamérica. Centro de Estudios Constitucionales México-Centroamérica, 47-48 (UNAM, Institute of Legal Research, 1999). The author listed some Mexican Laws that prevent Mexicans with a second nationality from running for specific public offices and that must be reformed.

[64] *See* Eliseo Aja and Laura Díez Bueso, *La participación política de los inmigrantes*, in 10 La factoría, (Oct. 1999-Jan. 2000). Available at http://www.lafactoriaweb.com/articulos/aja.htm (Last consulted March 25, 2011).

voters did not vote. Thus, only 32,632 of the potential 4 million voters cast their votes. This rather poor outcome reflects the large number of irregular migrants. This number did not have a significant effect on the elections: The elected president Felipe Calderon won the elections by a margin of 243,898 votes.[65]

The low participation of Mexicans living abroad in the presidential elections was seen again in 2012: only 40,737 ballot papers were received.[66]

The cost of Mexican absentee voting stands in stark contrast with its potential impact. Every vote cost 290 Mexican pesos.[67] Had the granting of voting rights to Mexicans abroad been a complete success and all 4 million had voted, it would have translated into a cost of one billion Euros (twenty billion Mexican pesos). It is clear that at this cost, it would be impossible to finance a successful campaign for Mexicans abroad to vote in Mexican elections.[68]

VI. Concluding Remarks

There is no a uniformity in the use of the concepts of national and citizen. It has been clearly demonstrated that citizenship status is needed to exercise political rights. In the international instruments studied above, the quality of citizen is mentioned as clearly referring to political rights.

It is also evident that according to international practice, migrants have political rights in the country of which they are citizens. There are different instruments that protect the political rights of citizens, but these do not necessarily mention the political rights of migrants, as in the case of the Universal Declaration of Human Rights and the American Convention of Human Rights and the International Covenant of Civil and Political Rights. All these international documents mention citizenship status as a requirement to exercise political rights.

In the Mexican case, it is clear that migrants are able to vote in presidential elections, but it is necessary to implement better ways to exercise political rights by opening up the possibility of being elected. This will encourage migrants to vote from abroad and at the same time, it could overcome the problem of low migrant participation in elections.

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[65] Information available at: http://mxvote06.ife.org.mx/libro_blanco/pdf/tomoV/anexo%206.pdf.

[66] *Id.*

[67] *See* Federico Vázquez and Jürgen Moritz (edits.), El triangulo de las Bermudas. El financiamiento de la política en México. Perspectivas progresivas (Friedrich Ebert Stiftung, 2007). Available at www.fesmex.org/.../Libro%20Triangulo%20de%20las%20Bermudas.pdf (Last consulted March 25, 2011).

[68] Information available at: http://mxvote06.ife.org.mx/libro_blanco/pdf/tomoV/anexo%206.pdf (Last consulted March 25, 2011).

We cannot speak of democracy if a large part of the Mexican population cannot exercise their political rights. Of course, the political rights of Mexicans living abroad must include the right to be elected too.

As the Universal Declaration states, it is important that "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives." So it is pertinent to ask what attempts are being made by the different States to achieve this task?

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