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The Inter-American Human Rights System and Transitional Justice in Mexico

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Bruno Boti Bernardi (brunoboti@gmail.com)

University of São Paulo (USP, Brazil)

Department of Political Science

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Bruno Boti Bernardi¹

Abstract

The aim of this article is to analyze how and why the norms of the Inter-American Human Rights System on transitional justice convened under the Rosendo Radilla ruling against the Mexican state exerted an impact on the human rights issues in Mexico, especially on the topics of military jurisdiction and conventionality control. Based on the emerging theoretical approach according to which the effects of international human rights regimes are conditioned by domestic factors of the target-countries, our research seeks to unravel how domestic politics influences the potential impact of these international norms that comprise the justice cascade, highlighting the role of non-governmental organizations (NGOs) and the local higher court.

Keywords: Mexico; Human Rights; Nongovernmental Organizations; Judiciary; Inter-American Human Rights System

In recent decades, the human rights field has consolidated itself as a topic of paramount institutional and regulatory importance in world politics. In the Americas, through their work on serious human rights violations in contexts of political transition since the late 1980s, the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) have consolidated a vast and clear jurisprudence that bans the validity of amnesty laws; consolidates the obligation to investigate and to punish; prohibits civilian trials by military courts; defines enforced disappearance as a continuing crime; and vetoes the application of military jurisdiction on members of the military accused of human rights violations (cf. Morales, 2012; Binder, 2011; Rodríguez-Pinzón, 2011; Gutiérrez e Cantú, 2010; Modolell González, 2010).

In this sense, the Inter-American system (IAHRS) has adopted a highly judicialized transitional justice model², which favors individual criminal prosecution and a retributive justice approach. Among the various possible ways of dealing with past abuses, this approach reinforces judgments and punishments as well as judicial and legal responses and strategies that necessarily involve the actions of the judiciary (cf. Huneeus, 2013; Morales, 2012; Lima, 2012)³. As a result, both the Inter-American Commission and the Inter-American Court position themselves as key players in the justice cascade model as defined by Sikkink (2011),

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¹ Doctoral student in the Department of Political Science, University of São Paulo (USP, Brazil), with a FAPESP scholarship.

² According to Roht-Arriaza (2006, p. 2), “transitional justice includes that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law”. In a similar direction, Mezarobba (2009, p. 121) states that the reflection “involves, on the one hand, serious human rights violations, and on the other, a need for justice that emerges in periods of transition to democracy or the end of conflicts”. Still according to the author, transitional justice thus identifies four rights for victims and society: the right to justice; the right to truth; the right to compensation; and the right to reorganized institutions that may be held liable (non-repetition measures) (cf. Mezarobba, 2009, p. 117).

³ The right to truth, reparations, and non-repetition measures are always invoked by the Commission and the Court but the need for justice and criminal penalties for serious violations and crimes against humanity are particularly emphasized, denying the possibility of trials being replaced by other transitional justice mechanisms.

involving the growing trend of applying individual criminal accountability on state officials and heads of state⁴.

Once identified, how can we come to understand the impact of this type of normativity or, more accurately, what are the domestic enforcement mechanisms of the Inter-American transitional justice model that drives the justice cascade within Nation-States' domestic level? To understand this phenomenon, Sikkink states that the move toward individual criminal accountability incorporates human rights litigants and domestic and international criminal courts into a relevant set of actors. Insofar as these will be the actors responsible for implementing and executing this norm, this process provides a role for lawyers, judges, and courts in the justice cascade (Ibid., p. 242). However, the author also considers it to be a complex role, for while we may expect these actors to support individual accountability – which could contribute to the power, wealth, influence and autonomy of the judicial sector – their actions may also be affected by specific domestic, institutional and ideological factors that can make it unappealing to pursue a case or a trial (Ibid., pp. 242-43).

In other words, according to Sikkink, we see the emergence of a decentralized and interactive accountability system in which “enforcement is often fragmented and haphazard; whether a state official is prosecuted for human rights violations depends mainly on whether determined and empowered domestic litigants are pressing for accountability” (Ibid., p. 18). In this sense, Sikkink continues (p. 19), “[b]ecause the system is decentralized, the quality of enforcement varies with the quality of criminal justice systems in different countries.”

Such a model recognizes the role of judicial actors and domestic litigants in the advancement of the justice cascade, but the most conducive local circumstances and conditions of these national criminal systems that predispose them to the effective enforcement of individual criminal accountability on state officials responsible for human rights violations are not yet sufficiently clear. Similarly, while domestic litigants are important, their individual trajectories and characteristics must be explored so that we can understand what might convert them into more or less open channels for the promotion of the justice cascade.

Based on the emerging consensus in the literature according to which “compliance is not an all-or-nothing affair and that the effects of human rights regimes, when and where they exist, are conditional on other [domestic] institutions and actors” (Hafner-Burton, 2012, p. 275), this article analyzes the theoretical and empirical issues related to these topics through the analysis of the Mexican case. Following the Inter-American Court's ruling against Mexico on the Rosendo Radilla case, and during its examination of judicial decision 912/2010 (*Expediente Varios* 912/2010)⁵, in 2011 the National Supreme Court of Justice (SCJN) changed the country's constitutional control model and restricted the use of military jurisdiction. In this sense, the hypothesis presented here attempts to outline how domestic politics influences and mediates the potential impact of norms issued by the regional system. Given that it involves serious violations committed in the past, this brings to light the transitional justice model of the Inter-American system. To this end, the role and specific characteristics of civil society groups and the response from the local judicial authority are

⁴ According to Sikkink (2011, p. 5), “justice cascade means that there has been a shift in the *legitimacy of the norm* of individual criminal accountability for human rights violations and an increase in criminal prosecutions on behalf of that norm”. The emergence and consolidation of this standard can be measured by three types of criminal prosecutions: those conducted by international or hybrid courts; those conducted by a State's national courts against foreign defendants; and those conducted by domestic courts against national defendants (cf. Sikkink, 2011, pp. 4-5).

⁵ The case concerns the forced disappearance of social leader Rosendo Radilla Pacheco in 1974 in the town of Atoyac de Alvarez, Guerrero state, during the Mexican dirty war, and among other issues involved transitional justice demands and the application of military jurisdiction in cases of serious human rights violations committed by members of the armed forces (cf. Corte Interamericana de Derechos Humanos, 2009).

emphasized, revealing how they may be considered as more or less open channels for the influence of the Inter-American human rights system.

According to our hypothesis, the Inter-American system acquires domestic adherence if and when these two sets of actors are able to understand and instrumentalize it as an effective mechanism for their own "empowerment." On the one hand, its impact thus depends on the prior organization of local human rights groups and their capacity of transnational articulation. The existence of professionalized non-governmental organizations (NGOs) that define strategic litigation actions and the legal mobilization of the Inter-American system's norms as a strategic priority for action is particularly important to increase these groups' ability to put pressure on the State. On the other hand, influence also depends on the openness of the local judicial authority – or at least of a group of judges – to the international normativity. In the Mexican case, for example, the use of IAHRs's norms was perceived as an opportunity to increase and strengthen the judiciary's resources and legal-judicial arguments, especially with regard to building the human rights agenda that the Supreme Court lacked at the time.

Mexican NGOs and relatives of victims of enforced disappearance

After the 1910 social revolution, an authoritarian and inclusive civilian political system was consolidated in Mexico with a corporatist and hegemonic party regime controlled by the Institutional Revolutionary Party (PRI). Contrary to its initial revolutionary promises of democracy and social justice, the "PRI regime" not only restricted freedom of association for social organizations and annulled the autonomous development of civil society groups throughout the twentieth century; it also proved to be a perpetual human rights violator. Between 1960 and 1980 especially, episodes such as the *Guerra Sucia*⁶ and the repression of the student movement in 1968 (Tlatelolco massacre) and 1971 (Corpus Christi massacre) underlined the State's official policy of persecuting opponents and the regime's disregard for international human rights standards, despite its formal defense of the theme in the country's constitutional texts and foreign policy.

At the same time, until the mid-1980s, human rights language was still largely unknown and had little domestic legitimacy in Mexico: it was broadly considered to be a US tool for intervention and infiltration, a set of Yankee ideas, foreign to the Mexican reality (see, Cleary, 1997, p. 37). Therefore, if the country did not really attract the international attention of the transnational human rights network (cf. Sikkink, 2006), Mexican social organizations – including human rights organizations – also spoke little abroad about what was happening in Mexico, as it would be an affront to the nationalist tradition (cf. Aguayo and Parra, 1997, p. 25).

It was only in the late 1980s that Mexican social organizations achieved greater autonomy from the state apparatus, a process that was accompanied with greater visibility and influence over the public agenda, which allowed them to shed light on the country's severe human rights violations, hitherto relatively unknown both in international and domestic arenas. These organizations represented a new kind of social movement that – amid an increasingly acute crisis of legitimacy for the regime and benefiting from a continuous

⁶ By "Dirty War" we consider the military and political repression measures taken by the PRI from the late 1960s to the early 1980s, which sought to dissolve political and armed opposition movements against the Mexican State. The term is questioned by the victims of human rights violations who argue that it suggests a false equivalence of forces between the guerrillas and the military and would therefore justify the State's arbitrary actions. We use the concept for the purposes of this article due to its broad historiographical dissemination but remain aware of such criticisms and of its limitations.

political liberalization process – exposed the authoritarian nature of “*PRI-ism*”, defended democratic values, and transcended local and economic objectives (cf. Aguayo and Parra, 1997).

A significant share of Mexican human rights NGOs was directly influenced or promoted by specific Catholic religious orders, such as the Jesuits and the Dominicans⁷, albeit not through the traditionally conservative hierarchy of the Mexican church. The convergence of these Christian groups with university professors, academics, and intellectuals on the one hand, and left-wing political activists disillusioned with political parties, on the other, ultimately delivered the necessary leaderships for organizing the emerging human rights groups. This process allowed for the creation of Mexican NGOs, which discreetly began to occupy the political spaces that were opening up within the authoritarian regime (cf. Aguayo, 1998, p. 169).

At first, the Victoria Center, the PRODH Center, and the Mexican Academy of Human Rights (AMDH)⁸ – three pioneering human rights NGOs – had no lawyers on their staff, and those who actually were members of these organizations did not necessarily dedicate themselves to programs or activities pertaining to legal defense or litigation. The Fray Francisco de Vitoria Center and the Mexican Academy of Human Rights (AMDH), in particular, responded to pressures from Central American activists, who looked at and travelled to Mexico seeking assistance for their activities (cf. Cleary, 1997, p. 30). In this sense, when commenting on the profile of the NGOs connected to the Church as well as those shaped by left-wing and intellectual sectors, Edgar Cortez (a former Jesuit priest and director of the PRODH Center between 1996 and 2004) said: “We basically had mostly activists working in dissemination, providing lectures, providing workshops” (personal interview). It was only in the mid-1990s, especially after the Zapatista uprising, that legal and litigation work becomes fully incorporated by the PRODH Center and other Mexican NGOs, especially the Mexican Commission for the Defense and Promotion of Human Rights, a break-away group from the AMDH.

As such, following an initial approach grounded on human rights research, training and diffusion activities that aimed to disseminate and popularize a hitherto fairly unknown discourse that lacked legitimacy, a second stage emerged that was marked by concerns over the registration of cases. In this way, complaints began to be sent to state and national human rights commissions, while public accusations were also made in the hope of pressuring public prosecutors and courts to receive and process cases. It was thus only after the learning phase on case documentation and the gathering of evidence, on the one hand, and initial contacts with judicial and non-judicial systems for the protection of human rights, on the other, that NGOs actually began to specialize in presenting litigations before international human rights mechanisms, given the internal justice system’s failure to respond (cf. Edgar Cortez, personal interview).

The process by which NGO’s practices, strategies and priorities were changed through the early stages of diffusion, registration of cases and accusations until reaching a structured scenario with teams of trained lawyers and the construction of paradigmatic cases becomes clear in the case of the Mexican Commission, a break-way group of the AMDH. Among other

⁷ In Mexico, Dominicans and Jesuits, respectively, were responsible for creating two of the main human rights NGOs: the *Centro de Derechos Humanos Fray Francisco de Vitoria O. P* (Vitoria Center) and the *Centro de Derechos Humanos Miguel Agustín Pro Juárez* (Prodh Center).

⁸ While the Dominicans founded the Victoria Centre in April 1984 and the Jesuits founded the Prodh Center in 1988, a group of academics, politicians and lay activists established the AMDH in October 1984. The AMDH began to train activists and to promote research and education on human rights in the country, as well as documenting and disseminating information with strong support from the Ford Foundation, which provided most of the funds during its first five years of existence (cf. Sikkink, 1993, p. 430).

controversies, there was a dispute among AMDH members as to what should be the nature and focus of their work. The split was between those who solely advocated for the promotion of human rights causes, defending academic and dissemination purposes, and those who sought to expand the organization's focus to include the legal defense and litigation of concrete human rights cases.

Given this division between causes and cases, Mariclaire Acosta and a group of activists argued that it was necessary to radicalize and deepen the work beyond dissemination and academic debates, taking on board "the active and committed defense of the country's countless victims of abuse" (Acosta 2006, p. 73). In her words, Academia "never wished to stop being Academia" (personal interview). As a result, "the AMDH's assembly recommended the formation of another organization to further the work of defending cases" (Peebles Lane, 1993, p. 85), as a response to the frustration of those members who wanted more freedom to respond to and defend individual cases. Acosta and a considerable number of people thus left the AMDH and this fission led to the formation of a new human rights NGO, the Mexican Commission for the Defense and Promotion of Human Rights, in December 1989.

Like the PRODH Center and, to a lesser extent, the Victoria Center, the Mexican Commission distinguished itself as a pioneer in the creation of a legal team trained in the litigation of cases and the legal mobilization of international norms. However, in the early 1990s and in the first years after the creation of the domestic human rights network (Rights for All Network – TDT [*Red Todos los Derechos para Todos*]), lack of knowledge and even occasional mistrust of the Inter-American system still prevailed among Mexican human rights groups⁹.

This situation would begin to change in 1992 when CEJIL (Center for Justice and International Law) and the TDT network began to offer training courses on the workings of the Inter-American system to some of the largest and most important Mexican NGOs at the time. This experience would prove to be essential for initiating a staff training process, providing activists and lawyers with legal and judicial expertise in both the registration and presentation of cases. The system's procedures and workings were studied in light of the American Convention on Human Rights (ACHR) as well as the technical and legal categories for classifying violations. Such activities paved the way for mobilizing international law beyond exposing the possibilities and limitations of the IAHRs.

The facilitating bond with CEJIL thus established relations of cooperation through which Mexican activists participated in "a series of workshops" initiated by members of this international NGO "to familiarize themselves with the Inter-American system that no one knew" (cf. Mariclaire Acosta, personal interview). In this period, there was almost no knowledge of the system's rules and workings in Mexico, and CEJIL played an important role in disseminating and training these domestic groups. In this regard, Acosta says that Mexican groups were aware of the Inter-American system, "but in the abstract, in courses provided by the Mexican Academy of Human Rights when dealing with the universal system [...] [but] no one [had enabled] it more than the PAN [National Action Party]" (Acosta, personal interview)¹⁰.

⁹ According to Michel Maza (personal interview), "[t]he main [problem] was lack of knowledge. And what we saw was the OAS, and not the Inter-American system," in the same way that activists considered the UN as a mere aggregate and were unaware of the existence of a universal human rights system.

¹⁰ In cases 9,768, 9,780 and 9,828, the PAN accused the Mexican government of violating the American Convention on Human Rights on the grounds of electoral fraud in the elections for governor in the state of Chihuahua in 1986, for federal deputies in the seventh district of Chihuahua in 1985, and in the elections for mayor in the city of Durango in 1986. The petition was submitted in 1989 and the Inter-American Commission

However, despite the CEJIL training courses and other forms of increased contact with international human rights apparatus, it was only with the Zapatista uprising in 1994 that Mexican NGOs actually began to activate the Inter-American system and to present the first cases of violation to the Inter-American Commission on Human Rights (IACHR). This shift was accompanied by advocacy within the UN Commission on Human Rights and the European Parliament as well as the intensification of advocacy in the United States, which had been pursued since the NAFTA negotiations (North America Free Trade Agreement). The Zapatista movement thus had a major impact on Mexican human rights NGOs and the year of 1994 became a turning point for the transnationalization of their work due to the dramatic increase in advocacy work and the formal presentation of cases and violation accusations before regional and universal international human rights institutions.

Simultaneous to the transnationalization of Mexican human rights NGOs – a process that readied them to mobilize the Inter-American system – important changes were also taking place in the profile and strategies adopted by one of the main Mexican dirty war victims' families associations, also eventually predisposing this group to seek the regional human rights regime. Since 1997, the CNI's (National Independent Committee for the Defense of Prisoners, Persecuted Persons, Disappeared Detainees and Political Exiles, already renamed as Afadem – Association of the Families of the Detained, Disappeared, and Victims of Human-Rights Violations in Mexico) strategy changed radically, guided by the depletion of legal recourse and national denunciations. It then went on to mobilize the Inter-American system following the guidelines and examples set by FEDEFAM (Latin American Federation of Associations of Relatives of the Detained-Disappeared) and Colombian family organizations (cf. Julio Mata, a personal interview; Sánchez Serrano, 2012)¹¹.

However, lack of knowledge as to the workings of the Inter-American human rights system combined with the absence of legal-judicial resources for submitting petitions to the IACHR forced Afadem to seek the help of human rights NGOs, whose contacts, legal expertise, and international funding enabled strategic litigation work and case monitoring. At first, the stigma that surrounded Afadem broke down their initial attempts to align themselves with human rights NGOs. It was only as a result of FEDEFAM's mediation, and particularly Janet Bautista's work, that Afadem finally managed to establish a cooperative working relationship with the Mexican Commission (Julio Mata, personal interview).

Thus, in the late 1990s two new favorable conditions emerged for the development of strategic litigation work and mobilization of international norms on Mexican transitional justice cases. On the one hand, Afadem had already begun to invest in their first domestic legal activities, which involved the documentation of cases and filing of complaints. It was a radical change in the group's strategy through which it sought to take a first step toward accessing the Inter-American system, given the lack of reaction and complicity by government authorities on violations committed in the past. On the other hand, after their first contacts, "a relationship of trust was formed between Afadem and the [Mexican] Commission" (cf. Acosta, personal interview). This allowed the leaders of this victims' families association to ask the Mexican Commission to present their cases of enforced disappearances before the IACHR. Such requests were based on the fact that these cases did not advance in the Mexican judicial system due to, among other things, the alleged lack of evidence, the application of statutes of limitations, and the referral of cases to military jurisdiction.

published a report of the case in its annual report for 1989-1990. This was the first case in the country admitted by the Inter-American system.

¹¹ For a long time, the CNI had turned their efforts toward political denunciations, marches, protests, concentrations, demonstrations, strikes, rallies, and occupations.

In this sense, the establishment of the bond between Afadem and the Mexican Commission was an important milestone and marked the start of a new chapter in the operations of Mexican NGOs. Human rights violations committed in the past had hitherto only concerned victims' family associations and not human rights groups. It had been removed from the latter's agenda both due to the stigma and disputes that reigned among families' and victims' associations and because of the view "that it was almost impossible to advance [this issue] since those responsible were still governing" (cf. Edgar Cortez, personal interview). It was only with the new political context, made possible by political alternation and the arrival of Vicente Fox (2000-2006) as president, that human rights groups were encouraged to approach the victims' families and to promote the transitional justice issue. This process was aided by expectations surrounding promises made by the new government, whose election campaign promised the creation of a Truth Commission.

However, the Mexican Commission was unable to meet Afadem's expectations of presenting dozens of cases, not only because the status of the available information was very feeble and the cases poorly documented (cf. Fabián Sánchez Matus, personal interview) but also because the organization had limited resources. This made it impossible to present a large number of similar cases and thus led to the strategy of pursuing a single emblematic case of State political repression in the town of Atoyac de Álvarez. According to Julio Mata, from Afadem, "[t]hey told us there were not enough resources. Then they argued that the Inter-American Commission could not bring many cases forward" (personal interview). He continues:

They told me of the paradigmatic cases. As a strategy and all that. Well, finally for us, I said, if it's going to be a single case [...] [then] we sought the best fitting case, conducted evaluations within Afadem, and we decided to take the Radilla case forward.

In the end, the case was presented to the IACHR in 2001, and in 2009 the Mexican State was convicted by the Inter-American Court, after the clear failure of Femospp, the special *Fiscalía* created by the Fox administration (2000-2006) to investigate human rights violations during the PRI governments. Nevertheless, the verdict showed some important limitations, which disappointed human rights activists as well as Rosendo's and other victims' families. This was because the Court decided in favor of the matter of access to justice and military jurisdiction to the detriment of transitional justice. For while the Court acknowledged that the disappearance was not an isolated offense, it failed to recognize it as a crime against humanity within a systematic and widespread policy of human rights violations and repression against the civilian population. Moreover, as stressed by María Sirvent (personal interview), one of the lawyers of the Radilla case:

We made endless demands for damage compensations, reconstruction of historical memory, truth, justice, reparation. Many meetings took place with the families so they could tell us the compensation they desired, what would compensate the family, what would compensate the community. And the Court would include practically nothing, or rather, nothing in their petitions.

Still, while in the end the case's transitional justice components faded in favor of military jurisdiction, the sentencing by the Inter-American Court was a catalyst for a number of important legal changes implemented by the National Supreme Court of Justice (SCJN) through judicial decision 912/2010 (*Expendiente Varios 912/2010*). Among other things, this established mandatory compliance with the Inter-American Court's rulings, placed restrictions on military justice, and initiated diffused conventionality control over domestic legislation.

The National Supreme Court of Justice (SCJN) and Judicial Decision 912/2010

During the operation of the Mexican authoritarian regime characterized by the existence of a hegemonic party system, “the court system essentially preserved authoritarian rule and the Mexican Supreme Court turned into a passive and unimportant institution” (Castillejos-Aragón, 2013, p. 138). While not oblivious to the law and being concerned about compliance with legal norms, the PRI governments dominated judicial bodies, adapting them to their needs so that the judiciary – and particularly the Supreme Court – were dependent and subservient to political power (cf. Domingo, 2000, 2005; Ansolabehere, 2006, 2007, 2010; B. Magaloni, 2008).

However, this historical framework of subordination and lack of protagonism by the judiciary would change due to the democratic transition that encapsulated the country's political setting after the controversial presidential election of 1988 (cf. Crespo, 1999; Lujambio, 2000; Magaloni, 2005; Nacif, 2007). This culminated in the political alternation that took place in 2000 with the arrival of Vicente Fox (PAN party) to the presidency. If the Supreme Court was previously submissive to the Executive and concerned solely with ensuring the application of laws, the institutional reforms of both 1994 and 1996 – which delegated more power to the Court as well increasing pluralization and political competition – consolidated its new role as an authentic constitutional court (Ansolabehere, 2006, p. 234).

As a result, throughout the democratic transition the Supreme Court was able to break free from its historical subordination to the Executive and began to show unprecedented levels of judicial activism (cf. Domingo, 2005). It thus ceased to be a governmental court and became responsible for judging conflicts between politicians, parties, and different levels of government and state bodies (Ansolabehere, 2010, p. 79). Conversely, however, it also assumed a role as arbitrator for political-institutional disputes more than ensuring citizens' rights (A. L. Magaloni, 2008; Ansolabehere, 2010); constitutional reforms thus failed to make the court more accessible to citizens, making it difficult for organized groups and individuals to apply legal pressure for a pro-rights jurisprudence¹².

Regarding international norms, international human rights law was put on the back burner or simply ignored for decades by the judiciary, despite the ratification of numerous conventions by the Mexican State, which were “only acts of international presence to highlight Mexican diplomacy” (Castilla, 2013a, p. 294). In this sense, judges were reluctant to use the treaties due to either their lack of knowledge about them or because they did not consider them to be part of Mexican law (González Rivas, Tinajero-Esquivel and Vega González, 2002, pp. 431, 445). Likewise, litigators did not use them to structure their arguments and demands for similar reasons, with the exception of the few belonging to human rights NGOs: they were not only unfamiliar with these international instruments but were also suspicious as to its applicability, given the prevailing view in the legal and judicial spheres that treaties were not part of national legislation (cf. González Rivas, Tinajero-Esquivel and Vega González, 2002, p. 429).

However, as underlined by Castilla (2013a), the growing impact of trade and economic treaties in the formulation of public policies and, to a lesser extent, the country's increased integration to the international human rights instruments – as expressed in decisions such as the acceptance of the Inter-American Court jurisdiction in 1998 – forced a readjustment in the traditional positions of judicial actors. This would lead to the gradual acceptance of abandoning the idea of internal normative self-sufficiency (Castilla, 2013a, p. 297). As a

¹² In this regard, Domingo (2005, p. 39) concludes that, in general, “the judicialization of politics in Mexico has been less the result of legal mobilization from below, than from political parties making use of the new judicial review powers”.

result, on May 11 1999, the Supreme Court modified its own doctrine on the hierarchy occupied by international law within the Mexican legal system. The Court abandoned the isolated thesis previously adopted in 1992 that treated such instruments merely as ordinary legislation in favor of a new interpretation that provided international treaties with supra-legal status.

Within this process of gradual and persistent receptivity to international law, from 2007 onwards, the office of Justice José Ramón Cossío Díaz was the major initial propeller for the use of treaties and international jurisprudence on the subject of human rights, assuming a leading role in disseminating these instruments within the tribunal and forcing other magistrates to position themselves on this topic. With time, other usually more progressive justices also took interest in this practice and members from their offices began to follow this example or even to seek Justice Cossío's staff to learn more about his work dynamics (which articulated both domestic and international law), thus increasing this shift¹³.

The academic profile of José Ramón Cossío Díaz – a distinguished expert in constitutional law, with postgraduate studies and a PhD in Spain, and a Professor at ITAM (Autonomous Technological Institute of Mexico) – is in line with both the latest discussions in legal doctrine and with the developments on matters contiguous to the international jurisprudence on human rights issues. His motivation for propelling the implementation of international law in this field had two main aspects: legal and political-strategic. On the one hand, he believed that judges should enforce international human rights norms ratified by the State, as they are as much an integral part of the Mexican legal as national laws. Thus, such rules would be fully applicable and its provisions should be guaranteed. On the other hand, the use of these rules and international jurisprudence – especially when it came to the Inter-American system – was considered to be a faster and easier way for the Supreme Court – and the Mexican courts, in general – to develop and apply a human rights agenda in their activities. They could do this through the interpretations and criteria already provided by the Inter-American Court and other international bodies.

The construction of an autochthonous approach would not only lead to the repetition of efforts already concluded by international bodies, but it would also entail several problems concerning judicial coordination, lack of information and institutional incapacity. Therefore, for progressive Supreme Court judges, such as Justice Cossío, the use of international norms not only avoided or diminished part of these problems, it also helped a court traditionally lacking in channels of access to societal actors and characterized by its lack of attention to human rights to finally establish an agenda in this direction. In other words, in a context in which Cossío and a minority group of progressive judges sought to propel this issue within the SCJN, the instrumentalization of international human rights law, and the Inter-American system in particular, fit their purposes, strengthening and empowering their arguments and positions within the court¹⁴.

¹³ The leadership role originally exerted by Justice Cossío's office proved to be crucial, as it provided several other justices with a focal point and practical examples from which they could learn how to establish a dialogue between international standards and domestic norms. According to Cossío, there was further receptivity to this issue “from Justice Gudiño, Justice Silva, Justice Sánchez Cordero, who were in the [First] Room [*Primera Sala*] at that time and for a long time we were trying to do something on human rights. Justice Góngora as well, I should mention. Basically, they were the ones with precedence on the matter” (personal interview).

¹⁴ According to Justice Cossío “when Mexico accepts the jurisdiction of the Inter-American Court, Mexico accepts an Inter-American legal system [...]. There is no international system and there is no national system, since I believe that by decree from Mexican democratic organs we have fully incorporated these norms as if they were norms of our national law [...] according to an explanation given to me several times by Professor Fix-Zamudio, my teacher, and Chief Justice of the Inter-American Court, I believe it's part of our national law [...] this is the legal conviction, but also had a strategic-political element. Because if we sit and wait for Mexican courts to develop those right one by one, it could take many years and the human rights situation in Mexico

In short, as a result of this gradual learning process on how to use and apply international human rights law, initially propelled by Justice Cossío's office – which managed to garner the support of other justices over time – it became possible to "break away from judicial ideas and concepts that sought to leave treaties out of the Mexican legal system" (Castilla, 2013a, p. 302). As a result, there was further recognition that such international instruments had a superior position to national laws, second only to the Constitution.

However, despite these achievements, the use of international human rights law was still difficult, limited, and irregular. The number of cases where these standards were used were negligible in light of the accumulated amount of resolutions issued by the Supreme Court¹⁵, and its requests for the use of powers of attraction (*solicitud de ejercicio de la facultad de atracción* – SEFAs) of cases involving non-legitimate actors was clearly insufficient to process the relevant demands and advance the application of international rules on human rights cases¹⁶. Moreover, although the use of the power of attraction reveals the disposition of a set of progressive judges to address human rights issues, international mechanisms were rarely used in these decisions, which relied mostly on domestic constitutional principles. These complications also converged with a series of problems and doubts brought about by the debate on the control of conventionality, which emerged from the ruling against the Mexican state in the Rosendo Radilla case, thus placing at risk the court's gradual receptivity to international human rights law.

On November 23 2009, the Inter-American Court of Human Rights condemned Mexico for the forced disappearance of Rosendo Radilla Pacheco, which took place in 1974 in the city of Atoyac de Álvarez (Guerrero State), and established a number of obligations to which the Mexican State had to adhere. For the first time a Court decision considered the judiciary responsible for a human rights violation¹⁷ and the following procedures were ordered in the sentence: 1) the application of *ex officio* conventionality control between Mexican internal norms and the American Convention on Human Rights (paragraph 339)¹⁸; 2) the non-application of military jurisdiction to crimes committed by military personnel against human rights of civilians (paragraphs 337-342); and 3) the implementation of programs or permanent courses for training employees of the justice system, including judges, in the Inter-American system's jurisprudence and standards that need to be followed during the investigation and prosecution of the crime of enforced disappearance (*Corte Interamericana de Derechos Humanos*, 2009, paragraphs 346-348).

In order to examine the ruling that had condemned the Mexican judiciary, Ortiz Mayagoitia, the Chief Justice of the Supreme Court, established a consultation procedure

might very seriously deteriorate. So I thought, how could we do this? If we take the contents that were already built by the Inter-American Court, that are part of international law, we introduce them and provide them with content on human rights from a constitutional source or conventional source from what the Court says. An express way, a shortcut so that contents being operated in Mexico are the contents of the Inter-American Court and [that] we do not lose time constructing what is already built [...]. It really was a conviction that this is Law and a legal political strategy" (personal interview).

¹⁵ Bearing in mind that each Supreme Court room decides on average 50 cases a week, we may conclude that a total of 35 cases in which international human rights law was applied between 2007 and 2010 represents an extremely small number (Castilla, 2013a).

¹⁶ The SEFAs allow the SCJN to analyze defense cases transiting in lower courts promoted by social actors not legitimized to enable the Supreme Court. Although lacking formal powers to enable the court such actors may have their demands analyzed if one of the justices takes interest in the importance and significance of a case and decides to pull it.

¹⁷ It was the "first Court ruling in which the Mexican judiciary complied with concrete compensation measures" (Castilla, 2013b, p. 4).

¹⁸ By conventionality control we understand the obligation that a country's domestic law should be in accordance with the provisions of the American Convention on Human Rights. Thus, a second form of control conditions the validity of the domestic law, in addition to constitutional examination.

through judicial decision number 489/2010 (*Expediente Varios 489/2010*) on May 26, 2010. This type of consultation may be established whenever the Chief Justice considers as uncertain or transcendent what kind of procedure should be adopted to analyze a specific issue. In this case, since Mexico still lacks a law regulating the formal measures and procedures for implementing an international ruling against the Mexican State, the Chief Justice of the SCJN established that the Plenary should deliberate on the actions that the court should or should not follow to meet the Inter-American Court's requirements, and Justice Cossío was in charge of presenting a project on this matter.

Once submitted to the Plenary, the project clearly demonstrated how the Radilla case's sentence was met with bewilderment by most justices, as discussions on judicial decision 489/2010 evinced the judges' lack of knowledge about the workings of the Inter-American system and the general logic of international human rights law¹⁹. In this sense, the debate on conventionality control generated particularly strong tensions for allegedly threatening both the court's jurisdictional competence and powers as well as the Constitution's prevalence and supremacy, due to the concern that the exercise of such a control would give preference to international treaties and jurisprudence in detriment of the Magna Carta.

Since 1999, judges had increased the hierarchical place occupied by treaties within the Mexican legal system, but the constitutional primacy model had never been abandoned. According to Castilla, former legal assistant to Justice Cossío, in this context "what was already moving slowly [stopped] in the face of the fear that, if continued, the work could possibly lead to the uncontrollable reactions of what they believed to dominate, more or less clearly" (personal interview). He continues:

[...] this whole conventionality control matter spurred a lot of fear [...]. And the idea that complying with the ruling would surrender the Supreme Court before the Inter-American Court, that treaties would gain more importance than the Constitution, all that. Although some changes had already happened in the Constitution, all this led to a lot of rejection and uncertainty among many justices. They were uncomfortable in dealing with these issues [...] there was much lack of knowledge.

In other words, the majority of the Supreme Court considered the Inter-American Court ruling in the Radilla case as a direct foray into their legal ground and an attempt to seize its status as the final jurisdictional instance of the national legal system. As a result, the Chief Justice asked the other justices to declare whether they supported Cossío's project – who was favorable to the ruling –, or if they thought the text should be rejected for having surpassed its consultation purposes. With a majority of eight votes, the Plenary decided that the proposal for judicial decision 489/2010 had exceeded the purpose, content, and scope of the original consultation.

Just nine months after the rejection of judicial decision 489/2010, Justice Margarita Luna Ramos presented a new project on the subject on July 4, 2011, this time listed as judicial decision 912/2010 (*Expediente Varios 912/2010*). However, in this second stage of deliberations about the Supreme Courts' obligations in the Radilla case ruling, both the political conditions within the Supreme Court and the country's constitutional framework had changed substantially. Justice Silva Meza, who was one of the most progressive judges and receptive to international law, had been elected President of the SCJN on January 3, 2011; and

¹⁹ According to Karlos Castilla, their lack of knowledge was blatant: "[t]hey wanted, for example, the Inter-American Court to notify the Supreme Court of the sentencing. Well, if you have a little bit of sense you know that this is provided to the State and to the Ministry of Foreign Affairs or the Embassy of Mexico in Costa Rica." Moreover, the Inter-American Court's authority was challenged and on several occasions judges inquired: "when had we accepted the jurisdiction of the Inter-American Court and who had accepted it" (personal interview).

the constitutional reform on human rights came into effect on June 11, 2011, proffering both constitutional *status* to recognized human rights in all treaties ratified by Mexico and the *pro persona* principle. According to this principle, in an eventual clash between constitutional and conventional law, the one providing greatest protection to the person should prevail, regardless of their national or international origin.

Although the theme of diffused constitutional control was absent in the Radilla sentence, Justice Cossío used the door opened by judicial decision 912/2010 to conduct a more general interpretation of the effects of the newly adopted constitutional reform on human rights. Mexico's constitutional regularity control method and model was thus changed by seven votes to three. In this new model, the Supreme Court continued to be the only court with the jurisdiction to fully expel legal norms due to its concentrated control over constitutionality in the analysis of injunctions, actions of unconstitutionality, and constitutional controversies. However, all other federal and local judges should then stop applying norms that were, in the matter of human rights, not only contrary to the treaties but also to the Constitution itself, thereby exerting the diffuse control of constitutionality and conventionality.

This was a noteworthy change if we consider what happened to judicial decision 489/2010, the accusations that the scope of an *Expediente Varios* could not encompass this type of decision, and the basis for these discussions, namely, whether the judiciary should comply with the ruling on the Radilla case. When combined with constitutional reform and the presence of progressive leaders within the Supreme Court, the Inter-American system's decision thus resulted in significant outcomes for the Mexican legal system and the operation of the country's justice system.

Lastly, despite the existence of interpretative differences in regard to military jurisdiction, the debates between justices were relatively simple since "the restrictions on the jurisdiction of military courts were simply part of abiding by [...] the ruling of Inter-American Court" (Castilla, 2013b, p. 21). Thus, we find three main topics addressed by judicial decision 912/2010 at the end of the deliberations by the Supreme Court Plenary: 1) the model of reception of international human rights law and the place occupied by these norms within the Mexican legal system after the constitutional reform on human rights, which finally led to the abandonment of the principle of constitutional hierarchy in favor of the *pro persona* principle with a broader protection of persons²⁰; 2) the limitation of military jurisdiction, excluding from its jurisdiction cases of human rights violations committed against civilians; and 3) the establishment of a new model for diffuse control of constitutionality and conventionality, whereby local and federal judges would cease to apply norms that contravene human rights recognized by Mexico's Constitution and treaties²¹. Moreover, the SCJN also recognized that it was not apt to evaluate the Inter-American Court's jurisdiction and litigations, being thus limited to complying with all the criteria emanating from the convictions of that tribunal against Mexico. Besides that, the SCJN also decided that the jurisprudence emerging from other cases in which Mexico was not involved would guide its future decisions, though not in a compulsory way.

²⁰ This change placed in effect "a new constitutional framework in which the treaties on human rights and the Constitution establish a human rights block without hierarchies," in such a way that "the most protective or less restrictive standard for protecting peoples' rights shall prevail, regardless of the national or international legislative body from which it emanates" (Castilla, 2013b, p. 33).

²¹ However, the Supreme Court continued to be the only court with jurisdiction to fully expel from the legal system any kind of norms, declaring them either as being unconstitutional or in conflict with the treaties. In other words, "[t]he Supreme Court is the only one to declare unconstitutionality or unconventionality; the remaining judges simply do not apply [the law]" (Castilla, 2013b, p. 31).

However, the Supreme Court did not address the matter of transitional justice and that remains a major debt of the Mexican legal system. Issues concerning conventionality control and military jurisdiction steered the debates and even though the ruling by the Inter-American Court individualized the analysis in the Radilla case – which in itself hindered the development of a definition on State obligations in matters of truth, justice, and reparations – the decision recognized systematic patterns of violations and disappearances during the dirty war, thus providing elements for the SCJN to tackle the issue of transitional justice²².

Notwithstanding this significant limitation, one must recognize the transcendence of the other changes introduced by the SCJN and how changes in the country's constitutional framework, produced by the human rights reform, were essential for the adoption of such resolutions. Such constitutional changes, which granted constitutional status to human rights norms recognized in treaties and determined the application of the *pro persona* principle, decisively altered the correlation of forces within the Supreme Court in favor of the group of justices most favorable to the application of international human rights law.

These new devices provided clear and explicit legal and constitutional support for these justices to boost the use of norms derived from the Inter-American human rights system and other international sources. This dispelled justices' suspicions and resistance, the majority of whom had traditionally argued that the Constitution's prevalence principle in Article 133 – which subordinated the application of international treaties to the constitutional text – imposed limits on the use of international standards. Thus was resolved the stalemate created during the first analysis of judicial decision 489/2010, which had created a situation of paralysis and increasing opposition regarding the incorporation of these rules.

In other words, constitutional reform came into effect at a time when the SCJN's use of international norms was at a crossroads after timid developments and advancements, and its role was crucial at the time as it was able to largely solve disputes between justices, thus empowering judges who were more receptive to international treaties and conventions. Previously, these divisions found no other solution than a regression in the application of international instruments, given the minority of justices who favored this agenda. However, the reform approved several new constitutional obligations, which made even justices with a more conservative and positivist profile review their positions, even though that did not necessarily nullified all the resistances concerning the use of international human rights norms.

In this sense, while potentially spurred on by reform, the application of these norms cannot be explained merely by the existence of constitutional provisions as it also reflected – and demanded – the existence and the judicial activism of a group of magistrates. They were prepared to seize the window of opportunity resulting from the constitutional change, thus making use of the Inter-American system, more specifically, and international human rights instruments, more generally, as tools to appropriate the human rights issue.

In short, from the start, the incorporation of international law and the Inter-American system as well as recent human rights activism have all been a means for the most progressive judges to bring the Supreme Court closer to citizenship, to gain momentum with this new agenda, and to strengthen the court in relation to the Executive and Legislative branches. For this group of justices, the Radilla case was a chapter in the broader process of the SCJN's

²² According to Castilla, the question was explicitly introduced by him in the project presented by Justice Cossío's office, but "in this last Foreword to the Plenary, when approving the Radilla [expedient], this was the first thing to be eliminated." He recalls that the justices "did not even understand what transitional justice meant [...]. I remember that when the Court told them: no, this part is transitional justice [justicia transitional] and they all understood transnational and not transitional." Thus, in his assessment, the question was eliminated "because they did not understand the term transitional justice. As if they said: 'no, who knows what it is, better remove it all'" (personal interview).

change, legitimation, and political empowerment as a constitutional court, in effect since 1995. In this sense, the Radilla case projected the SCJN as a human rights protector, helping the court to distance itself from a past when the tribunal was either an irrelevant arena or a court whose competence was limited to the resolution of conflicts between political-institutional actors.

In recent years, an emerging literature has stressed that human rights treaties and norms are consequential only at the presence of certain local conditions in the target countries mediating their impact (cf. Hafner-Burton, 2012; Simmons, 2009). In general, these studies indicate that, unless domestic conditions are favorable, international pressure will fail to produce many effects. It is thus argued that an increase in international pressure and human rights policies does not decrease human rights violations by itself, and may only affect state behavior indirectly and alongside many other domestic conditions.

In this sense, whether in transitional justice or in other issues, the potential impact that the Inter-American system may have within states does not begin with the publication of a Court ruling or a recommendation by the IACHR. Rather, these decisions depend on specific actors' capacity and agency as well as on domestic institutions, without mentioning the simple fact that the system's very rulings also inexorably depend on the activation of the IACHR by domestic litigation groups with transnational agency.

The system's influence thus depends on domestic processes beginning long before decisions made by the IACHR and the Inter-American Court and, in particular, on the existence of NGOs dedicated to: collecting and preserving evidence; maintaining relations with the victims; and devoting time and resources to train legal teams, structure strategic litigations and mobilize international law. Moreover, for the Inter-American system to have an impact, one also needs some openness from the judiciary – or at least a majority group of Supreme Court justices –, which on the basis of an explicit legal framework or some kind of interpretation must understand the use of international law not only as a legitimate legal exercise, but also as an indispensable instrument for the establishment rights and the accomplishment of their very work.

In the Mexican case, especially since the mid-1990s, one can observe the existence of some professionalized NGOs capable of building cases and strategic litigations through the mobilization of international human rights norms within the Inter-American system. They have been crucial because of their continuous ability to attract the attention of the IACHR and due to their role in generating pressures, debates and a legal doctrine that seeks to guide judges and lawyers toward a greater incorporation of Inter-American jurisprudence and international human rights standards. As a result, NGOs with national visibility such as the Mexican Commission and the Prodh Center, and more regional NGOs such as Tlachinollan, were able to adopt a strategy that went beyond the follow-up of victims and acts of political pressure and denunciation. They were able to document cases and prioritize their work within a specific and specialized legal framework as they increased their ties and relations with the transnational advocacy network. In this way, they were therefore capable of adopting new standards and institutional practices more in line with both the procedures of intergovernmental bodies as well as the human rights demands and language used by international NGOs²³.

²³ Mexican NGOs had to alter the meaning and format of their demands, which meant investing in increasing professionalization and specialization of their staff and groups. That included the hiring of trained, paid, and full-time employees, giving special attention to creating teams of lawyers.

As for the judiciary, for progressive Justices of the Supreme Court that have promoted the appropriation both of the Inter-American system and international norms, the relationship between the court and the regional and international human rights regimes was understood not as an eventual subordination by the SCJN, but as a form of cooperation that allows the Mexican court to incorporate internationally recognized human rights discussions, criteria and arguments. The independent elaboration of these issues would imply unnecessary costs and efforts in view of the availability of international legal-judicial resources. Moreover, given the resistance from both conservative justices and the broader legal-judicial sphere, the results might not be satisfactory. For these magistrates, the easiest, fastest, and safest way to obtain progress in a human rights agenda is thus precisely by harnessing the international regime and the Inter-American system, more specifically. Given the minority position of this group and its relative weakness, the use of such external mechanisms and instruments becomes the best strategy to achieve its goals, especially following constitutional reform, which provided these magistrates with a more solid legal support to pursue the application of international human rights law.

However, while it is impossible to deny the influence of the Inter-American system in the Rosendo Radilla case, given the restriction of military jurisdiction and the changes to Mexico's constitutional control model, the demands for truth, reparations, and justice concerning enforced disappearances committed during the dirty war remain unfulfilled. Thus, the Inter-American system's transitional justice model has not yet led to any significant impact in Mexico. Besides not having been adequately addressed by the Inter-American Court and by the Mexican Supreme Court, the issue is no longer part of the country's political agenda following Femosp's (Special *Fiscalía* for Political and Social Movements of the Past)²⁴ extinction and the ongoing violence started during the Calderón administration and its war on drugs (2006-2012), which led to a total of more than 20,000 new disappearances²⁵.

Given this situation, María Sirvent, one of the lawyers in the Radilla case, offers an accurate assessment of the country's current situation. According to her:

[...] legally speaking, yes, we accomplished a lot [...]. I believe it was super important for the law in Mexico, but not for the families, not for the people in Atoyac. For the people in Atoyac, the judicial decision, the diffused control, the conventionality control, and the Supreme Court that said rulings are mandatory, I don't believe this speaks anything to them. I believe it would mean more to them to have a little museum in Atoyac. I believe it would mean more to them if this chapter of history was recognized in history textbooks, those free textbooks from SEP [Ministry of Public Education]. I think that would give them more meaning. They would be able to say: oh [look], this did happen, we didn't make this up. So I think in this case the [Inter-American] system did not work on everything. It is a very important sentencing. I believe so, it had a major impact, but not in the transitional justice issue.

24 A special instance of the public prosecutor established in 2001 by the Fox administration (2000-2006) to deal with investigations of human rights violations committed during the student massacres of 1968, 1971, and during the Mexican Dirty War. It was terminated in November 2006 without obtaining any conviction in the cases investigated and submitted to court. For a review of its performance, shortcomings and failure, see Aguayo & Treviño Rangel (2007).

25 "Desaparecidas, más de 22 mil personas, confirman", *El Universal*, 22 ago. 2014. Available at: <<http://www.eluniversal.com.mx/nacion-mexico/2014/impreso/desaparecidas-mas-de-22-mil-personas-confirman-218061.html>>. Accessed in: August 31, 2014.

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Interviews

1. *Edgar Cortez*. Former Jesuit priest and director of the Center Miguel Agustín Pro Juárez (PRODH Center) between 1996 and 2004. Interview held in Mexico City on January 31, 2014.
2. *Michel Maza*. Human rights activist and former member of the Center Miguel Agustín Pro Juárez (PRODH Center). Interview via Skype on February 13, 2014.
3. *Mariclaire Acosta*. Founder of the Mexican Academy of Human Rights and the Mexican Commission for the Defense and Promotion of Human Rights. Interviews conducted in Mexico City on February 7 and March 6, 2014.
4. *Julio Mata*. Afadem Executive secretary. Interview conducted in Mexico City on February 19, 2014.
5. *María Sirvent*. Former member of the Mexican Commission for the Promotion and Defense of Human Rights and one of the lawyers in the Radilla case. Interview conducted in Mexico City on January 31, 2014.
6. *Fabián Sanchez Matus*. Former member of the Mexican Commission for the Promotion and Defense of Human Rights and one of the lawyers in the Radilla case. Interview conducted in Mexico City on January 31, 2014.
7. *José Ramón Cossío Díaz*. Justice of the Mexican Supreme Court of Justice. Interview conducted in Mexico City on March 28, 2014.
8. *Karlos Castilla*. Former legal assistant in Justice Cossío’s office. Interview conducted via Skype on February 23, 2014.
9. *Carlos Pérez Vázquez*. Human Rights coordinator at the SCJN (Supreme Court of Justice) and advisor to the SCJN’s Chief Justice Silva Meza (2011-2015). Interview conducted in Mexico City on February 11, 2014.